

9-2020

Restoring the Presumption of Innocence: Protecting a Defendant's Right to a Fair Trial by Closing the Door on 404(b) Evidence

Aaron Diaz
St. Mary's University School of Law

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Evidence Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Remedies Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Aaron Diaz, *Restoring the Presumption of Innocence: Protecting a Defendant's Right to a Fair Trial by Closing the Door on 404(b) Evidence*, 51 ST. MARY'S L.J. 1001 (2020).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol51/iss4/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

RESTORING THE PRESUMPTION OF INNOCENCE: PROTECTING A DEFENDANT'S RIGHT TO A FAIR TRIAL BY CLOSING THE DOOR ON 404(B) EVIDENCE

AARON DIAZ*

I.	Introduction.....	1002
II.	Background.....	1006
	A. Introducing a Defendant's Prior Bad Acts	1008
	B. The Limiting Instruction: An Ineffective Attempt to Prevent Misusing 404(b)	1014
	C. A Look at Texas's Approach to 404(b) Evidence	1016
III.	Psychological Considerations.....	1019
	A. The University of Chicago Law School Jury Project.....	1020
	B. Crime Seriousness on Simulated Jurors' Use of Inadmissible Evidence	1021
	C. Jury Deliberations and Inadmissible Evidence.....	1021
	D. Ineffective Judicial Instructions to Disregard Inadmissible Evidence.....	1022

* St. Mary's University School of Law, J.D., 2020. The author extends his deepest gratitude to his mother, Letty—whose guidance, love, and sacrifices allowed the author to pursue all his endeavors; his wife, Samantha—for her unwavering support, encouragement, and patience during the author's legal studies; and the members of Volume 51—for their dedication to the *Journal* and preparing this Comment for publication. Additionally, the author thanks *Goldstein & Orr*—for their sponsorship, and commitment to vigorously defending the rights of the accused; and Professor David Schlueter—whose vast knowledge of evidence law was critical to writing this Comment. Lastly, the author extends his sincerest appreciation to Professor Stephanie Stevens—for her invaluable mentorship, and the significant role she plays as director of the Summer Skills Enhancement Program.

IV.	Representing a Defendant with Past Misdeeds	1022
A.	Objections Highlight a Defendant's Prior Bad Acts	1024
B.	Overcoming Ineffective Assistance of Counsel Claims	1026
V.	Recommendation	1028
A.	Option One: The Defendant Holds the Key to 404(b) Evidence	1028
B.	Option Two: Limit the Permitted Uses and Increase the Burden of Proof	1031
VI.	Conclusion	1033

I. INTRODUCTION

Traditionally, courts recognized the presumption of innocence as an undoubted principle of criminal law.¹ In fact, the presumption was substantially embodied within Roman law.² Unless “competent evidence” proves otherwise, “[t]he law presumes that [individuals] charged with a crime are innocent.”³ The presumption stands as “sufficient protection” unless disproven beyond a reasonable doubt.⁴ Today, this maxim remains one of the most cherished notions of fundamental fairness, and an essential component within the American judicial system.⁵ As Justice Berger opined:

To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle

1. See *Coffin v. United States*, 156 U.S. 432, 453–54 (1895) (“It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of several states.”).

2. *Id.* at 454–55.

3. *Id.* at 452.

4. *Id.*

5. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment.”); *Coffin*, 156 U.S. at 453 (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

that guilt is to be established by probative evidence and beyond a reasonable doubt.⁶

Our state and federal constitutions have long emphasized substantive and procedural safeguards necessary to ensure fair and impartial trials.⁷ To further protect our trial system, Congress enacted the Federal Rules of Evidence (The Rules).⁸ The Rules govern evidentiary procedures during trials by “eliminat[ing] unjustifiable expense and delay, and promot[ing] the development of evidence law.”⁹ In criminal trials, for example, the Rules seek to limit certain evidence that could unduly prejudice a defendant.¹⁰

Understandably, the drafters could not anticipate every clever technique lawyers devise to circumvent the Rules’ primary purpose.¹¹ Character evidence, in particular, allows prosecutors to strategically parade a defendant’s prior bad acts before juries. Although character evidence is generally inadmissible “to prove that on a particular occasion the person acted in accordance” with such character,¹² Rule 404(a) provides three exceptions that allow courts to admit otherwise excludible evidence.¹³ Additionally, Rule 404(b) prohibits introducing evidence of defendants’ prior bad acts¹⁴ “to show that on a particular occasion [they] acted in

6. *Estelle*, 425 U.S. at 503. Justice Burger further warned that “[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined.” *Id.* at 504. Accordingly, “the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.” *Id.*

7. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (returning to the “constitutional principles established to achieve a fair system of justice” by recognizing a criminal defendant’s right to counsel).

8. *See generally* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5007 (2d ed. 2015) (summarizing the history of the Rules’ enactment).

9. FED. R. EVID. 102.

10. WRIGHT & GRAHAM, JR., *supra* note 8, at 201.

11. *See* Symposium, *Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 NW. U. L. REV. 635, 635 (1977) (stressing the fears that a defendant will receive an unfair trial if the jury learns about the defendant’s prior criminal acts).

12. FED. R. EVID. 404(a)(1).

13. *Id.* R. 404(a)(2)–(3). The first of these exceptions allows the defendant to introduce evidence of a pertinent trait. *Id.* R. 404(a)(2)(A). If the defendant “opens the door,” the prosecution is allowed to provide rebuttable evidence. *Id.* R. 404(a)(2)(A). Additionally, defendants “may offer evidence of an alleged victim’s pertinent trait.” *Id.* R. 404(a)(2)(B). If admitted, the prosecution may offer counter evidence and also “offer evidence of the defendant’s same trait.” *Id.* R. 404(a)(2)(B)(i)–(ii). The last exception allows character evidence of a witness to be admitted under Rules 607, 608, and 609. *Id.* R. 404(a)(3).

14. Throughout this Comment, “prior bad acts” is used to refer to a defendant’s uncharged misconduct, all extrinsic act evidence and extraneous offenses.

accordance with the character” of which they are accused of having.¹⁵ Nevertheless, Rule 404(b) allows prosecutors to introduce a defendant’s prior bad acts for non-character purposes.¹⁶ For example, prosecutors may offer the defendant’s prior bad acts to prove “motive,¹⁷ opportunity,¹⁸ intent,”¹⁹ or a number of other reasons.²⁰ Such circumstantial evidence is often considered the “forbidden inference” because it creates a risk that a defendant’s propensity to act a particular way “will be inferred from his prior acts, rather than from the conduct in question at trial.”²¹

Courts have expressed concern that 404(b) may overcomplicate issues, and that “particularly if there is a dispute about whether the defendant committed the other acts, introduction of evidence concerning those acts could be time-consuming and distract the factfinder from the central issues in the case.”²² With limited guidance from the Supreme Court, federal courts have misapprehended 404(b) and effectively rendered its purpose useless.²³ Moreover, circuits have developed conflicting burdens of proof²⁴ and inconsistent tests to determine the admissibility of a

15. *Id.* R. 404(b)(1).

16. *See id.* R. 404(b)(2) (“This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”).

17. *See* United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir. 1991) (“The district court also did not err in refusing to allow the cross-examination to show that Hill had a motive to lie about the events in question.”).

18. *See* United States v. Jobson, 102 F.3d 214, 221 (6th Cir. 1996) (“Evidence used to establish opportunity is evidence that shows ‘access to or presence at the scene of the crime’ or the possession of ‘distinctive or unusual skills or abilities employed in the commission of the crime charged.’”).

19. *See* United States v. Smith, 789 F.3d 923, 930 (8th Cir. 2015) (holding the district court did not abuse its discretion by admitting the defendant’s prior conviction as relevant to the defendant’s knowledge and intent).

20. FED. R. EVID. 404(b)(2).

21. Theodore J. Froncek, Note, *Proof of Prior Act Evidence*, 49 U. CIN. L. REV. 613, 614 (1980).

22. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981).

23. *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 588 (1990) (observing how courts substantially undermine the character evidence prohibition by continuing to admit uncharged misconduct).

24. *See* Froncek, *supra* note 21, at 613 (discussing the “varying standards of proof [regarding 404(b)] that the circuits have developed and suggest[ing] the proper approach to resolve the question”); Jason Tortora, Note, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493, 1534 (2013) (encouraging a different approach to the standard of proof).

defendant's prior bad acts.²⁵

A defendant's past misdeeds can have damaging effects on their trial.²⁶ Moreover, despite efforts to amend Rule 404(b), the rule has remained virtually untouched. In fact, Rule 404(b) is one of the most litigated evidence rules and has generated more published opinions than any other subsections of the rules.²⁷ This Comment proposes a solution that limits the prosecution from admitting 404(b) evidence, restores courtroom fairness, and strengthens the presumption of innocence.²⁸

This Comment first explores the genesis of the Federal Rules of Evidence. The first segment (Section II of this Comment) provides Rule 404(b)'s historical background, and Rule 105's ineffective attempt to correct misusing a defendant's prior bad acts. Section II also outlines Texas's approach to 404(b) evidence, which should serve as a guide for changing the federal rule. In support of this Comment's proposal, Section III analyzes psychological factors that influence a jury's inability to disregard inadmissible evidence, despite instructions for them to do so. Section IV examines the difficulties defense counsel faces when representing defendants with prior bad acts. Finally, this Comment proposes two solutions to the fictitious ban against a defendant's prior bad acts. Specifically, Rule 404(b) must be amended to exclude a defendant's prior bad acts unless the defendant "opens the door." The Rule should also include a misuse provision to allow the trial court to render a mistrial if it determines the prosecution improperly introduced 404(b) evidence.

