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NOTES

THE ACCUSED'S BAD CHARACTER: THEORY AND PRACTICE

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> [T]her can be no great smoke arise, but ther must be some fire, no great reporte without great suspition.
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> —John Lyly[1]

INTRODUCTION

Propensity character evidence has long been a source of consternation for jurists and policymakers in the United States and the United Kingdom. The two systems have struggled to strike an appropriate balance between the relevant nature of such evidence and its prejudicial effects. Until the twenty-first century, both systems had settled upon an exclusionary approach: all propensity character evidence as such was considered inadmissible. However, the Criminal Justice Act 2003 radically altered this landscape in making British character law inclusionary: it now allows prosecutors to adduce evidence of a defendant's bad character provided it passes through one of seven gateways.[2] While the particulars will be addressed later in this Note,[3] suffice it to say that the Act broadly expanded the role of character evidence in criminal prosecutions, as compared to previous British law and current law in the United States. However, a closer look indicates that United States law, in practice, already provides plenty of methods

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1 JOHN LYLY, EUPHUES: THE ANATOMY OF WIT 31 (1579), *reprinted in* JOHN LYLY, EUPHUES 153 (Edward Arber ed., A. Constable & Co. 1895) (1581).

2 Criminal Justice Act, 2003, c. 44, § 101.

3 *See infra* Part I.B.

for a competent prosecutor to introduce any piece of propensity character evidence she wishes. In this sense, Britain's recent inclusionary bad character law may be only nominally different from the exclusionary counterpart that the United States has been utilizing all along.

This Note argues that the Criminal Justice Act, with its subsequent revisions, sets forth the best statutory approach to the issue of bad character evidence in criminal prosecutions. However, that is not to say that the British approach is superior. Indeed, the flexibility that inheres in the U.S. system has allowed it to evolve into a body of law that mirrors the British law under the Criminal Justice Act, despite statutory language that would suggest otherwise. Part I will establish a baseline, providing a factual overview of the statutory differences between American and British bad character evidence law. Part II will examine the most common justifications for the United States' ostensibly exclusionary approach to evidence of the accused's bad character and will indicate that the better approach would be one of inclusion. Part III concludes that in practice, the United States is already there, through use and misuse of Federal Rule 404(b). Part IV considers recent changes relating to an accused's character evidence in relation to rape and child molestation and points out that the legal changes have not led to changes in practice or results. It also underscores the futility of restricting the legal changes to such a small portion of criminal law. In light of the "true" state of American character evidence, Part V concludes that the Criminal Justice Act could almost as easily be a description of U.S. law as a proclamation of British law. All told, the United States, whose approach is only nominally different from the British approach, reaches the best compromise possible in its propensity character evidence scheme.

I. THE LAW

The United States, through Federal Rule of Evidence 404, disallows all propensity character evidence as such.[4] Britain, however, with the Criminal Justice Act of 2003, generally allows such evidence.[5] The details of the United States and British approaches to evidence of the accused's bad character will here be addressed in this Part.

The starting point for any analysis of U.S. evidence law is Federal Rule of Evidence 403, a general rule applicable to all forms of evidence.[6] It mandates that a judge weigh the probative value of any

4 FED. R. EVID. 404.

5 Criminal Justice Act, 2003, § 101.

6 FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

piece of evidence against factors such as the danger of unfairly prejudicing a jury, confusing the jury as to the issues of the case, overtly misleading the jury, or inhibiting the speedy and smooth flow of a trial.[7]

Rule 404 is the first rule to directly address the admissibility of character evidence.[8] The Rule is bifurcated into subparts. Rule 404(a) establishes a general rule of exclusion: character evidence of the accused is not admissible, save two exceptions. First, an accused may introduce character evidence about herself.[9] Second, evidence of the accused's character may be admitted by the prosecution as rebuttal.[10] Therefore, Rule 404(a) does not provide a mechanism for the prosecutor to proactively introduce evidence of the accused's bad character.

It is the Rule's second part, 404(b), where nuance emerges. The Rule begins by reiterating that prior crimes, wrongs, or acts cannot be

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the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

7 *Id.*

8 Rule 404 states:

> (a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (1) Character of accused.—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . . .
>
> (2) Character of alleged victim.—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
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> (3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

9 *Id.* 404(a)(1).

10 *Id.* 404(b).

admitted as character evidence.[11] However, the Rule provides that prior crimes, wrongs, or acts *may* be admitted for "other purposes," such as proving identity, motive, plan, or knowledge.[12] While the actual use of Rule 404(b) will be explored later in this Note,[13] the language of the law reveals a policy judgment that, despite the inherent dangers of character evidence, such evidence may be admitted if it is not introduced to establish a propensity chain of inferences.

There is, however, a section of the Federal Rules of Evidence that allows prosecutors to introduce evidence of an accused's bad character to prove a propensity to act in conformity with previous bad acts. Rules 413, 414, and 415 were signed into law by President Bill Clinton in 1995 and took effect in 1995.[14] The Rules allow specific instances of conduct to be admitted as evidence of bad character in sexual assault cases.[15] A defendant charged with rape or child molestation may be subjected in his trial to evidence of past convictions, charges, or accusations of rape or child molestation.[16]

As readers are presumably less familiar with the British system of character evidence, a considerable overview is here appropriate. The starting point is the Criminal Justice Act (CJA) of 2003, which provided that evidence of a defendant's bad character is admissible if:

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11 *Id.*

12 *Id.*

13 *See infra* Part II.

14 *See* FED. R. EVID. 413–15.

15 In pertinent part, Rule 413 reads:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which is relevant.

Id. 413(a).

In pertinent part, Rule 414 reads:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Id. 414(a).

In pertinent part, Rule 415 reads:

> In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Id. 415(a).

16 *Id.* 413(a); 414(a).

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.[17]

The law provides that a court must not admit evidence under subsections (d) or (g) if, on motion by the defendant to exclude it, "it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[18] In short, a judge must allow character evidence admitted under theories (a), (b), (c), (e), or (f). However, character evidence admissible under theories (d) or (g) must still pass a secondary threshold of fairness. The standard provided, "such an adverse effect . . . that the court ought not . . . admit it," is circular and nebulous, seemingly allowing a judge considerable discretion in its interpretation.