25. Compare *United States v. Williams*, 534 F.3d 980, 984 (8th Cir. 2008) (outlining the four-part test used by the Eighth Circuit), with *United States v. Fasciana*, 226 F. Supp. 2d 445, 455 (S.D.N.Y. 2002) (explaining the three-part test used by the Second Circuit).

26. See Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 780 (2013) ("Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket."); see also Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 295 n.18 (2008) (providing evidence concerning the negative effect prior convictions have on juries).

27. According to the Advisory Committee: "Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused." FED. R. EVID. 404 advisory comm. note to 1991 amend.

28. See Kuhns, *supra* note 22, at 777 ("Evidence that a defendant has been violent once or twice in the past . . . shows that the defendant has the capacity for violence, but such evidence is not very probative of the issue whether the defendant was in fact violent on a particular occasion."); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice In the Courtroom*, 130 U. PA. L. REV. 845, 868 (1982) ("Smuggling propensity evidence into a criminal prosecution must be taken as a fairly serious offense to some cherished notions of fairness.").

Alternatively, Rule 404(b) must increase the burden of proof prosecutors must satisfy before a jury may consider a defendant's prior bad acts, while limiting permitted uses. Courts must also enforce current disciplinary measures under the Model Code of Professional Responsibility, which caution prosecutors from improperly injecting prejudicial evidence during a trial. Both options seek to further the Rules' primary purpose by ensuring defendants are tried for what they allegedly did—not for who they are.

II. BACKGROUND

Until 1975, much of the law surrounding evidence rules originated from common law.²⁹ Between 1939 and 1953, several attempts were made to promulgate a set of evidence rules, but none were immediately accepted.³⁰ As momentum grew, Congress considered adopting a set of uniform federal evidence rules.³¹ The Supreme Court subsequently formed an Advisory Committee on Rules of Evidence,³² which developed a set of evidence rules.³³ After years of drafting, debates, and several revisions, the Supreme Court promulgated a set of rules and forwarded them to Congress for approval.³⁴ The Rules sat idle for three years before finally passing both the House and Senate.³⁵ On January 1, 1975, President Ford officially signed the Federal Rules of Evidence into law.³⁶

For over forty years, the Federal Rules of Evidence have governed trial procedure in federal courts to safeguard against admitting unreliable, irrelevant, and untrustworthy evidence.³⁷ Several attempts have been made to amend Rule 404(b). And, until recently, the Rule has remained virtually unchanged.³⁸

29. See Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 909 (1978) ("The legal background against which the Rules were drafted and enacted was a vast collection of common law precedents.").

30. WRIGHT & GRAHAM, JR., *supra* note 8, § 5005.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* § 5006.

36. *Id.*

37. See *id.* § 5007 (detailing the history of the Federal Rules of Evidence).

38. See, e.g., Memorandum from the Advisory Comm. on Evidence Rules to the Comm. on Rules of Practice and Procedure, at 397–401 (May 14, 2018), https://www.uscourts.gov/sites/default/files/ev_report_1.pdf (exemplifying unsuccessful attempts to amend the Rules).

In April of 2018, the Advisory Committee on Evidence Rules convened and unanimously approved a proposal to amend Rule 404(b).³⁹ The Advisory Committee sent the proposed amendment to the Standing Committee with the recommendation to release for “public comment.”⁴⁰ During the meeting, committee members debated the purpose of 404(b). One member argued “that 404(b) is the most critical rule of evidence in a criminal case and that the real reason that other acts are offered is in fact to suggest the defendant’s propensity to commit crimes.”⁴¹ According to the report, the Committee monitored “significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts.”⁴² Recognizing the need to carefully apply the Rule, several circuits “set forth criteria for that more careful application.”⁴³ The Advisory Committee sent the proposed amendment to the Standing Committee with the recommendation to release for “public comment,” which ended February 15, 2019.⁴⁴

After what seemed to be a promising attempt to rectify direly needed revisions, the amendments fell short of necessary substantive changes to Rule 404(b).⁴⁵ However, one change the Committee agreed to was a more stringent notice requirement, which expanded the Government’s obligation under Rule 404(b)’s current notice requirement.⁴⁶ Specifically, the Government soon will be required to “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence

39. *Id.* at 402.

40. *Id.*

41. Advisory Comm. on Evidence, Meeting Minutes (Apr. 26–27, 2018), https://www.uscourts.gov/sites/default/files/ev_minutes_april_2018_final_0.pdf.

42. Memorandum from the Advisory Comm. on Evidence Rules to the Comm. on Rules of Practice and Procedure, *supra* note 38 at 400.

43. *Id.* The proposed amendment focused on three areas:

- 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference;
- 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements; and
- 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proved a fact that is inextricably intertwined with the charged crime.

Id. at 400–01.

44. *Id.* at 402.

45. *See id.* at 401 (determining the amendments would “make the Rule more complex without rendering substantial improvement.”).

46. *Id.*

and the reasoning that supports the purpose.”⁴⁷ The Committee also agreed to restore Rule 404(b)’s current heading to its previous phrasing: “other crimes, wrongs, or acts.”⁴⁸ Doing so “would clarify that Rule 404(b) applies to crimes, wrongs and acts other than those charged.”⁴⁹

Despite numerous attempts to amend Rule 404(b), the Rule has remained virtually unchanged.⁵⁰ Although no substantive changes were made, the Committee’s modest revisions illustrate a positive trend towards limiting 404(b) evidence and further protecting a defendant’s right to a fair and impartial trial.

A. *Introducing a Defendant’s Prior Bad Acts*

Character is a combination of qualities that make an individual distinctive from others.⁵¹ For example, one who is honest, law-abiding, and trustworthy suggests a person of good character, while one who is malicious, unreliable, or impulsive connotes a person of bad character. Our inherent nature to judge people by their good or bad attributes exemplifies the danger of using character evidence in trials because we assume individuals are unlikely to deviate from their routine behavior. Legally speaking, character evidence demonstrates a person’s propensity to act a certain way.⁵² Thus, one who repeatedly commits robberies may be characterized as a habitual thief or robber.

At common law, most jurisdictions applied character evidence as an “exclusionary” rule.⁵³ Under this approach, a defendant’s prior bad act was “presumptively inadmissible unless the proponent established that the evidence was offered to prove circumstantially an element of the case.”⁵⁴ Unfortunately, Rule 404(b) adopted the minority view’s inclusionary

47. *Id.* Under the proposed amendment, a defendant no longer has to make a request before notice is provided. *Id.* at 422. Also, the Government must sufficiently notify opposing counsel in writing “to give the defendant a fair opportunity to meet the evidence.” *Id.* at 450.

48. *Id.* at 401. The committee reasoned changing the title to its original form “clarif[ies] that Rule 404(b) applies to other acts and not the acts charged.” *Id.*

49. *Id.*

50. *Id.* (summarizing various suggested amendments that were ultimately not implemented because they were found “unlikely to do any better than the courts are already doing . . .”).

51. *Character*, BLACK’S LAW DICTIONARY (10th ed. 2014).

52. DAVID A. SCHLUETER & JONATHAN D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL § 404.02[1], at 210 (10th ed. 2015).

53. Froncek, *supra* note 21, at 614 n.7.

54. *Id.* at 613–14.

approach, which presumes a defendant's prior acts are admissible.⁵⁵

Our justice system rejects prejudging individuals based on their prior criminal acts. As Justice Jackson explained:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.⁵⁶

As previously noted, Rule 404(b) prohibits admitting a defendant's prior bad acts to prove the defendant's propensities.⁵⁷ Yet, prosecutors may freely admit such evidence under a non-exhaustive list of exceptions,⁵⁸ or

55. See *United States v. Smith*, 383 F.3d 700, 706 (8th Cir. 2004) ("Because Rule 404(b) is a rule of inclusion, we presume that evidence of 'other crimes, acts, or wrongs' is admissible to prove motive, opportunity, [or] intent . . . unless the party seeking its exclusion can demonstrate that it serves only to prove the defendant's criminal disposition."); *United States v. Kandiel*, 865 F.2d 967, 972 (8th Cir. 1989) ("Rule 404(b) is a rule of inclusion permitting admission of 'other crimes' evidence unless it tends to prove only the defendant's criminal disposition."); see also Daniel Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 786 (2018) ("In sum, a review of federal case law governing the admissibility of uncharged acts by criminal defendants reveals a disturbing pattern. Appellate courts routinely start from a faulty premise that Rule 404(b) is a 'rule of inclusion,' which presumes admissibility of other-acts evidence.").

56. *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (Jackson, J., concurring).

57. See *United States v. Lane*, 323 F.3d 568, 579 (7th Cir. 2003) ("Rule 404(b) is inapplicable where the 'bad acts' alleged are really direct evidence of an essential part of the crime charged.").

58. See FED. R. EVID. 404(b)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."); see *United States v. Wilson*, 31 F.3d 510, 514 (7th Cir. 1994) ("Under Federal Rule of Evidence 404(b), evidence of other misconduct is not admissible to show that the defendant acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity."); *United States v. Jacobson*, 578 F.2d 863, 866 (10th Cir. 1978) (recognizing Rule 404(b) evidence is generally excluded, but may be

without proving the defendant actually committed the acts.⁵⁹ Although the evidence is not offered to demonstrate a defendant's propensities, the jury is left to make the inference for themselves. The "propensity inference" allows the jury to infer that because the defendant possesses a particular trait, he acted in accordance with that trait and likely committed the charged offense.⁶⁰ For example, assume a defendant is charged with selling heroin, and was previously convicted of selling cocaine. The jury may infer that the defendant has the propensity to sell illegal drugs. Generally, a limiting instruction would attempt to prevent this inference. However, as outlined below, instructing a jury to limit the evidence for a specific purpose is ineffective.

Rule 404's legislative history recognizes that character evidence is "an important asset in the prosecution's case,"⁶¹ and advises prosecutors to refrain from misusing character evidence.⁶² Nevertheless, prosecutors continue to brandish a defendant's past misdeeds with little oversight.⁶³

admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (citations omitted)).

59. Some lower courts do require the proponent to prove the defendant actually committed the prior bad act. *See* *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986) ("[T]estimony regarding [the defendant's prior] escape from the Arkansas Corrections Facility and the theft of the Arkansas Department of Corrections vehicle was relevant to establish identity."); *United States v. Feinberg*, 535 F.2d 1004, 1009 (7th Cir. 1976) ("It is well established that evidence of prior criminal acts is admissible on the issues of a defendant's specific criminal intent if (1) the prior act is similar enough and close enough in time to be relevant, (2) the evidence of the prior act is clear and convincing . . ."); *United States v. Jenkins*, 525 F.2d 819, 826 (6th Cir. 1975) ("[E]vidence of misconduct not charged in an indictment is not admissible at trial, but, where, as here, such evidence tends logically to prove an element of the offense charged, an exception is made to the general rule." (citation omitted)).

60. *See* Milich, *supra* note 26, at 778 (showing the propensity inference causes juries to overvalue the evidence). As one commentator noted:

Judges are taught that propensity inferences occupy the illegitimate, prejudicial side of the balancing scale, while relevant, nonpropensity uses of character evidence are legitimate. In practice, however, the propensity inference is an unreliable proxy for undesirable character evidence, and efforts to faithfully apply the propensity rule often lead to confusion and frustration.

Id. at 785.

61. FED. R. EVID. 404 advisory committee's note to 1991 amendments.

62. *See* *United States v. Biswell*, 700 F.2d 1310, 1317–18 n.5 (10th Cir. 1983) ("The legislative history of Rule 404 suggests that the policy of protecting the accused should be embraced in good faith by prosecutor and judge. Accordingly, the onus of showing that prejudice over-balanced by need and good faith should rest on the Government. This may call for prosecutorial restraint.") (quoting 2 WEINSTEIN'S EVIDENCE 404–45 (1981)).

63. *See* Imwinkelried, *supra* note 23, at 588 (observing how courts substantially undermine the character evidence prohibition by continuing to admit uncharged misconduct).

Furthermore, trial judges are given broad discretion to admit 404(b) evidence.⁶⁴ As one commenter suggested, “the character rule is steadily losing ground and is perhaps on its way to disappearing.”⁶⁵

Evidence of a defendant’s other crimes must be relevant to prove an issue in the case.⁶⁶ Under Rule 403, a court may exclude otherwise relevant evidence “if its probative value is substantially outweighed by a danger of one or more [factors].”⁶⁷ However, admitting relevant propensity evidence taints the jury’s perception of the defendant, and should be strictly limited.⁶⁸ In *Old Chief v. United States*,⁶⁹ the Supreme Court held that a district court abused its discretion for rejecting the defendant’s willingness “to concede a

64. See *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996) (citing *United States v. Mark*, 943 F.2d 444, 447 (4th Cir. 1991) (“The admission of evidence by the district court under Rule 404(b) may be overturned only for an abuse of discretion.”); see also *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993) (citing *United States v. Haney*, 914 F.2d 602, 607 (4th Cir. 1990) (“The admission of evidence, including such as may be offered under Federal Rule of Evidence 404(b), is committed to the discretion of the trial court, and its action will not be overturned on appeal unless its decision is shown to be arbitrary or irrational.”); see also *United States v. Berkowitz*, 619 F.2d 649, 659 (7th Cir. 1980) (holding that the trial judge did not abuse its discretion in allowing testimony of the defendant’s prior criminal acts), *abrogated by* *Dowling v. United States*, 473 U.S. 207 (1985). In *Berkowitz*, a defendant was convicted of illegally transporting stolen property, and willfully violating federal copyright laws. *Id.* at 651. Over objection, the government sought to admit testimony from three individuals who bought the defendant’s merchandise, as proof that the defendant knew his acts were illegal. See *id.* at 654 (explaining evidence to be admitted by the government). The defense argued the testimony was “irrelevant and concerning a period of time too remote from the time of their challenged conduct to have sufficient probative value to outweigh its prejudicial effect.” *Id.* On appeal, the Seventh Circuit held the evidence to be relevant and the “cautionary instruction given to the jury” was within the trial judge’s discretion. *Id.* at 655–56.

65. See Milich, *supra* note 26, at 777.

66. See Fed. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); see also *United States v. Jobson*, 102 F.3d 214, 220 (6th Cir. 1996) (noting courts “must always determine whether[] one of the factors justifying admission of other acts’ evidence is material . . . and if so, whether the . . . evidence is probative of such factors”); *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978) (“The basic criterion is that the evidence of other crimes must be relevant to prove an issue in the case.”).

67. FED. R. EVID. 403. Such factors include: “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Id.*; see also *United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir. 1982) (“[T]he more remote the extrinsic offense the less probative it is.”); Kuhns, *supra* note 22, at 777 (“Evidence that a defendant has been violent once or twice in the past . . . shows that the defendant has the capacity for violence, but such evidence is not very probative of the issue whether the defendant was in fact violent on a particular occasion.”).

68. See *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (“[P]ropensity evidence’ is relevant . . . [but] creates a prejudicial effect that outweighs ordinary relevance.”).

69. *Id.* at 172.

prior judgement and," instead, admitted the entire judgment record.⁷⁰ Old Chief was charged under federal law for possessing a firearm with a prior felony conviction.⁷¹ At trial, Old Chief moved to prohibit the government from admitting the nature of his prior assault conviction.⁷² Over objection, the trial court allowed the government to admit Old Chief's prior conviction,⁷³ despite his offer to concede his prior misconduct.⁷⁴ The Supreme Court disagreed.⁷⁵ Writing for the majority, Justice Souter explained that events behind a defendant's prior convictions could not be "proper nourishment for the jurors' sense of obligation to vindicate the public interest."⁷⁶ Moreover, all the jury needed to know was that Old Chief's prior conviction "[f]ell within the class of crimes that Congress thought should bar a convict from possessing a gun."⁷⁷

As the Fifth Circuit articulated in *United States v. Myers*,⁷⁸ "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."⁷⁹ To protect against the prejudicial effects of admitting a defendant's prior criminal acts, the Fifth Circuit outlined two conditions that must be satisfied prior to admitting the evidence.⁸⁰ First, five threshold prerequisites must be satisfied.⁸¹ Second, the court must

70. *Id.*

71. *See id.* (indicating Defendant was convicted "of being a felon in possession of a firearm . . .").

72. *See id.* at 175 ("[H]e moved for an order requiring the Government 'to refrain from mentioning . . . any testimony from any witness regarding the prior criminal convictions of the Defendant . . .").

73. *See id.* at 177 ("[O]ver renewed objection, the Government introduced the order of judgment and commitment for Old Chief's prior conviction.>").

74. *See id.* ("Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence." (citations omitted)).

75. *Id.*

76. *Id.* at 190.

77. *Id.* at 190–91.

78. *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977).

79. *Id.* at 1044 (5th Cir. 1977); *see also* *United States v. Powell*, 587 F.2d 443, 448 ("An inference of identity from prior crimes can only arise when the elements of the prior offenses and the charged offense . . . are sufficiently distinctive to warrant an inference that the person who committed the prior offense also committed the offense on trial.>").

80. *Myers*, 550 F.2d at 1044.

81. *See id.* (outlining the five prerequisites that must be met). Other circuits take a similar approach. For example, the Eighth Circuit prohibits the prosecution from admitting a defendant's prior bad acts unless the evidence is: "1) relevant to a material issue; 2) similar in kind and not overly remote in time to the crime charged; 3) supported by sufficient evidence; and 4) higher in probative value than prejudicial effect." *United States v. Williams*, 534 F.3d 980, 984 (quoting *United States v. Walker*, 470 F.3d 1271, 1274 (8th Cir. 2006)).

balance the probative value of the evidence of other crimes with any prejudice resulting from admitting a defendant's prior criminal acts.⁸² A year later, in *United States v. Beechum*, the Fifth Circuit adopted a two-step analysis for determining the admissibility of extrinsic act evidence under Rule 404(b).⁸³ In *Beechum*, a postal worker was indicted "for unlawfully possessing a silver dollar."⁸⁴ At trial, the prosecution introduced evidence regarding a separate incident involving stolen credit cards.⁸⁵ The prosecution stipulated, and the trial court agreed, that the credit card evidence was relevant to the issue of intent.⁸⁶ During cross-examination, the defendant admitted to possessing the stolen credit cards.⁸⁷ On appeal, the Fifth Circuit upheld the defendant's admission.⁸⁸ The court reaffirmed that Rule 404(b) "follows the venerable principle that evidence of extrinsic offenses should not be admitted solely to demonstrate the defendant's bad character."⁸⁹

If the Government intends to use a defendant's prior bad conduct, it must provide the defendant with reasonable notice before trial.⁹⁰ The purpose

82. *See Myers*, 550 F.2d at 1044 ("[T]he probative value of the evidence of other crimes must outweigh the prejudice to the defendant that may result from its admission.").

83. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) ("[I]t must first determine[] that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403."); *see generally* *United States v. Guerrero*, 650 F.2d 728 (5th Cir. 1981) (applying the two-step *Beechum* test).

84. *Beechum*, 582 F.2d at 904.

85. *See id.* ("[T]he Government introduced the credit cards and explained the circumstances surrounding their obtention.").

86. *Id.*

87. *See id.* at 905 ("Beechum did admit . . . that the only credit cards he had were his own.").

88. *See id.* at 918 ("[W]e affirm Beechum's conviction.").

89. *Id.* at 910. In a dissenting opinion, Justice Goldberg argued that using the defendant's uncharged misconduct to prove intent was clearly a propensity inference.