It is gateway (d), "relevant to an important matter in issue," that represents the major change in the British jurisprudence. As the standard is less than exact, it requires further historical and contextual explanation. Before the CJA and section 101(1)(d), *DPP v. P*[19] was the leading case law on bad character evidence. Under *DPP*, evidence demonstrating that the defendant was guilty of another crime could be admitted if its probative value outweighed the risk of prejudice to the defendant.[20] This test served as an exception to section 1 of the Criminal Evidence Act 1898, which established a general exclusionary rule to the introduction of evidence of a defendant's bad character.[21]

17 Criminal Justice Act, 2003, c. 44, § 101(1).

18 *Id.* § 101(3).

19 [1991] 2 A.C. 447 (H.L.) (appeal taken from Eng.).

20 *Id.* at 461.

21 The Act reads, in pertinent part:

> Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings, whether the person so

Section 101(1)(d) of the CJA turns the tables, so to speak. The Crown Prosecution Service (CPS), Britain's equivalent to the U.S. Attorney's Office, explains, in seeking to focus the broad scope of section 101(1)(d), that it must be read in conjunction with section 103.[22] Section 103 provides that a "matter in issue" includes (1) whether a defendant has a propensity to commit crimes of the kind with which he is charged or (2) whether a defendant has a propensity to be untruthful.[23] Each of these will be addressed, respectively.

The policy on evidence regarding a defendant's propensity to commit a crime is stated in section 103(1)(a), which provides that evidence of bad character can be admitted to show that an accused has a propensity to commit crimes "of the kind with which he is charged."[24] According to the CPS, this phrase is understood to mean that evidence of a defendant's bad character is admissible in two separate but related situations: (1) if a defendant has a *desire* to commit a particular crime, such as pedophilia,[25] and (2) if a defendant has a *habit* of committing a certain kind of crime, such as child molestation.[26] While section 103(1)(a) contains the language, "except where his having such a propensity makes it no more likely that he is guilty of the offence,"[27] this provision applies only to cases where there is no dispute about the facts, and the case is decided on a question of law.[28]

Section 103(2) is a bit more specific, allowing the admission of propensity evidence if the accused has either a previous conviction of the exact type as that with which he is charged,[29] or if the previous offense is "of the same category" as the one charged, as determined by

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charged is charged solely or jointly with any other person. Provided as follows . . .

(f) A person in criminal proceedings who is called as a witness in the proceedings shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than one with which he is then charged or is of bad character . . . ."

Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1 (amended 2002).

22 Criminal Justice Act, 2003, c. 44, § 103.

23 *Id.*; *see also* Crown Prosecution Service, Bad Character Evidence, http://www.cps.gov.uk/legal/a_to_c/bad_character_evidence/index.html (last visited Mar. 5, 2009) (outlining the scope of the "matter in issue" exception).

24 Criminal Justice Act, 2003, § 103(1)(a).

25 Crown Prosecution Service, *supra* note 23 (describing the varieties of propensity evidence).

26 *Id.*

27 Criminal Justice Act, 2003, § 103(1)(a).

28 Crown Prosecution Service, *supra* note 23.

29 Criminal Justice Act, 2003, § 103(2)(a).

the Secretary of State.[30] As of this writing, two such categories—theft offenses and sexual offenses on persons under sixteen—have been created.[31] This categorization presumably represents a parliamentary determination that the types of crimes comprehended by the categories are sufficiently similar to warrant their grouping and that offenders of these crimes are prone to recidivism.

As with propensity to commit crimes, propensity to be untruthful is at issue in almost every criminal trial. Section 103(1)(b) provides that the defendant's propensity for untruthfulness satisfies section 101(d)'s "matters in issue" requirement.[32] This is intended to enable the admission of a limited range of evidence such as convictions for perjury or other *crimen falsi* offenses.[33] Another way in which this theory could be utilized is to argue that a defendant's alibi is so similar as one advanced by him on a previous occasion that it is unlikely to be true. For example, if a defendant is twice accused of robbing a driver at knife point, and he twice claims that he entered the taxi only after the robbery, the previous alibi would be admitted in the subsequent case.

In conclusion, at least in statutory language, the United States and United Kingdom currently have evidentiary laws on bad character that are nearly diametrically opposite. The difference is most glaringly apparent when one focuses on the concept of propensity. Whereas the U.S. laws take pains to ensure that evidence will not be used against a defendant to show "action in conformity therewith,"[34] the British system actively favors admitting evidence to prove that a person has a propensity to commit a certain type of crime. It is therefore certain that the two legal systems operate under a philosophical divide on the question of whether or not to introduce evidence of a defendant's bad character. It is in this context that this Note will proceed to analyze which philosophical approach is more sound, and which practical approach is actually in effect in the United States.

II. In Defense of the Inclusionary Approach

Much of the scholarly research addressing the American exclusionary approach to evidence of a defendant's bad character has

30 *Id.* § 103(2)(b); 4(b).

31 Crown Prosecution Service, *supra* note 23.

32 Criminal Justice Act, 2003, § 103(1)(b).

33 Crown Prosecution Service, *supra* note 23.

34 Fed. R. Evid. 404.

focused on two possible justifications[35]: (1) that character evidence is irrelevant,[36] and (2) that jurors may convict the defendant of the charged crime in order to punish her for past crimes or will somehow overvalue the significance of bad character evidence.[37] This Part will address each justification in turn, debunking the notion that character evidence is irrelevant before finding no additional compelling reasons to restrict the admission of evidence of bad character. Finally, this Part will address a foggier argument for the exclusion of character evidence: the gauzy principle that the scales should be tilted as much as possible in favor of a defendant; that as a society we have decided that it is preferable to have guilty acquittals as opposed to innocent convictions.

A. Character Evidence Is Relevant

The first consideration in this analysis is that potential prejudice aside, propensity character evidence is highly relevant. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[38] A brief example may be instructive. Suppose there is a teenager in your neighborhood notorious for stealing hood ornaments from Jaguar automobiles. He keeps a sizeable collection over his mantle and has taken to calling himself "Jaguar." When you return home one day from a walk in the park, you notice that *your* Jaguar's hood ornament has been purloined. Does "Jaguar's" charac-

35 For additional defenses used in favor of the U.S. rule, see generally Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547 (including the defenses of fair notice to the defendant and avoidance of time consuming, distracting collateral issues).

36 *See, e.g.*, Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1041 (1984) ("[S]cientists question whether character evidence has any probative value at all.").

37 *See* James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 107 (1994) ("It is self-evident that allowing juries to learn of a defendant's prior criminal history . . . will increase the chances of convicting all those accused defendants who have been convicted (or at least accused) of sexual offenses in the past—regardless of whether those defendants are guilty or innocent."). *But see* Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REFORM 707, 730–34 (1989) (rejecting common arguments that admitting evidence of prior crimes creates prejudice).