Thus the majority thinks the rule unequivocally allows us to reason that because a defendant displayed an improper intent in the past, he is more likely to have an evil intent in the act for which he is tried. How this differs from reasoning that the defendant has a "propensity" to act with evil intent is beyond reason; but the majority says the rule prohibits references based on propensity. There simply are no such watertight compartments to be found, unless we engage in subtle and sophisticated metaphysical analysis.

Id. at 920 (Goldberg, J., dissenting) (internal citations omitted).

90. FED. R. EVID. 404 (b)(2)(A)–(B) ("On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.").

of the notice requirement is “to reduce surprise and promote early resolution on the issue of admissibility.”⁹¹ Initially, the prosecution and defense were expected to request the information “in a reasonable and timely fashion,” without any time requirement.⁹² The notice requirement further requires prosecutors to disclose “how it intends to use the extrinsic evidence at trial,”⁹³ and gives the trial court the discretion to determine whether the notice was sufficient.⁹⁴

B. *The Limiting Instruction: An Ineffective Attempt to Prevent Misusing 404(b)*

If the defense is concerned that the jury will improperly consider the defendant's prior bad acts, Federal Rule of Evidence 105 allows the defense to request a limiting instruction.⁹⁵ Under Rule 105, defense counsel must timely and specifically object to the admissibility of the non-character evidence.⁹⁶ Defense counsel must specifically ask the judge to instruct the jury that such evidence must be restricted to its proper scope.⁹⁷ If properly instructed, a jury may not consider the evidence for any reason but for its limited non-character purpose.⁹⁸ Failure to request a limiting instruction may have devastating consequences, which are discussed in greater detail in Section IV of this Comment.

Rule 105 is designed to prevent the jury from considering potentially prejudicial evidence. Nevertheless, the instruction itself is limited to the judge's charge without any consequences on the jury, because the Rule

91. FED. R. EVID. 405 advisory committee's note to 1991 proposed rules.

92. *Id.*

93. *Id.*

94. *See id.* (“The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness.”).

95. *See* FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”).

96. *Id.*

97. *Id.*; *see* United States v. Mercado, 573 F.3d 138, 141 (2d Cir. 2009) (determining whether the trial court properly admitted other act evidence by considering whether an appropriate limiting instruction was administered). The following is an example of a jury instruction offered by the Fifth Circuit: “Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime.” DIST. JJ. ASS'N FIFTH CIR. COMM. ON PATTERN JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS (CRIM. CASES) § 1.09 (2015), Westlaw FEDCRIM-JI5C 1.09.

98. *See* United States v. Mora, 768 F.2d 1197, 1199 (10th Cir. 1985) (“[T]he trial judge's cautionary instruction on this issue was not only justified but required to carry out the purpose of the rule.”).

presumes jurors are able to limit evidence to its proper scope.⁹⁹ In *Bruton v. United States*,¹⁰⁰ the Supreme Court reasoned that limiting instructions do not “effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him.”¹⁰¹ In *Bruton*, a joint trial between Bruton and his codefendant Evans resulted in convictions of both for armed postal robbery.¹⁰² During the trial, the jury was instructed that the Evans’s confession was sufficient evidence against him, but that the confession was inadmissible hearsay against Bruton.¹⁰³ Relying on *Delli Paoli v. United States*,¹⁰⁴ the Court held that “because of the substantial risk that the jury, despite instruction to the contrary, looked to incriminating extrajudicial statements in determining [Bruton]’s guilt, [admitting] Evan’s confession in [the] joint trial violated [Bruton]’s right to cross-examination secured by the Confrontation Clause of the Sixth Amendment.”¹⁰⁵ In a concurring opinion, Justice Stewart insisted that some evidence is “at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.”¹⁰⁶

Although the Supreme Court recognizes that limiting instructions are seemingly unreliable, the Court continues to adhere to the rule that instructions are sufficient safeguards.¹⁰⁷ To the contrary, psychological

99. See *Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding admission of codefendant in joint trial violated the petitioner’s right of cross-examination); *United States v. Boone*, 951 F.2d 1526, 1536 (9th Cir. 1991) (“In its evaluation, the court must respect the exclusive province of the jury to determine credibility of witnesses.”); *but see* *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.”).

100. *Bruton v. United States*, 391 U.S. 123.

101. FED. R. EVID. 105 advisory committee’s note to 1972 proposed rule.

102. *Bruton*, 391 U.S. at 124.

103. See *id.* at 125 (“[T]he trial judge instructed the jury that although Evans’ confession was competent evidence against Evans it was inadmissible hearsay against petitioner . . .”).

104. *Delli Paoli v. United States*, 352 U.S. 232 (1957), *overruled in part by* *Bruton v. United States*, 391 U.S. 123 (1968).

105. *Bruton*, 391 U.S. at 126. According to the Court: “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Id.* at 135.

106. *Bruton*, 391 U.S. at 138 (Stewart, J., concurring).

107. See *Cruz v. New York*, 481 U.S. 186, 191 (1987) (reiterating the “general rule that jury instructions suffice to exclude improper testimony . . .”).

research indicates that juries are unable to ignore inadmissible evidence.¹⁰⁸ There are numerous explanations as to why limiting instructions are ineffective.¹⁰⁹ One theory is that jurors are unable to engage in effective “thought suppression.”¹¹⁰ Another explanation is that the instruction’s language might draw attention to the defendant’s prior bad acts.¹¹¹ Because limiting instructions are insufficient to protect the defendant’s rights, 404(b) must include additional safeguards that ensure the prosecution does not improperly admit a defendant’s prior bad acts.

C. *A Look at Texas’s Approach to 404(b) Evidence*

With a few exceptions, the Texas Rules of Evidence mirror the Federal Rules. Texas Rule of Evidence 404(b) and its federal counterpart are substantially similar.¹¹² In fact, the language of both rules is identical, with the Texas Rule also including a notice provision in criminal cases.¹¹³ Like the federal rule, Texas Rule of Evidence 404(b) permits the prosecution to introduce a defendant’s extraneous offenses if they are relevant.¹¹⁴ However, extraneous offenses that are not relevant are “absolutely inadmissible.”¹¹⁵ Some jurisdictions refer to extraneous offenses as “uncharged misconduct,”¹¹⁶ while others refer to them as “extrinsic

108. See generally Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 751–52 (1959) (discussing data collected about a jury’s ability to ignore inadmissible evidence); Bruce Rind et al., *Effect of Crime Seriousness on Simulated Jurors’ Use of Inadmissible Evidence*, 135 J. SOC. PSY. 417 (1995) (“[J]urors cannot completely ignore the inadmissible evidence, particularly when it is significant.”); Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 472 (2006) (showing “a significant impact on inadmissible evidence on juror verdicts despite the use of judicial instructions to disregard . . .”).

109. See Daniel M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. PERSONALITY & SOC. PSYCH. 903, 903 (1992) (comparing “the accessibility of suppressed thoughts” with “the accessibility of thoughts on which subjects were consciously trying to concentrate.”).

110. *Id.*

111. See Broeder, *supra* note 108, at 754; Rind et al., *supra* note 108, at 417.

112. See SCHLUETER & SCHLUETER, *supra* note 52, at 210 (“Both Rules, subject to several exceptions, generally bar the admission of character evidence when it is used circumstantially to prove that a person acted in conformity with that character.”).

113. *Id.* at 228.

114. TEX. R. EVID. 404(b); see also *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (discussing relevancy as a necessary prerequisite to introducing character evidence).

115. *Montgomery*, 810 S.W.2d at 387.

116. See *Manning v. State*, 114 S.W.3d 922, 926–27 (Tex. Crim. App. 2003) (“An extraneous offense is any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers. It is an offense that is ‘extra, beyond, or foreign to the offense for which the party is on trial.’”).

offense” evidence.¹¹⁷ Nonetheless, the Texas Court of Criminal Appeals has explained that an extraneous offense is prejudicial “because ‘the accused has no notice he will be called upon to defend against it.’”¹¹⁸

Prior to 1994, Texas’s standard of proof for admitting extrinsic evidence was known as the “clear proof standard.”¹¹⁹ The Texas Court of Criminal Appeals later clarified this standard, and now prosecutors must prove the defendant actually committed the alleged acts.¹²⁰ For example, in *Fischer v. State*,¹²¹ the Court of Criminal Appeals held that the extraneous offenses presented by the State at trial were “sufficient to support a finding beyond a reasonable doubt that [the defendant] committed [the offense].”¹²² In contrast, the federal rules do not require the Government to prove the defendant committed the extraneous offenses beyond a reasonable doubt.¹²³

Texas Rule 404(b), like its federal counterpart, requires prosecutors to provide the defendant with notice¹²⁴ if the defendant submits a “timely” request.¹²⁵ The State’s notice must provide the defendant with the prior bad acts it intends to offer during its case-in-chief.¹²⁶ Although requesting

117. *United States v. Beechum*, 582 F.2d 898, 898 n.1 (5th Cir. 1978).

118. *Manning*, 114 S.W.3d at 926–27. In *Manning*, evidence that the defendant had cocaine metabolite in his bloodstream one and a half hours after the accident was not considered an extraneous offense. *Id.* According to the court, the indictment alleged that consumption of a controlled substance caused the defendant’s recklessness. *Id.*

119. *McCann v. State*, 606 S.W.2d 897, 901 (Tex. Crim. App. 1980). Under the “clear” proof standard, extrinsic evidence was inadmissible unless there was a clear showing that: “(1) the evidence of the extraneous offense is material, . . . 2) the accused participated in the extraneous transaction being offered into evidence, and 3) the relevancy to a material issue outweighs its inflammatory or prejudicial potential.” *Id.*

120. *See Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999) (holding that the trial court did not err by admitting evidence that the defendant committed extraneous offenses of making obscene phone calls). *Harrell v. State*, 884 S.W.2d 154, 159 (Tex. Crim. App. 1994).