38 FED. R. EVID. 401.

ter, as evidenced by his prior acts of theft, make it more or less likely that he stole your property? Of course it does.

The idea that one's character can be a useful predictor of his future behavior seems so obvious as to not require much further analysis. Indeed, courts and scholars alike have acknowledged the relevance of character evidence.[39] However, whether bad character evidence is *relevant* is only the first line of inquiry as to whether it should be admissible.

B. Character Evidence Will Not Be Overvalued

Rule 403, again, orders that even relevant evidence should be excluded if its probative value is outweighed by the risk of unfair prejudice, including issue confusion, misleading the jury, or general inefficiency and delay.[40] Defenders of American character evidence law would say that even if character evidence is relevant, it would either be overvalued or used to punish defendants for past crimes.[41]

In spite of wide belief to the contrary, there is no good reason to believe that juries will convict to punish past crimes. Legal authorities have held that exclusion of character evidence is necessary to prevent the jury from convicting based on the belief that the accused is a person of bad character.[42] This stems from the fear that a jury will convict an accused on the grounds of bad character without regard to the rest of the evidence in the case.[43] For example, the Advisory Committee's Note on Rule 404, which bans character evidence, provides that character evidence is inappropriate because it "subtly permits the trier of fact to . . . punish the bad man because of [his] character[] despite what the evidence in the case shows actually happened."[44]

Were the fear founded that juries would improperly use evidence of past crimes and convictions, its exclusion would almost certainly be justified. However, a persuasive study by Professor Kenneth J. Melilli

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39 *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475–76 (1998); Old Chief v. United States, 519 U.S. 172, 180–82 (1997); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 289 (1995).

40 FED. R. EVID. 403.

41 *See, e.g.*, Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 48 (2007).

42 *See, e.g.*, United States v. Turquitt, 557 F.2d 464, 468 (5th Cir. 1977).

43 *See, e.g.*, United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993); United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir. 1979).

44 FED. R. EVID. 404(a) advisory committee's note.

of Albany Law School finds no such evidence of misuse.[45] He does not find that jurors will not be *influenced* by character evidence. Of course they would, just as they would be influenced by DNA evidence of witness identifications.[46] But there is a large logical leap from the proposition that jurors will weigh such evidence to the proposition that they will value it disproportionately; that is, that it will be unfairly prejudicial.

In fact, Melilli recognizes the idea that jurors will "overvalue" propensity character evidence as internally inconsistent. Juries are the backbone of America's criminal justice system, trusted as authoritative finders of fact. If we are to trust that their "consensus of opinion is a valid proxy for accuracy,"[47] then we must accept that if a jury gives propensity character evidence great weight in one case, then it necessarily is deserving of that weight.[48]

Therefore, the overvaluation theory finds no support in the proposition that a juror exercises too much subjectivity in determining character evidence's weight: this is the juror's very job. Instead, one must believe that a jury would purposely come to a verdict based on meting out punishment for a past offense. And there is no reason to believe that a group of jurors would conspire to act so nefariously as to base their verdict on uncharged conduct. As Melilli states, "[t]he notion that it is unfair to punish someone for something other than the matter at issue is so straightforward . . . that it is difficult to fathom that an entire jury would agree to do just that . . . ."[49] This fear also rings hollow in light of the fact that character evidence is allowed in the United States in some circumstances. For example, a defendant's character may be impeached if he is a witness, or through cross-examination of his own witnesses.[50] This suggests that if the unjust punish-

45 *See* Melilli, *supra* note 35, at 1606 ("[T]here is simply no empirical basis for the speculative assertion that jurors will convict persons believed to be not guilty of the charged crimes in order to impose sanctions for uncharged crimes. In fact, the most that can be said in support of the unjust punishment hypothesis is that it 'has widely been presumed' that jurors will convict as a sanction for uncharged misconduct." (citations omitted) (quoting Duane, *supra* note 37, at 110)).

46 *Id.*

47 *Id.* at 1598.

48 *See id.* at 1598 ("Now, if it is true that most jurors believe that the correct value of character evidence is [*x*] . . . then the actual correct value of the character evidences is [*x*], and there is no overvaluation whatsoever.").

49 *Id.* at 1607.

50 Rule 608 reads, in pertinent part:

> (a) Opinion and reputation evidence of character.
>
> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the

ment theory is valid, "then the well-established range of opportunities for the prosecutor to deliver such apparently intoxicating information to the jury under existing law makes no sense whatsoever."[51]

Given the failure of these arguments to overcome the relevance of propensity character evidence, it is logical to assume that what truly motivates this concern is a more general distrust of juries; that strictly controlling what comes into a trial is a way of controlling the jury itself. This concern, it should be noted, is mostly American. At least one British judge—working in a system that favors character evidence admissibility—generally finds juries "incredibly educated and informed" with respect to the relevance of character evidence. Even when character evidence is admitted, jury verdicts are "remarkably fair."[52]

Furthermore, Rule 403 is a sufficient safeguard against inefficiency and delay. A common defense of bad character exclusion is that an inclusive system would require the defendant to be on trial for any and all bad acts committed throughout his life.[53] If character evidence enters a trial through prior bad acts evidence or by reputation and opinion testimony, the defendant is forced to refute additional charges, "inject[ing] an additional and confusing burden upon the defense."[54] Also, admission of character evidence may reduce the efficiency of a trial, raising costs and confusing the issues.[55] In sum, this

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evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.

Specific instances of the conduct of a witness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608.

51 Melilli, *supra* note 35, at 1608.

52 Interview with the Honorable Judge David Paget, Old Bailey Courthouse, in London, Eng. (May 29, 2008) [hereinafter Interview].

53 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5232, at 346 (1978).

54 Johnson v. United States, 356 F.2d 680, 684 (8th Cir. 1966).

55 22 WRIGHT & GRAHAM, *supra* note 53, at 346.

pressure on the parties and the jury has the potential to "increas[e] both injustice and inefficiency."[56]

However, such arguments possess a fatal error. If the exclusion policy of Rule 404 did not exist, it would *not* be tantamount to blanket admission of any and all character evidence. Indeed, such evidence, like all otherwise admissible evidence, would still be subject to Rule 403's exclusion of prejudicial, confusing, misleading, or inefficient evidence.[57] In other words, the exact concerns supposedly solved by excluding character evidence are already adequately protected. With Rule 403 in place, Rule 404 is at best a redundancy and at worst a barrier against perfectly legitimate, probative evidence.