121. *Fischer v. State*, 268 S.W.3d 552, 556 (Tex. Crim. App. 2008).

122. *Id.* at 556. Because the State proved beyond a reasonable doubt that the defendant stole the murder weapon, it was able to prove beyond a reasonable doubt that the defendant subsequently used the weapon to murder the victim. *Id.* As a matter of law, appellate courts may conclude that the prosecution failed to meet its burden under the totality of the evidence. *Higginbotham v. State*, 356 S.W.3d 584, 594 (Tex. App.—Texarkana 2011, pet. ref’d).

123. *Huddleston v. United States*, 485 U.S. 681, 682 (1988).

124. TEX. R. EVID. 404(b)(2).

125. *Id.* (“On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence—other than that arising in the same transaction—in its case-in-chief.”).

126. SCHLUETER & SCHLUETER, *supra* note 52, at 234.

the information pre-trial can be advantageous for the defendant, it may also alert the prosecution of possible extraneous conduct.

Similar to the Fifth Circuit, Texas has adopted a two-part test for admitting evidence of extraneous offenses or uncharged acts.¹²⁷ Assuming the defense raises a sufficient 404(b) objection,¹²⁸ the prosecution must first show the evidence is relevant to a material issue in the case.¹²⁹ In *Rankin v. State*,¹³⁰ for example, a defendant was found guilty of aggravated sexual assault.¹³¹ During the trial, the prosecution introduced extraneous evidence to demonstrate a common plan or scheme.¹³² Over objection, the trial court admitted the evidence.¹³³ The Texas Court of Criminal Appeals opined that introducing a defendant's prior acts for something other than proving character is not "magically admissible."¹³⁴ Under Texas Rule of Evidence 403, relevancy demands that "the evidence makes a *fact in consequence* in the case more or less likely."¹³⁵ Because the trial court failed to bridge the gap between an elemental fact (intent) and the existence of a common plan or scheme, the court remanded the case for a thorough relevancy analysis.¹³⁶

If the court determines the evidence is relevant, the second step requires the court to balance the probative value of the evidence against its prejudicial or inflammatory effect.¹³⁷ Prejudicial effects outweighing the evidence's probative value may be excluded,¹³⁸ while prejudicial dangers

127. *Montgomery*, 810 S.W.2d at 387.

128. The Texas Court of Criminal Appeals suggested that defense counsel's 404(b) objection be specific. According to the court, "An objection that such evidence is not 'relevant,' or that it constitutes an 'extraneous offense' or 'extraneous misconduct,' although not as precise as it could be, ought ordinarily to be sufficient under the circumstances to apprise the trial court of the nature of the complaint." *Id.*

129. *Id.*

130. *Rankin v. State*, 974 S.W.2d 707 (Tex. Crim. App. 1996).

131. *Id.* at 708.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990).

138. *E.g.*, *Bishop v. State*, 837 S.W.2d 431, 432 (Tex. App.—Beaumont 1992), *aff'd*, 869 S.W.2d 342 (Tex. Crim. App. 1993) (agreeing with the defendant's first point of error that "[t]he trial court erred in admitting evidence of [his] sexual proclivities and practices pursuant to Rule 404(b), Texas Rules of Criminal Evidence.").

that do not substantially outweigh the probative value may be admitted.¹³⁹ Like federal judges, Texas trial judges have broad discretion to admit or exclude evidence.¹⁴⁰ A reviewing court will “reverse the trial court’s judgment ‘rarely and only after a clear abuse of discretion.’”¹⁴¹

Once the court conducts step two’s balancing requirement, the defense should request a limiting instruction.¹⁴² As discussed above, limiting instructions attempt to cure any error caused by admitting the extraneous offenses.¹⁴³ Failure to request a limiting instruction may subject defense counsel to ineffective assistance of counsel claims on appeal.¹⁴⁴ Problems associated with ineffective assistance of counsel claims are reserved for a later discussion in Section IV of this Comment.

III. PSYCHOLOGICAL CONSIDERATIONS

The purpose of Rule 105’s limiting instructions is to prevent juries from considering otherwise inadmissible evidence.¹⁴⁵ Rule 105 presumes that juries can limit the evidence for non-character purposes. However, numerous studies reveal that asking jurors to disregard inadmissible evidence or to limit the scope of particular evidence is simply ineffective.¹⁴⁶

139. See generally *Smith v. State*, 105 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2003, pet. ref’d) (considering whether “the probative value of [the] statements were outweighed by the danger of unfair prejudice”).

140. See *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999) (“The plain language of Rule 403, however, states all ‘relevant evidence’ is subject to its general balancing determination.”).

141. *Id.* at 847.

142. TEX. R. EVID. 105; see also SCHLUETER & SCHLUETER, *supra* note 52, at 247 (directing “the jury to consider the evidence only for the purpose of which it was offered.”).

143. See *Gonzalez v. State*, 541 S.W.3d 306, 310 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (“If the trial court determines the offered evidence has independent relevance apart from or beyond character conformity, the trial court may admit the evidence and instruct the jury the evidence is limited to the specific purpose the proponent advocated.”); see also *Moody v. State*, 827 S.W.2d 875, 890 (Tex. Crim. App. 1992) (“[E]xcept in extreme cases, if the trial court sustains a timely objection and instructs the jury to disregard an improper response referring to an extraneous offense, the error is cured.”).

144. See *Hall v. State*, 161 S.W.3d 142, 154 (Tex. App.—Texarkana 2005, pet. ref’d) (“Extraneous offenses are inherently prejudicial, and when counsel fails to object to numerous extraneous and prejudicial matters, counsel is ineffective.”); see also *Ex Parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) (concluding that trial counsel’s performance was deficient “for failing to request either an instruction on the burden of proof or limiting instructions regarding the extraneous act evidence admitting at [the defendant’s] trial.”).

145. TEX. R. EVID. 105.

146. Broeder, *supra* note 108, at 748; Rind et al., *supra* note 108, at 423 (1995); Steblay et al., *supra* note 108, at 469.

Below are four studies that demonstrate why more procedural safeguards are needed to ensure defendants receive a fair trial.

A. *The University of Chicago Law School Jury Project*

In the 1950s, the University of Chicago Law School began the Jury Project as part of an effort to integrate social sciences techniques into legal research.¹⁴⁷ The project studied various aspects of juries, including the development of jury trials in the American court system.¹⁴⁸ An important facet of the project was the experimental jury.¹⁴⁹ The experiment provided jurors with tape recordings of mock trials based on an automobile accident.¹⁵⁰ The jurors were given two versions of facts and asked to assess damages based on the disclosure of the defendant's liability insurance.¹⁵¹ In one version, the jurors were told the defendant was covered by liability insurance.¹⁵² In a second version, the jurors were told the defendant was covered by liability insurance, but were instructed not to consider that when assessing damages.¹⁵³ The experiment found that the jury awarded damages higher in the latter version. Specifically, the jury awarded \$33,000 in damages without an instruction, and \$46,000 when given the limiting instruction.¹⁵⁴ The study's results indicate "that most criminal cases are decided during the trial and not during jury deliberations."¹⁵⁵ Additionally, the study found that limiting instructions had minimal impact on a juror's adherence to the judge's orders.¹⁵⁶ The results were two-fold: "first, that juries tend to award less when they know that an individual defendant is not insured; and second, that where they know [the] defendant is insured and a fuss is made over it the verdict will be higher than when no such fuss was made." In other words, the objection and disregard "sensitize the jurors to the fact that defendant is insured and thereby increase the award."¹⁵⁷ Thus, the limiting instruction failed to serve its purpose.

147. Broeder, *supra* note 108, at 744.

148. *Id.* at 746.

149. *Id.* at 753.

150. *Id.*

151. *Id.*

152. *Id.* at 753–54.

153. *Id.* at 754.

154. *Id.*

155. *Id.* at 747.

156. *Id.* at 754.

157. *Id.*

B. *Crime Seriousness on Simulated Jurors' Use of Inadmissible Evidence*

In 1995, an experiment was conducted on the effect of crime seriousness on simulated jurors' use of inadmissible evidence.¹⁵⁸ The study examined conflicting theories concerning a jury's inability to disregard inadmissible evidence.¹⁵⁹ Specifically, the examiners focused on whether jurors were less willing to disregard prejudicial evidence in relation to the severity of the crime.¹⁶⁰ The participants were provided with six variations of court proceedings and asked to evaluate the evidence.¹⁶¹ Each participant was further instructed to follow the judge's instructions and render verdicts as if they were "actually on a jury."¹⁶² The study found that inadmissible evidence biased jurors' guilty judgments when the crime was less severe, "but not when the crime was relatively more serious or very serious."¹⁶³ It is worth noting that the simulation was not conducted during live courtroom proceedings, participants were provided with a fictitious case, and they did not actually partake in jury deliberations.¹⁶⁴ What is significant about this study is that it demonstrates how damaging inadmissible evidence continues to factor into jury deliberations despite a judge's instructions to disregard.

C. *Jury Deliberations and Inadmissible Evidence*

Five years later, a study "examine[d] the effect of jury deliberations on juror's propensity to disregard inadmissible evidence."¹⁶⁵ According to this study, prior research was inconclusive regarding a jury's ability to disregard judicial instructions.¹⁶⁶ The researchers administered two experiments to determine whether inadmissible evidence affected juror's decisions.¹⁶⁷ The study found that mock juror bias was tempered following deliberations,

158. Rind, et al., *supra* note 108, at 417.

159. *Id.* at 417–18. The research identified studies that found jurors were unable to ignore inadmissible evidence, others that found they could ignore the evidence, and one with mixed results. *Id.* at 417.

160. *Id.* at 418 ("[The] purpose [of] this research was to conduct an experiment that varied crime seriousness while holding all other factors constant, to determine the impact of crime seriousness on simulated jurors' use of inadmissible evidence.").