C. Guilty Acquittals v. Innocent Convictions

A final consideration that may account for the disparity between the two systems relates to the axiom that it is better to see a certain number of guilty men acquitted than it is to see an innocent man imprisoned.[58] If this consideration is indeed important, then an exclusionary approach is certainly preferable. For example, a spate of British miscarriages of acquittal related to terrorist bombing cases in the 1980s and 1990s have been attributed to "a failure to disclose . . . important character evidence."[59] However, a number of recent statements and reforms show that this ideal is more axiomatic than realistic.

In calling for the enactment of Rules 413–15, Senator Robert Dole raised the troubling history of guilty persons acquitted because of over-stringent evidentiary rules.[60] And in introducing the CJA, Prime Minister Tony Blair referred to it as "part of a major rebalancing of the criminal justice system in favour of the victim."[61] Indeed,

56 James Landon, *Character Evidence: Getting to the Root of the Problem Through Comparison*, 24 AM. J. CRIM. L. 581, 595 (1997).

57 FED. R. EVID. 403.

58 English jurist William Blackstone first set the number at ten, saying, "[B]etter that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *358. Benjamin Franklin once said "[t]hat it is better a hundred guilty Persons should escape than that one innocent Person should suffer." Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN 291, 293 (Albert Henry Smyth ed., 1906).

59 Interview, *supra* note 52.

60 *See infra* Part IV.

61 Cindy S. Kui, Note, *Right to an Impartial Jury: United Kingdom Parliament's Order to Disclose Previous Convictions and Its Impact on Defendants*, 33 SYRACUSE J. INT'L L. & COM. 495, 513 (2006) (quoting Julie Hyland, *Britain: Government Extends Attack on Defendants' Rights*, WORLD SOCIALIST, Oct. 28, 2004, http://www.wsws.org/articles/2004/oct2004/jury-o28.shtml).

the idea that a criminal justice system should be charged with purposely erring to either guilt or innocence is flawed. Were this the case, a system would strive to produce as many acquittals as possible, thus obviating the system's very imperative.

Instead, a system should merely strive to admit relevant evidence, while giving only secondary consideration at best to prosecutors' win-loss records. For the reasons stated above, a system of inclusion can best provide such a fair process. And at least one British judge has gone on record stating that he does not believe that the CJA has led to any more guilty pleas or convictions.[62]

In sum, there is a very strong case that the justifications for the United States' exclusionary approach to a defendant's bad character are either chimerical or satisfied elsewhere in the legal system. First, it is undisputed that character evidence is highly relevant. Moreover, fears of vindictive or pliable juries are largely unfounded, and the admissibility of character evidence for other specific purposes has not borne out any of these fears. Finally, legitimate concerns about turning trials into free-for-alls with an accused forced to defend his whole life are already solved by Rule 403. As such, an inclusive approach to a defendant's character evidence is the better approach.

III. RULE 404(B): A MATTER OF CHARACTER

Although Part II suggests that the United Kingdom's inclusionary scheme is preferable to the United States' exclusionary scheme, a closer analysis of U.S. evidence law, particularly as related to Rule 404(b), reveals that the United States, in practice, does have a British-style rule of inclusion. This Part aims to first track the Rule's history and to discredit the notion that the Rule was intended to deal only with issues outside the realm of character. It will then compare the Rule to its British counterpart, by way of referring to each of the listed categories encompassed by the Rule. In each instance the face of the U.S. law would seem to militate toward the character evidence's exclusion. However, the liberal interpretation of the Rule's language leads to a result of inclusion.

It may initially seem puzzling that a discussion of Rule 404(b) would occupy such a large portion, or any portion, of a Note relating to character evidence. After all, the Rule begins with the explicit admonishment, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[63] In other words, a defendant's bad charac-

62 Interview, *supra* note 52.

63 FED. R. EVID. 404(b).

ter evidence is not admissible as such. However, a review of the Rule's history shows that abuse of this exclusionary principle is as old as the principle itself. It contains, so to speak, more hole than target, and works not to restrict the admission of evidence of bad character, but to divert its path to admittance through loopholes and side doors.

A. Revisionist History: People v. Molineux *and Its Aftermath*

In the seminal case of *People v. Molineux*,[64] Roland Molineux was accused of fatally poisoning a Mrs. Adams.[65] Specifically, he was accused of mailing her a bottle of medicine laced with cyanide.[66] Earlier that year, a Mr. Barnet, who lived in the same building as Mrs. Adams, had died when he ingested medicine he had received in the mail to treat an upset stomach.[67] Believing these events to be more than mere coincidence, the prosecutor for the Adams killer sought to introduce evidence that showed Molineux was probably also responsible for the Barnet death.[68] Molineux was convicted.[69] Molineux appealed, arguing that evidence of his alleged criminal history should have been excluded.[70] The opinion behind his successful appeal forms the basis of the modern Rule 404(b).

While Judge Werner authored the majority opinion, it is Judge Alton Parker's special concurring opinion that forms the basis for the modern law.[71] He fashioned his standard in the form of a question, asking, "Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved."[72] To be sure, this formulation is consistent with the wording of 404(b), which nonexhaustively limits past-behavior evidence to such criminal elements as motive, opportunity, intent, identity, etc.[73] As such, 404(b) is not a betrayal of the *Molineux* principle.

However, Rule 404(b) represents only one of two possible interpretations of *Molineux*. The other conforms to the British approach to evidence of bad character. This approach allows past-behavior evi-

64 61 N.E. 286 (N.Y. 1901).

65 *Id.* at 287.

66 *Id.*

67 *Id.*

68 *Id.* at 290–93.

69 *Id.* at 287.

70 *Id.* at 293.

71 *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 203–04 (2005).

72 *Molineux*, 61 N.E. at 314.

73 FED. R. EVID. 404(b).

dence any time it relates to "an important matter in issue."[74] Again, recall that this has been interpreted to allow past behavior as character evidence any time it tends to show propensity to commit a certain type of crime or to be untruthful.[75] Whether one is telling the truth about an alibi or whether the defendant in fact committed the crime (the matters toward which character evidence are relevant in British law) could certainly be considered "elements" of a crime pursuant to *Molineux* to the same extent that motive, plan, and knowledge can.

In any case, the wording of Rule 404(b) unambiguously finished the work of interpreting *Molineux* to exclude all character evidence. It passed in 1975 as one of the least controversial Rules[76] and was not the focus of much public commentary or legislative discussion.[77] The transformation from an ambivalent decision to a steadfast rule was seemingly complete.