161. *Id.* at 419.

162. *Id.*

163. *Id.* at 422.

164. *Id.* at 423.

165. Kamala London & Narina Nunez, *The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence*, 85 J. APPLIED PSY. 932, 932 (2000).

166. *Id.*

167. *Id.*

despite their bias prior to deliberation.¹⁶⁸ Specifically, experiment one revealed that “jury members’ predeliberation verdicts were biased by the presentation of inadmissible evidence.”¹⁶⁹ Additionally, experiment two concluded that jurors “did not appear to accurately gauge the effect that the inadmissible evidence had on their verdicts.”¹⁷⁰ This study differed from prior studies because it examined larger groups of mock jurors.¹⁷¹ Moreover, the study “was designed to present the inadmissible evidence in a manner that could feasibly occur in court.”¹⁷² The results of this study further support the idea that jury instructions do not sufficiently protect defendants from the prejudicial effects of inadmissible evidence.

D. *Ineffective Judicial Instructions to Disregard Inadmissible Evidence*

A year after the jury deliberations study, the Augsburg College Department of Psychology used a meta-analysis to evaluate how judicial instructions to disregard inadmissible evidence affected juror verdicts.¹⁷³ The study examined “175 hypothesis tests from 48 studies with a combined 8,474 participants.”¹⁷⁴ The study revealed “inadmissible evidence [had] a reliable effect on verdicts consistent with the content of the inadmissible evidence.”¹⁷⁵ Additionally, instructions to “ignore the inadmissible evidence [did not] effectively eliminate the inadmissible evidence impact.”¹⁷⁶ The study further found that when judges provided a rationale for a ruling of inadmissibility, juror compliance may increase.¹⁷⁷ Contested evidence ruled admissible highlighted such information, resulting in a detrimental impact on verdicts.¹⁷⁸

IV. REPRESENTING A DEFENDANT WITH PAST MISDEEDS

According to the Supreme Court, prosecutors are representatives “of a sovereignty whose obligation to govern impartially is as compelling as its

168. *Id.*

169. *Id.* at 935.

170. *Id.* at 937.

171. *Id.* at 938.

172. *Id.*

173. Steblay et al., *supra* note 108, at 469.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

obligation to govern at all.”¹⁷⁹ A prosecutor’s goal, therefore, is not solely “to win a case,” but to ensure that “justice shall be done.”¹⁸⁰ In *Berger v. United States*, the Court admonished a federal prosecutor for his improper trial tactics,¹⁸¹ which included misstating facts during cross-examination, placing words in the witnesses’ mouths, and “conducting himself in a thoroughly indecorous and improper manner.”¹⁸² By admitting evidence that would prejudice a defendant’s case, prosecutors undoubtedly undermine their duty as representatives of the people.¹⁸³

Fifty years after *Berger*, the Supreme Court reasoned that inappropriate prosecutorial comments, alone, “[do] not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.”¹⁸⁴ To reverse a conviction, reviewing courts must find that the prosecution’s tactics were calculated to produce a wrongful conviction.¹⁸⁵ In *Young*, the Court voiced its concern against a prosecutor’s improper comments.¹⁸⁶ According to the Court:

The prosecutor’s vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.¹⁸⁷

Because prosecutors operate with little oversight, prosecutorial misconduct is largely unreviewable.¹⁸⁸ Therefore, defense counsel must

179. *Berger v. United States*, 295 U.S. 78, 88 (1935).

180. *Id.* (“He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”).

181. *Id.* at 84 n.6.

182. *Id.*

183. *See id.* at 88 (“It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

184. *United States v. Young*, 470 U.S. 1, 11 (1985).

185. *Berger v. United States*, 295 U.S. 78, 88 (1935).

186. *United States v. Young*, 470 U.S. 1, 18–19.

187. *Id.*

188. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 797 (1999) (discussing the prosecutor’s role as the “government’s advocate, and society’s representative” and the difficulty in policing prosecutorial misconduct).

thwart any attempt by the prosecution designed to generate a wrongful conviction.¹⁸⁹ Making objections during trial is one method used to challenge the prosecution. Objecting over the prosecution's attempt to introduce 404(b) evidence, however, can negatively affect the defendant's trial, which places defense counsel in a difficult situation.

Two options are available to defense counsel when deciding whether to object over the prosecution's introduction of a defendant's prior bad acts.¹⁹⁰ The first option is to object and preserve the record for review.¹⁹¹ However, objections are known to "spotlight attention" on evidence, which triggers attentive jury responses.¹⁹² Thus, counsel risks highlighting his client's alleged criminal history.

Alternatively, defense counsel may choose to forgo objecting. Of course, failing to object waives the error, and the defendant is precluded from raising the issue on appeal.¹⁹³ Furthermore, even if counsel does object, he must further request a limiting instruction under Rule 105.¹⁹⁴ Failing to object, or objecting without requesting a limiting instruction, subjects counsel to ineffective assistance of counsel claims.¹⁹⁵ Each decision requires defense counsel to weigh the benefits and detriments of objecting thoroughly.

A. *Objections Highlight a Defendant's Prior Bad Acts*

Both sides use objections to enforce evidentiary rules against the other.¹⁹⁶ For example, if a prosecutor attempts to introduce a defendant's

189. See *Berger*, 295 U.S. at 88 ("It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

190. FED. R. EVID. 103(a).

191. *Id.*

192. Krystia Reed & Brian H. Bornstein, *Objection! Psychological Perspectives on Jurors' Perceptions of In-Court Attorney Objections*, 63 S.D. L. REV. 1, 13 (2018).

193. See *Ex Parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001) ("At the time of applicant's direct appeal, we were unable to determine his attorney's reasons for failing to object the omissions in the charge.").

194. See *id.* ("[R]easonable counsel would have requested the instructions given the facts of this case.").

195. See *id.* (concluding trial counsel's performance was deficient "for failing to request either an instruction on the burden of proof or limiting instructions regarding the extraneous act evidence admitting at [the defendant's] trial"). But see *United States v. Pittman*, 319 F.3d 1010, 1012 (7th Cir. 2003) (holding "trial counsel's failure to object to the Rule 404(b) evidence was not objectively unreasonable and therefore did not constitute ineffective assistance").

196. See FED. R. EVID. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on

criminal history without an exception, and the defense properly objects, the evidence should be excluded.¹⁹⁷ Objecting is one of the most important duties a lawyer is charged with.¹⁹⁸ But objections are one of a number of courtroom interruptions.¹⁹⁹ As one commenter stated, “Objections are intrusions on the trial—temporary halts due to an unexpected interruption initiated by one attorney that interrupts the continuity of the other attorney or witness.”²⁰⁰

As noted, objections are known to “spotlight attention” on specific evidence, which may harm a lawyer’s credibility with the jury.²⁰¹ Once an attorney objects, all proceedings immediately halt until the judge makes a ruling.²⁰² The period between objection and ruling can affect the jury’s attention and memory. Specifically, juries become more attentive when attorneys object.²⁰³ Under the “spotlight attention” theory, interruptions harness attention.²⁰⁴ When attorneys interrupt trials “by objecting, jurors’ attention and memory for the testimony might change.”²⁰⁵ Research further suggests that objecting highlights the information, which negatively influences jury verdicts.²⁰⁶ Consequently, drawing attention to a defendant’s prior bad acts can severely taint the jury’s verdict.²⁰⁷

In *Hilliard v. State*,²⁰⁸ the Second Court of Appeals held that the prosecution’s comments during the defendant’s sentencing contributed to the defendant’s punishment.²⁰⁹ Hilliard was convicted of retaliation, and

the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context.”).

197. *Id.*

198. Reed & Bornstein, *supra* note 192, at 12.

199. *Id.* (“Interruptions generally are defined as ‘incidents or occurrences that impede or delay . . . progress on [a task].’”). Other interruptions include “intrusions, breaks distractions, and discrepancies.” *Id.*

200. *Id.*

201. *Id.* at 13 (“Spotlight attention” . . . describes visual attention being focused on a particular element, like a spotlight.”).

202. *Id.*

203. *Id.*

204. *Id.* at 14.

205. *Id.*

206. *Id.* at 11.

207. *See* *Hilliard v. State*, 881 S.W.2d 917, 921–22 (Tex. App.—Fort Worth 1994) (“We find the prosecutor’s line of questioning was error and we cannot conclude beyond a reasonable doubt that this error did not contribute to Hilliard’s punishment.”).

208. *Id.* at 921.

209. *Id.*

sentenced to eight years confinement.²¹⁰ During sentencing, Hilliard took the stand and asked the jury to sentence him to probation,²¹¹ which placed his character at issue.²¹² The jury previously heard testimony that Hilliard threatened to kill the complainant.²¹³ The jury's attention was again drawn to the testimony when the prosecutor "improperly admitted photographs, focusing on the underlying, unadjudicated extraneous offense."²¹⁴ Additionally, the prosecutor asserted "that anyone who did such a thing, regardless of the circumstances, belonged in prison."²¹⁵ On appeal, the court determined that the prosecution's line of questioning highlighted Hilliard's alleged prior acts and contributed to his punishment.²¹⁶

B. *Overcoming Ineffective Assistance of Counsel Claims*

The second issue defense counsel must hurdle is deciding whether to object over the prosecutor's introduction of the defendant's prior criminal acts, and subsequently overcome ineffective assistance of counsel claims on appeal.²¹⁷ To demonstrate trial counsel was ineffective under the Sixth Amendment,²¹⁸ a defendant must satisfy *Strickland*'s two-pronged test.²¹⁹ First, the defendant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" under the Sixth Amendment.²²⁰ To do so, the defendant must prove that "counsel's representations fell below an objective standard of reasonableness."²²¹ "Second, the defendant must show that such deficient performance prejudiced his defense."²²² Each prong must be demonstrated by a preponderance of the evidence.²²³

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 921–22.

217. *Hall v. State*, 161 S.W.3d 142, 152 (Tex. App.—Texarkana 2005, pet. reFd).

218. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense.").

219. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

220. *Id.* at 687.

221. *Id.* at 688.

222. *Id.* at 687.

223. *See id.* (inferring each prong must be shown by a preponderance of the evidence); *Hall*, 161 S.W.3d at 152 (requiring each prong to be established by a preponderance of the evidence).

Reviewing courts generally give an attorney's performance substantial deference.²²⁴ In *Ingham v. State*,²²⁵ for example, the Texas Court of Criminal Appeals reasoned that an attorney's "failure to object to certain procedural mistakes or improper evidence does not constitute ineffective assistance of counsel."²²⁶ However, as the Fifth Circuit has recognized: "to pass over the admission of prejudicial and arguably inadmissible evidence . . . has no strategic value."²²⁷

In *Hall v. State*, the Sixth Court of Appeals held Hall's defense counsel was ineffective for failing to object to the prosecution's introduction of 404(b) evidence.²²⁸ Hall was convicted of felony possession of a controlled substance and sentenced to sixty years confinement.²²⁹ During the trial, the State repeatedly referenced "Hall's [prior] arrests for unadjudicated offenses."²³⁰ Additionally, Hall's counsel failed to object to the evidence and never requested a limiting instruction.²³¹ On appeal, the Sixth Court of Appeals concluded that Hall's extraneous offenses were irrelevant to the charged offense, and "were clearly objectionable and inadmissible."²³² Because Hall's extraneous offenses were highly prejudicial, Hall's trial counsel "was deficient in failing to object."²³³

While defense counsel contemplates subjecting himself to ineffective assistance of counsel claims, prosecutors are permitted to circumvent

224. See *Murphy v. State*, 112 S.W.3d 592, 601 (Tex. Crim. App. 2003) (quoting *Ortiz v. State*, 93 S.W.3d 79, 88 (Tex. Crim. App. 2002) ("[I]f counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal.")).

225. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) ("[J]udicial scrutiny of counsel's performance must be highly deferential, and every effort made to eliminate the distorting effects of hindsight.").

226. See *id.* at 509 ("The right to effective assistance of counsel merely ensures the right to reasonably effective assistance. The constitutional right to counsel does not mean errorless counsel whose competency or accuracy of representation is to be judged by hindsight."); *Weathersby v. State*, 627 S.W.2d 729, 730 (Tex. Crim. App. 1982) ("The effectiveness of counsel is to be judged by the totality of the representation."). It is worth noting that Texas adopted the *Strickland* standard as the test to determine whether trial counsel was ineffective. *Hall*, 161 S.W.3d at 152.

227. *Lyons v. McCotter*, 770 F.2d 529, 534–35 (5th Cir. 1985) (holding that defense counsel's "omissions were outside the wide range of professionally competent assistance") (quoting *Strickland*, 466 U.S. at 690).

228. *Hall*, 161 S.W.3d at 154.

229. *Id.* at 147.

230. *Id.* at 153.

231. *Id.*

232. *Id.* at 154.

233. *Id.*

Rule 404(b)'s prohibitions by simply alleging the defendant's prior criminal acts are relevant for some other non-character purpose.²³⁴ Such conduct cannot be permitted in a judicial system designed to protect the rights of its citizens.

V. RECOMMENDATION

Repealing Rule 404(b) and banning the prosecution from introducing the defendant's prior bad acts is the quickest solution to protect the defendant's right to a fair trial. Doing so would ensure the jury's verdict is untainted by outside influence and rendered solely upon the relevant evidence of the case before it. Unfortunately, the lack of substantive changes made to Rule 404(b) since its enactment suggests the Evidence Committee is unlikely to repeal the rule.

A viable proposal, then, requires two factors: amending Rule 404(b) to restrict trial courts from admitting a defendant's prior bad acts unless the defendant "opens the door," such as Rule 404(a)(2)(A), and including within the rule an automatic mistrial provision for improperly commenting on the defendant's prior bad acts. Alternatively, the Federal Rules should limit the acceptable uses of 404(b) evidence, increase the burden of proof, and enforce current disciplinary measures under the code of professional conduct.

A. *Option One: The Defendant Holds the Key to 404(b) Evidence*

As noted above, the federal character evidence rules allow the defendant to introduce evidence of his or her pertinent traits.²³⁵ This is commonly referred to as "opening the door."²³⁶ If the evidence is admitted, the prosecution may offer rebuttal character evidence.²³⁷ In *United States v. McLaurin*, McLaurin and Lowery were convicted of various conspiracy offenses under the Hobbs Act.²³⁸ At trial, both co-defendants relied on an

234. FED. R. EVID. 404(b)(2).

235. *Id.* R. 404(a)(2)(A).

236. *See* *United States v. McLaurin*, 764 F.3d 372, 383 (4th Cir. 2014) ("[E]ven if the evidence were prohibited by Rule 404(b), the district court acted within its discretion by concluding that [the defendant] opened the door to its admission.").

237. FED. R. EVID. 404(a)(2)(A).

238. *See McLaurin*, 764 F.3d at 378. McLaurin and his co-defendant were "charged with three counts of conspiracy arising directly from [a] stash-house sting," which included: interfering with commerce by threats; possessing with intent to distribute cocaine; using or possessing a firearm in furtherance of a drug trafficking offense or crime of violence; and possessing of a firearm as a convicted

entrapment defense.²³⁹ During cross-examination of one of the agents, Lowery suggested that statements he made during an undercover meeting about being “strapped” were simply “just talk,” and that there was “no evidence . . . that he actually possessed a gun at such meeting.”²⁴⁰ Subsequently, the government argued that Lowery’s questioning “opened the door to evidence” concerning a separate firearm possession charge.²⁴¹ Over Lowery’s objection, the court admitted the evidence and allowed the government to question Lowery’s former girlfriend about possessing the firearm and an officer who found the firearm while searching Lowery’s vehicle.²⁴²

To support his entrapment defense, Lowery argued he lacked the intent to carry out the robbery and the predisposition to commit the act.²⁴³ On appeal, the Fourth Circuit reasoned that:

Evidence tending to prove that Lowery had the ability to bring a necessary tool . . . to conduct the proposed stash-house robbery was relevant to the question of Lowery’s predisposition to commit the robbery, and Lowery’s prior possession of a firearm showed his familiarity with and access to weapons.²⁴⁴

Furthermore, even if the evidence were barred by Rule 404(b), the trial court concluded within its discretion that “Lowery opened the door to its admission.”²⁴⁵

McLaurin demonstrates the only method in which the jury should hear evidence of a defendant’s prior bad acts.²⁴⁶ In practice, the defendant’s

felon. *See id.* (identifying the various offenses involved at trial). *McLaurin* was subsequently sentenced to 151 months imprisonment, and Lowery to 168 months. *Id.*

239. *Id.* Although both appealed their convictions, Lowery’s argument is discussed in greater detail to illustrate the process of “opening the door.” *See id.* at 382 (describing the government’s position that Lowery “opened the door to evidence” through cross-examination). In a separate argument, *McLaurin* also argued that the trial court “violated Rule 404(b) by admitting a judgment and commitment order establishing that he had been convicted of common law robbery in 2003.” *Id.* at 383. Like it held for Lowery, the Fourth Circuit also held the trial court did not abuse its discretion by admitting the 404(b) evidence because *McLaurin* “opened the door.” *Id.* at 384.

240. *Id.* at 382.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 383.

246. *Cf.* Capra & Richter, *supra* note 55, at 787 (suggesting 404(b) should be a rule of exclusion, not inclusion).

prior bad acts should be admissible only if the defendant opens the door. For example, assume a defendant is charged with murder and was previously convicted of possession of a controlled substance and domestic violence. During the murder trial, the defendant's counsel questions the arresting officer and contends that the only investigative report linking the defendant to any criminal activity is a prior incident involving drug possession.²⁴⁷ By suggesting the defendant has an immaculate record, the prosecution should be permitted to introduce rebuttal evidence of a defendant's prior acts. Only then should the defendant's criminal history be admissible.

If the prosecution alludes to a defendant having past misdeeds, defense counsel should move for a mistrial. Prior to ruling, and out of the jury's presence, the trial judge should determine whether the prosecutor's comments were so egregious as to tip the scale in their favor. The court must conclusively determine whether at any time during the trial, the defendant opened the door. Rather than instructing the jury to disregard the prosecutor's improper comments, the judge should declare a mistrial. As exhibited above, instructing juries to disregard or limit certain inadmissible evidence is unreliable. Thus, the only solution that ensures the defendant receives a fair, untainted trial is to declare a mistrial.

The proposed 404(b)(2) language would substantially mirror 404(a)(2)'s permitted exceptions. Because the proposed amendment would not allow for a defendant's prior criminal history to be admitted unless the defendant opens the door, Rule 404(b) would no longer need a notice provision. As a replacement, the new rule should include an improper use provision. This provision would instruct the trial court to conduct a review, outside the presence of the jury, of the prosecutor's improper comments in accordance with Rule 103(d).²⁴⁸ Accordingly, the new Rule 404(b) would read as follows:

(b) *Crimes, Wrongs, or Other Acts.*

(2) Permitted Uses. A defendant may offer evidence of the defendant's prior crimes, wrongs, or acts, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

247. See, e.g., *United States v. Balthazard*, 360 F.3d 309, 317 (1st Cir. 2004) (agreeing with the trial court that the defendant "opened the door to questioning" about a prior theft report).