However, at the time of its passing, Judge Friendly of the Second Circuit Court of Appeals asked presciently of the Rule:

> "Does this . . . allow[] evidence of other crimes *except* when offered only to show the defendant is a bad man, or the rule requiring that these crimes show some particular trait relevant to the charge? The rule seems to walk both sides of the street. It will provide a bountiful source of appeals and possible reversals . . . ."[78]

Indeed, and despite its uncontroversial passing, Rule 404(b) has been the most contested Federal Rule of Evidence, giving rise to by far the most appeals.[79] This can be attributed to its fuzzy determination of whether and how it should be interpreted to admit character evidence.

B. Practical Application of 404(b): Better than No Character Evidence at All

During the era of Prohibition, a popular rallying cry was, "[It's] better than no booze at all!"[80] A similar phrase could describe 404(b)'s ban on character evidence. The irony in the law since *Molineux* is that even as the statutory law has moved surely and steadily

74 Criminal Justice Act, 2003, c. 44, § 101(1)(d).

75 Crown Prosecution Service, *supra* note 23.

76 Reed, *supra* note 71, at 209.

77 *Id.* at 209–10.

78 *Id.* at 210 (quoting *Hearings Before the Special Subcomm. on Reform of Fed. Criminal Laws of the Comm. on the Judiciary*, 93d Cong. 251–52 (1973) (statement of Judge Henry Friendly, Court of Appeals for the Second Circuit)).

79 *Id.* at 211.

80 Milton Shapp, Governor of Pa., Address to the National Governors Association (Mar. 6, 1974).

toward an interpretation disallowing character evidence, the case law has diverged, favoring its inclusion even in the face of increasingly imposing obstacles. While the language of Rule 404(b) makes clear that it is nonexhaustive,[81] the following sections attempt to take each of the listed situations in which past occurrences can be admitted and show how they have served as mere gateways for the introduction of propensity character evidence.

1. Knowledge

"Knowledge," for the purposes of Rule 404(b), is a "circumstantial way to prove criminal intent, because if the defendant knows what he or she is doing, then criminal intent to commit a crime follows from that knowledge."[82] For example, presume that a man is arrested and charged with possession of marijuana with an intent to distribute. The man's defense is that he found the bags of marijuana in the new desk he bought and he guessed that the bags contained oregano. Under 404(b)'s knowledge exception, a prosecutor could probably introduce evidence that the man had been seen smoking marijuana on several previous occasions. In theory, this evidence would be introduced to show that the man had knowledge that what he possessed was marijuana. The problem, of course, is that there is no way to excise evidence of the man's character of smoking marijuana from the "knowledge" aspect of the evidence.

While the "knowledge" gateway is problematic enough in theory, it has been even more flagrantly abused in real-life trials. Take, for example, the case of *United States v. Lopez*.[83] Defendant Lopez was in

81 FED. R. EVID. 404(b).

82 Reed, *supra* note 71, at 218–19; *see also* United States v. Floyd, 343 F.3d 363, 369 (5th Cir. 2003) (admitting evidence that the defendant participated in two prior staged auto accidents to collect insurance proceeds to show that defendant knowingly participated in the false staged accident described in indictment and to show general criminal intent).

83 340 F.3d 169 (3d Cir. 2003). There are many examples of cases with similar results on similar facts. *See, e.g.*, United States v. Givan, 320 F.3d 452, 460–62 (3d Cir. 2003) (allowing evidence of a prior conviction for cocaine trafficking to imply knowledge of the physical appearance of heroin); United States v. Vega, 285 F.3d 256, 261–62 (3d Cir. 2002) (admitting evidence of a previous drug conspiracy conviction that did not involve defendant coming into contact with illegal drugs to prove knowledge of drugs' properties in a subsequent trial for drug conspiracy); United States v. Gordon, 987 F.2d 902, 908–09 (2d Cir. 1993) (allowing evidence of a prior conviction for importing small amounts of cocaine to imply knowledge of a large quantity of marijuana); United States v. Bibo-Rodriguez, 922 F.2d 1398, 1401–02 (9th Cir. 1991) (allowing evidence of a prior conviction for cocaine trafficking to imply knowledge of the appearance of marijuana). For a case taking an alternative approach, see *United*

prison on a conviction for possession of cocaine with intent to distribute.[84] While in jail, prison guards found twenty small bags of heroin in his cell.[85] He was charged with drug possession with intent to distribute. Lopez raised the defense of innocent association.[86] At issue on appeal was whether the district court was correct in permitting evidence of his conviction for cocaine possession to prove knowledge in the heroin trial.

In theory, British law should allow this evidence, whereas American law should not. Without much analysis needed, this case would pass the British threshold of a person having a desire or habit to commit a particular crime (drug distribution) under sections 101(1)(d) and 103(1)(a) of the CJA. However, this would not seem to be admissible under U.S. law, which does not allow propensity evidence. As to the 404(b) knowledge exception, it does not seem that a knowledge of what cocaine looks like would have any bearing on whether one would know the same about heroin.

However, the Third Circuit ruled that the past conviction was admissible. In so doing, it did not adduce a single piece of analysis of how one's prior association with cocaine would make him more likely to acquire or identify heroin. Rather, it relied on the nebulous assertion that it was the court's policy to "uphold[] the admission of evidence of prior drug involvement for the purpose of rebutting defense claims of innocent association."[87] If one rules out flagrant malpractice from consideration, it follows that the Third Circuit's intent in allowing a drug conviction to operate against a man on trial for possession of *another drug* is to endorse the use of 404(b) for admission of the information as *character* rather than *knowledge* evidence.

2. Identity

To introduce past-behavior evidence under the theory of "identity," a prosecutor must allege similar criminal conduct to prove that the accused committed the crime.[88] Most courts require more than mere similarity; usually the crime must be so specifically unique as to

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States v. Garcia-Orozco, 997 F.2d 1302, 1304–05 (9th Cir. 1993) (finding evidence of a prior heroin possession irrelevant in implying knowledge of the appearance of marijuana).

84 *Lopez*, 340 F.3d at 172.

85 *Id.* at 171.

86 *Id.* at 174.

87 *Id.*

88 Reed, *supra* note 71, at 234.

constitute a criminal "signature."[89] For example, suppose a man has previously been known to devour two boxes of Cheerios during his house robberies. If he is on trial for a robbery in which Cheerios bits were found on the floor and two empty Cheerios boxes were found in the trash, this evidence would presumably be allowed through the 404(b) identity gateway.

However, this gateway, too, has sometimes proved to be little more than a conduit for the admission of propensity character evidence. Take, for example, the case of *United States v. Mack*.[90] In that case, Mack was convicted of armed bank robbery.[91] The Sixth Circuit reviewed whether the prosecutor was rightfully allowed to admit evidence of other charged bank robberies based on the fact that in both, the defendant allegedly (1) wore a ski mask, (2) "burst into the bank," and leaped over the teller counter, and (3) leaped back over the teller counter to leave.[92]

Under British law this case would be open and shut. Under section 103(4)(b) of the CJA, the Secretary of State has prescribed theft as a categorical indicator that a defendant has a propensity to be a repeat offender. As robbing a bank falls into this category, the defendant's previous crimes would be admitted. Under U.S. law, this situation would seem to demand an opposite, though equally obvious, result. Anyone who has ever watched a heist movie would know that these three ways of robbing a bank are hackneyed and overplayed, hardly unique enough to constitute a signature. The court itself acknowledged that the elements "were not particularly unusual."[93]

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89 *See, e.g.*, State v. Long, 575 A.2d 435, 452–53 (N.J. 1990) (discussing the "signature" requirement).

90 258 F.3d 548 (6th Cir. 2001). There are many examples of similar identity decisions on similarly generic facts. *See, e.g.*, Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) (admitting evidence of a defendant's former robbery of a particular 7-Eleven to prove identity in a subsequent *murder* of a clerk in the 7-Eleven); United States v. Connelly, 874 F.2d 412, 414 (7th Cir. 1989) (admitting as evidence of identity a home invasion where homeowner was bound with duct tape); United States v. Woods, 613 F.2d 629, 635 (6th Cir. 1980) (finding defendants' conduct of wearing ski masks, goggles, jumpsuits, and using a stolen vehicle for a getaway car established a "signature" for the purposes of Rule 404(b)). For an alternative approach, see *United States v. Luna*, 21 F.3d 874, 878–83 (9th Cir. 1994) (finding inadmissible evidence of a former bank robbery where the common elements were the use of guns, masks, gloves, bags, and profanity).

91 *Mack*, 258 F.3d at 551.

92 *Id.* at 553–54.

93 *Id.* at 554.

Still, the Sixth Circuit held that the robberies were similar enough to be admitted.[94] Lest one think this is an isolated incident, consider the case of *United States v. Woods*,[95] in which the Sixth Circuit admitted identity evidence for robbers who used the decidedly nonsignature items of ski masks, goggles, jumpsuits, and, least shockingly, a stolen automobile to commit their crime.[96] Again, any lay observer, let alone a Sixth Circuit judge, could see that the similarity of an aggressive bank robber is not the type of "identity" evidence envisioned by Rule 404(b). The only conclusion to be drawn from cases like this is that courts are reading the Rule broadly enough as to allow in character evidence.

3. Motive

Motive is almost never an explicit element of a crime, but courts have traditionally found that proof of motive is relevant to an issue of guilt or innocence.[97] In order to have past-behavior evidence admitted under the motive theory, a prosecutor can either introduce dissimilar crimes to explain why the accused committed the crime charged or admit similar crimes for the same purpose.[98] For example, a prosecutor could introduce evidence that a man had previously attempted to rob a convenience store in a trial against him for an attempted bank robbery, in order to show that the defendant was in desperate need of money.

In a now familiar refrain, this gateway too has been abused for the introduction of seemingly unrelated character evidence. In *Miller v. State*,[99] Miller was convicted of first-degree robbery. He appealed, arguing that evidence of a cocaine trafficking scheme was improperly

94 *Id.*

95 613 F.2d 629 (6th Cir. 1980).

96 *Id.* at 635.

97 *See* Reed, *supra* note 71, at 217.

98 *See, e.g.*, United States v. Claxton, 276 F.3d 420, 423 (8th Cir. 2002) (permitting evidence in a federal firearms violation case to show that accused's apartment contained unlawful drugs because it was relevant to his motive for keeping a firearm).

99 866 P.2d 130 (Alaska Ct. App. 1994). There are many examples of cases with similar results on similar facts of dissimilar crimes. *See, e.g.*, United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir. 1993) (admitting evidence that defendant had a twenty- to thirty-dollar-a-day heroin habit to prove motive in prosecution for a bank robbery); United States v. Fuller, 887 F.2d 144, 147 (8th Cir. 1989) (allowing evidence of drug paraphernalia seized at an apartment to prove motive in a charge of firearm violations); United States v. Mills, 704 F.2d 1553 (11th Cir. 1983) (allowing evidence of crimes committed by members of a white supremacist group to prove motive in a murder committed by a *different member* of the group).

admitted.[100] The trial court judge had allowed evidence that three codefendants had trafficked in and used cocaine because "'[i]t defined the relationship between the parties at the time. It dealt with motive . . . .'"[101] The connection, as stated by the majority opinion, is that the robbery (as it provided income) was motivated by an overall plan to "buy cocaine in Florida for resale in Alaska."[102] This despite the fact that "the plan to rob . . . was not even hatched until much of the cocaine dealing and use had already occurred."[103]

Under Britain's inclusionary system, the cocaine trafficking would be admitted under gateway 101(c) as important explanatory evidence.[104] According to section 102, "important explanatory evidence" is evidence without which the court or jury would find it difficult to understand both other evidence in the case and the case as a whole.[105] Note that this is a lower standard than motive, which requires a link to why a person committed a crime (in essence, a definition of the crime itself). In the British system, then, this evidence would be admissible under the simple explanation that it defines how the men know each other. In the United States, the timeline of events would seem to argue against admittance. After all, if the cocaine scheme had mostly concluded, it would not be able to establish *why* the robbery was committed.

One wonders if the judge would have allowed in the evidence had Miller's debts been owed for a child's school tuition, or United Way donations. While the answer to that question is unknown, what is known is that the court here found admissible the fact that Miller illegally bought and sold cocaine as a motive for a robbery that did not involve theft of cocaine or its subsequent purchase. This again seems to be an attempt by the court to subvert the intent of 404(b) by using its supposed character evidence barriers as entrances.

4. Entrapment

Entrapment is "a defense that accuses the law enforcement authorities of originating the crime charged in the indictment against

100 *Miller*, 866 P.2d at 131. It should be noted that this case was tried under the Alaska Rules of Evidence, as opposed to the Federal Rules of Evidence. However, Alaska Rule 404(b) is an exact duplicate of Federal Rule 404(b).

101 *Id.* at 133 (emphasis added) (quoting the judge below).