248. See FED. R. EVID. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

(3) Improper Use. Upon proper objection, the trial court shall conduct a hearing in accordance with Rule 103(d). If the court determines the prosecutor's improper comments regarding the defendant's crimes, wrongs, or other acts would substantially alter the jury's verdict, the court should declare a mistrial.²⁴⁹

B. *Option Two: Limit the Permitted Uses and Increase the Burden of Proof*

Alternatively, Rule 404(b) should be amended to limit the permitted uses available to the prosecution and require trial courts to make initial findings establishing the defendant committed the alleged prior acts beyond a reasonable doubt. Currently, Rule 404(b) allows the prosecution to introduce a defendant's prior bad acts under a non-exhaustive list of exceptions.²⁵⁰ As indicated above, the federal evidence rules differ from the Texas rules in that federal trial courts are not required to make preliminary findings that the defendant committed the alleged prior acts beyond a reasonable doubt.²⁵¹

In *Huddleston v. United States*,²⁵² the Supreme Court held trial courts are not required to make preliminary findings that the prosecution proved a defendant's prior bad acts "by a preponderance of the evidence before it submits the evidence to the jury."²⁵³ According to the Court, requiring trial courts to predetermine the prior acts were committed by a preponderance of the evidence was "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b)."²⁵⁴ Because Rule 404(b)'s language does not plainly necessitate a preliminary showing, the Court refused to "superimpose a level of judicial oversight."²⁵⁵ Furthermore, the Rule's legislative history showed Congress's lack of intent "to confer any arbitrary discretion on the trial judge."²⁵⁶ Although the

249. This proposed language does not incorporate recent amendments approved by the Advisory Committee. Although the amendments were transmitted to Judicial Conference, Congress has not approved the amendments.

250. See FED. R. EVID. 404(b)(2) ("[E]vidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

251. See *supra* text and accompanying notes p. 117 (noting differences between the Federal and Texas rules).

252. *Huddleston v. United States*, 485 U.S. 681 (1988).

253. *Id.* at 682.

254. *Id.* at 687.

255. *Id.* at 688.

256. *Id.*

Court rejected the petitioner's arguments, it warned the Government against parading "a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo."²⁵⁷

Since *Huddleston*, the Supreme Court has not required a higher standard than a preponderance of the evidence.²⁵⁸ Moreover, Congress has yet to implement a heightened burden on the prosecution. In contrast, Texas rejects prior act evidence unless proven beyond a reasonable doubt.²⁵⁹ In *Harrell v. State*,²⁶⁰ the Texas Court of Criminal Appeals declined to adopt the *Huddleston* standard.²⁶¹ Texas traditionally instructed juries from considering "extraneous offense evidence unless they believed beyond a reasonable doubt that the defendant committed such [acts]."²⁶² By requiring a higher standard, the presumption for uncharged and charged conduct are equivalent. Accordingly, the federal rules should emulate Texas's standard for admitting extraneous offense evidence,²⁶³ and require proof beyond a reasonable doubt.

If the presumption of innocence is to remain an essential component of our criminal trial system, judges must exercise their discretion to ensure prosecutors adhere to their ethical duties and curb any attempt to misuse 404(b) evidence. Courts may do so by strictly enforcing disciplinary remedies under the Model Code of Professional Responsibility.²⁶⁴ Under Disciplinary Rule 7-106 a lawyer may not: "In appearing in his professional capacity before a tribunal, . . . [s]tate or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."²⁶⁵ Violating this rule implicates both

257. *Id.* at 689.

258. *See* United States v. Gutierrez-Mendez, 752 F.3d 418, 424 (5th Cir. 2014) (reciting the *Huddleston* standard for admitting 404(b) evidence); Michael D. Dean, *Dealing with Extrinsic Act Evidence*, 28-SUM CRIM. JUST. 34, 35 (2013) (stating "the [U.S.] Supreme Court has held that the government does not need to 'prove' 404(b) acts past a preponderance of the evidence").

259. *See* Harrell v. State, 884 S.W.2d 154, 157 (Tex. Crim. App. 1994) ("This Court has long required that juries be instructed not to consider extraneous offense evidence unless they believed beyond a reasonable doubt that the defendant committed such offense.").

260. Harrell v. State, 884 S.W.2d 154 (Tex. Crim. App. 1994).

261. *See id.* at 160 ("We decline to follow *Huddleston* to this extent.").

262. *Id.* at 157.

263. *Id.*

264. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106 (C)(1) (AM. BAR ASS'N 2018) (defining structures lawyers are bound to in dealing with the misuse of a defendant's prior acts).

265. *Id.*

constitutional and ethical dilemmas.²⁶⁶ In fact, courts have overturned jury verdicts tainted by unfair arguments.²⁶⁷

Unlike defense attorneys, prosecutors are only given one opportunity to prove their case.²⁶⁸ Consequently, their desire to secure a conviction often causes them to deviate beyond the confines of their ethical obligations.²⁶⁹ Those who “smuggl[e] propensity evidence into a criminal prosecution” undermine the “cherished notions of fairness,” and undoubtedly violate their ethical duties.²⁷⁰ Prosecutors are obliged by law to represent society zealously.²⁷¹ But defense attorneys represent the people just as prosecutors do; only they do so one person at a time.²⁷²

VI. CONCLUSION

An essential prerequisite of a fair and impartial trial is that the defendant not be judged for past misdeeds but tried solely for the crime charged.²⁷³

266. Mary Beth Meyer, *Unringing the Bell: Enforcing Model Rule 3.4(e) As an Alternative to Trial Reversal for Attorneys' Improper Argument*, 11 J. LEGAL PROF. 187, 218 (1986) (addressing the challenges courts face when faced with attorney misconduct under Rule 3.4 of the Model Rules of Professional Conduct).

267. See *Berger v. United States*, 295 U.S. 78, 89 (1935) (overturning tainted jury verdicts due to unfair arguments); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 644–47 (1972) (offering remedies for prosecutorial misconduct).

268. See Henning, *supra* note 188, at 798 (“Unlike other attorneys, the prosecutor operates within a system that, for the most part, gives the government only one chance at proving its case.”).

269. *Id.* at 797. As one commenter noted:

The temptation to overstep, however, by imparting to the trier of fact one’s firmly held belief in the defendant’s guilt, even at the risk of allowing advocacy to degenerate into prejudicial argumentation or unfair commentary on the evidence and credibility of the witnesses is omnipresent. Although the presence of the judge is moderating influence on both sides, there are numerous instances of overreaching by lawyers during trial. Every objection sustained by the judge or sanction for improper conduct is, in a sense, a result of one attorney’s transgression, whether it be characterized as an innocent mistake, aggressive advocacy, or willful misconduct.

Id.

270. See Uviller, *supra* note 28, at 868 (recognizing the negative effects associated with smuggling propensity evidence into a criminal prosecutions).

271. Henning, *supra* note 188, at 797.

272. See *Kaley v. United States*, 571 U.S. 320, 358 (2014) (Roberts, C.J., dissenting) (“Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time. In my view, the Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.”).

273. See *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (“Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.” (citation omitted)).

The Federal Rules of Evidence ensure a defendant's rights are protected and that presumption of innocence remains an essential component within our judicial system. Additionally, the federal evidence rules balance the scales between those charged with a crime and those seeking justice. However, Rule 404(b) allows prosecutors to step outside the confines of their ethical duties and undermine a defendant's guaranteed constitutional rights.²⁷⁴

Rule 404(b) continues to be one of the most litigated evidence rules.²⁷⁵ So long as 404(b) remains unchanged, courts and scholars will further debate various solutions to prevent misusing a defendant's prior misdeeds.²⁷⁶ Most agree that Rule 404(b) must be amended. Unless Rule 404(b) is amended, prosecutors will continue to taint the jury's opinion by smuggling propensity evidence into a defendant's trial.

Requiring the defendant to open the door, rather than allowing the prosecution to introduce a defendant's prior bad acts under the guise of "another purpose,"²⁷⁷ is a practical solution against misusing Rule 404(b). In addition, amending 404(b) to include a misuse provision would further reduce the chances that prosecutors improperly comment on the defendant's prior bad acts. In the alternative, Rule 404(b) must be revised to require prosecutors to prove the defendant committed the alleged prior bad acts beyond a reasonable doubt. In conjunction with increasing the burden of proof, courts must protect against blatant prosecutorial misconduct. Where prosecutors willfully disregard their ethical duties in order to secure a guilty verdict, courts must serve as an additional check against an overreaching government.

As detailed above, a defendant's criminal history weighs heavily on the jury's outcome.²⁷⁸ Once a prosecutor exposes a defendant's prior criminal acts, it is nearly impossible to "unring [the] bell."²⁷⁹ As Justice Jackson

274. See *supra* Part IV.

275. Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(B)*, 78 TEMP. L. REV. 201, 211 (2005).

276. See Capra & Richter, *supra* note 55, at 828 (proposing a more protective balancing test for criminal defendants); Tortora, *supra* note 24, at 1497 (urging jurisdictions to "adopt a minimal standard of proof to limit the risk of prejudice to the defendant"); Froncek, *supra* note 21, at 613 (offering a "proper approach to resolve the [circuit split] question").

277. FED. R. EVID. 404(b)(2).

278. See *United States v. Cote*, 744 F.2d 913, 916 (2d Cir. 1984) (holding the other evidence, "was likely to have prejudiced the jury's consideration of [the defendant's] guilt."); see also Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 137 (1989) ("Extrinsic crime evidence does weigh too heavily with the jury. It causes the jury to prejudice the case and to deny the defendant a fair trial on the specific charge in the indictment.").

279. *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).

articulated, “[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”²⁸⁰ As the Fifth Circuit advised: “It is better to follow the rules than to try to undo what has been done.”²⁸¹ Because once you “throw a skunk into the jury box, you can’t instruct the jury not to smell it.”²⁸²

280. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (citations omitted); see *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (noting that asking jurors to disregard a defendant’s prior bad acts requires “mental gymnastics which is beyond, not only their powers, but anybody’s else.”).

281. *Dunn*, 307 F.2d at 886.

282. *Id.*