102 *Id.*

103 *Id.*

104 Criminal Justice Act, 2003, c. 44, § 101(c).

105 *Id.* § 102.

the accused."[106] The heart of an entrapment defense is that the defendant was not predisposed to commit a crime until pressed to do so by the government. "To counteract that defense the prosecution is entitled to place before the jury evidence tending to show predisposition."[107] This seems the most nefarious of the 404(b) categories because it by definition calls for propensity character evidence.

Consider the case of *United States v. Crump*.[108] In this case, defendant Crump was convicted of distributing phentermine HCL and cocaine.[109] Crump claimed entrapment, that he only sold the undercover agent the substances under duress.[110] The prosecution was allowed to admit testimony from a Lisa Clark, who told the jury that she had sex with Crump (a member of the Missouri House of Representatives) four or five times a year in exchange for drugs.[111] Clark did not allege that Crump ever sold her the drugs or that the transactions were in any way similar to the one in which Crump was allegedly entrapped.

Again, this evidence would seem to be admissible under British law, with little question. The prosecution merely seeks to introduce evidence that the defendant had dealt drugs before. As British law admits propensity evidence, the issue of entrapment would not come into play, and the previous crime would be admitted. And again, the plain language of 404(b) would seem to exclude this evidence as it is propensity evidence, plain and simple. In fact, the *Crump* court asserted that it was the prosecution's burden to prove that Crump was "predisposed to commit the crimes alleged."[112]

Despite this, the Eighth Circuit held that the distribution of drugs aspect of the incidents made them "similar in kind," and thus admissible.[113] As the two incidents were only tenuously related, the case can reasonably be read as giving carte blanche to introduce bad character evidence any time an entrapment defense is raised. Or, to quote the

106 Reed, *supra* note 71, at 224 (citing Sorrells v. United States, 287 U.S. 435, 453–56 (1932) (Roberts, J., concurring)).

107 United States v. Demetre, 464 F.2d 1105, 1106 (8th Cir. 1972).

108 934 F.2d 947 (8th Cir. 1991). There are examples of cases with similar results on similar facts. *See, e.g.*, United States v. Salisbury, 662 F.2d 738, 739–41 (11th Cir. 1981) (allowing evidence of a defendant's former attempt to sell stolen tires to rebut his defense of entrapment in selling stolen cars); *Demetre*, 464 F.2d at 1105–06 (allowing evidence of a defendant's prior interactions with a Secret Service informant to rebut his claim of entrapment in a prosecution for forgery and counterfeiting).

109 *Crump*, 934 F.2d at 948.

110 *Id.* at 950.

111 *Id.* at 953–55.

112 *Id.* at 954.

113 *Id.*

Crump court itself, "We have consistently held that prior bad act evidence is admissible to show a defendant's predisposition once the defendant has asserted the entrapment defense."[114]

These decisions evidence the crux of U.S. policy on propensity character evidence. Based on the arguments in Part II, the evidence in question *should* be admitted. But a literal reading of Rule 404(b) would demand that the evidence be excluded. However, this Part shows how three different federal courts of appeals and a state court of appeals all adopted a different interpretation of *Molineux*, and thus character evidence, than the statutory language of Rule 404(b). The courts' propensities to follow the spirit of Rule 404(b) as opposed to its language suggests that the United States has a practically inclusionary, rather than exclusionary, approach to bad character evidence of the accused. In these cases, in fact, there is no perceived difference between using the U.S. system and the British, its supposed opposite.

IV. RULES 413–15: A TELLING EXPERIMENT

Even with all of the academic hand-wringing over Rule 404(b), the consequences of its enactment might have forever inhabited the world of the hypothetical. After all, for all its flaws, there was never a way to know whether it was doing any more work to exclude character evidence than would an ostensibly inclusionary rule. The hypothetical, however, became reality on September 13, 1994. On that day, President Clinton signed into law Federal Rules of Evidence 413, 414, and 415.[115] These Rules allow specific instances of prior conduct to be admissible as character evidence against the accused in sexual

114 *Id.*; *see also* United States v. Padilla, 869 F.2d 372, 380 (8th Cir. 1989) (considering that testimony that defendant had previously sold drugs was relevant and admissible for purposes of showing defendant's predisposition to traffic in drugs to refute entrapment defense); United States v. French, 683 F.2d 1189, 1193 (8th Cir. 1982) (regarding testimony that defendant had unlawfully purchased food stamps in January was relevant to the defendant's predisposition for doing likewise in June and July to refute entrapment defense).

115 *See* Michael S. Ellis, Note, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 968 (1998). Rule 413 provides in pertinent part: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a).

Rule 414 provides in pertinent part: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." *Id.* 414(a).

assault cases.[116] This fundamental change offered a chance to observe, side by side, an inclusionary U.S. approach to character evidence with its exclusionary counterpart. This Part of the Note will first chronicle the legislative history of these new rules, noting that their unambiguous purpose was to admit character evidence in certain types of cases. Next, it will note the counterintuitive result that is, largely, no result at all. That Rules 413–15 make so small a contribution to the default of 404(b) underscores the point that the system was already one of inclusion.

During the early 1990s, several high-profile rape cases motivated the public and Congress to implement stronger measures against that particular societal scourge.[117] This goal coincided with an increased female presence in the American political, military, and working worlds.[118] In response to this near-perfect storm, Congress passed the Rules to show the public it was getting tough on sex crimes.[119] Senator Robert Dole justified the new Rules like this:

> [T]oo often, crucial evidentiary information is thrown out at trial because of technical evidentiary rulings. This amendment is designed to clarify the law and make clear what evidence is admissible, and what evidence is not admissible, in sex crime cases . . . . [I]f we are really going to get tough, and if we are really going to try to make certain that justice is provided for the victim . . . [I] think we ought to look seriously at [this amendment].[120]

The enactment of these Rules represents a clear effort on behalf of the legislature to obviate procedural hindrance regarding an accused's character evidence in sex crimes trials. In discovering significant overlap of Rules 413–15, whose interpretation cannot be doubted, 404(b) is empirically exposed as a practical rule of inclusion.

In comparing the ways in which Rules 413–15 supposedly alter Rule 404(b), one finds much more similarity than change. For example, one argument for Rules 413–15 is that a person's desire to display deviant sexual behavior in one case is akin to motive in another.[121] Whatever dark instincts cause a rapist to abuse one child would also

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116 *Id.* 413–15.

117 At that time, celebrities such as Kennedy cousin William Kennedy Smith and the boxer, Mike Tyson, were imprisoned for and charged with rape. Smith was ultimately acquitted, Tyson convicted. Ellis, *supra* note 115, at 974.

118 *Id.*

119 *See* Denis F. McLaughlin, *Rule Changes Pending in Congress: The Shape of Things to Come?*, 143 N.J. L.J 683, 683 (1996).

120 Ellis, *supra* note 115, at 979 (alterations in original) (quoting 139 CONG. REC. S15,072–77 (daily ed. Nov. 4, 1993)).

121 Melilli, *supra* note 35, at 1585.

cause him to abuse another. The new Rules would seem unnecessary for this purpose, however, as 404(b) has consistently been used to allow would-be character evidence to prove motive.[122] Another justification for the new Rules is that the past behavior is necessary to prove intent and absence of mistake.[123] A person previously accused of rape would certainly not be mistaken as to the nature of consent in another case. However, *Lopez* showed that the concept of intent can be stretched far more than this under 404(b).[124] A third claim, based on the so-called doctrine of chances, relates to identity. Simply put, a rapist is more likely than a non-rapist to commit rape.[125] However, if the act of rape is specific enough to be considered a signature (and even if it is not),[126] Rule 404(b) will have the evidence admitted that way.

All told, many of the policy concerns heretofore cited for a switch to an inclusionary system are concerns that had already been solved in the United States' preexisting exclusionary scheme. This suggests that despite the legislators' alarmism, the change they sought had been enacted long ago, through the loophole-ridden 404(b), and the common law that was all too willing to exploit it.

V. Exceptions Proving the Rule

The liberal-in-practice nature of Rule 404(b) suggests a conclusion that the United States' bottom-up and Britain's top-down approaches have arrived at the same place; that comparing an exclusionary system with exceptions to an inclusionary system with gateways is akin to asking if a zebra is white with black stripes, or black with white stripes. The thrust of this Note is that this is generally true. This Part, though, will identify salient features of each system that produce differences in practice, as well as theory. However, it will conclude that the narrow circumstances in which the two systems do not overlap are not sufficient to support the proposition that the U.S. rule is fundamentally one of exclusion.

As previously noted, the British Secretary of State may prescribe categories of offenses which are "of the same type" for use as an indicator that a defendant has a propensity to commit offenses of a certain type.[127] One category so designated is the category of theft.

122 *See supra* Part III.B.3.
123 Melilli, *supra* note 35, at 1586.
124 *See supra* Part III.B.1.
125 Melilli, *supra* note 35, at 1586.
126 *See supra* Part III.B.2.
127 *See* Criminal Justice Act, 2003, c. 44, § 103 (4)(b).

Therefore, *any* act of theft in a defendant's history will be admitted in *any other* trial she is ever subject to relating to theft. While the liberal reading of 404(b) makes a similar result likely in the United States, it is not difficult to imagine a case where evidence would be excluded. For example, imagine a case in which the prosecution moves to introduce evidence that a man on trial for allegedly stabbing another man to death in order to steal his wallet has previously been convicted of burgling a pharmacy after closing time in order to procure a prohibitively expensive medicine for his dying wife.

In Britain this evidence would be admitted. In the United States, however, it seems even the most liberal reading of 404(b) would bar the evidence. For example, the previous crime is not similar enough to go toward identity, not joined enough by elements of the crime to go toward evidence, does not explain the man's alleged motive, and the defense of entrapment does not enter into play. Neither does it fit into any of the other listed exceptions or otherwise prove anything besides propensity character. Therefore, Britain's codification of this policy determination means that character evidence for theft is more likely to be used against an accused there than in the United States.

As previously stated, the United States has amended its evidentiary laws to allow propensity character evidence in cases of sex crimes. Even in Britain's nominal law of inclusion, a prosecutor would still have to pass this evidence through a threshold burden of establishing that it proves the defendant either has a desire to commit the particular crime, or a habit of committing a certain kind of crime. Say, for example, a man is accused of imprisoning a woman in his home and violently raping her at gunpoint. In his trial, suppose that a prosecutor wishes to adduce evidence that several years prior, he was convicted of sexual assault for illegally touching another man's anus in the "darkroom" of a nightclub.[128]

In the United States, this evidence would be admitted under Rule 413. As both acts constitute sexual assault under the Rule, the previous conviction would be admitted for its bearing on any matter for which it is relevant. In Britain, the evidence's admissibility would not be so clear-cut. The prosecutor would either have to successfully make the case that groping someone in a bathroom stems from the same "desire" to rape a woman at gunpoint, or that the crimes are close enough as to constitute a "habit."[129] Owing to the peculiarities

128 This scenario would qualify as sexual assault for the purposes of the Rule. *See* FED. R. EVID. 413(d)(2).

129 While not pertinent to this very discussion, it should be noted that sexual assault on a person under the age of sixteen is the other section 103(4)(b) category,

of the hypothetical, these arguments seem implausible. As seen in the language of Rules 413–15, the United States has made a policy judgment that Britain has not: namely, that once one has committed a sex crime, he necessarily has a greater propensity to commit another.

CONCLUSION

This final analysis of the practical differences between the two systems is a fitting way to conclude this Note. Because in analyzing the two substantive differences, something is immediately apparent. Specifically, there are only two of them. It is shocking that between two systems that have taken totally divergent paths toward evidence admission, a searching study yields only two major differences of what may or may not be admitted. Further, in one of these cases, the United States, with its ostensibly exclusionary system, is actually more inclusive.

Therefore, what is left is that for all of the ideological differences, it is harder to get propensity character evidence for theft admitted in the United States than it is in the United Kingdom. Even in that specific case, though, it is important to note that Britain's system is more inclusive because of a special exception made to their general rule. Without theft being one of two cases designated as a special category by the Secretary of State, this Note would yield the result that the U.S. system was more *inclusionary* than Britain's, rather than vice versa.

This Note, however, should not be read as an indictment of the hypocrisy of U.S. courts. Rather, it represents a triumph of common sense in determining what should, or should not be, admissible evidence in a criminal trial. Propensity character evidence is relevant, and it is well within the ability of a jury to give it appropriate weight and consideration. Therefore, it appears that U.S. courts, and especially courts of appeals, are interpreting *Molineux* through Rule 404(b) as a way to introduce character evidence when at all appropriate. When compared to the inclusionary Rules 413–15 and especially the British rules of evidence, it is seen that the U.S. courts are doing a more than adequate job in providing juries sufficient evidence to form their verdicts, and providing defendants the protections of a fair trial.

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along with theft. If this hypothetical concerned a minor, then, it would be admitted just as readily under both systems. *See* Criminal Justice Act, § 103(4)(b); *see also* Crown Prosecution Service, *supra* note 23 (describing how theft and sexual assault of a minor under 16 are the two categories created by the Secretary of State).