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The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)

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THE DEPRAVED SEXUAL INSTINCT THEORY: AN EXAMPLE OF THE PROPENSITY FOR ABERRANT APPLICATION OF FEDERAL RULE OF EVIDENCE 404(b)

I. INTRODUCTION

Admissibility of evidence of other crimes, wrongs or acts under Federal Rule of Evidence 404(b) is one of the most frequently litigated evidentiary issues.[1] More published opinions have arisen regarding this rule than any other subsection of the Federal Rules of Evidence.[2] Allegations of errors in admitting evidence under Rule 404(b) comprise the most common ground for appeal in criminal cases in many jurisdictions.[3] The Federal Rules' prohibition against introducing character evidence to prove conduct on a specific occasion[4] is at issue particularly in criminal cases.[5] The admissibility of such evidence is arguably the single most important issue in contemporary criminal evidence law.[6] However, it ap-

1. 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 404(08) (1982) (stating that Rule 404(b) has generated more reported decisions than any other subsection of Federal Rules of Evidence).

2. *Id.*

3. 22 CHARLES WRIGHT & KENNETH GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239 (1978).

4. FED. R. EVID. 404(a) provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (1) *Character of the accused.*—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
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> (2) *Character of victim.*—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
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> (3) *Character of witness.*—Evidence of the character of a witness, as provided in rules 607, 608, and 609.

5. Several cases have implied that the prohibition of Rule 404(b) has constitutional overtones when applied to the criminal defendant. *See* United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (reaffirming that part of presumption of innocence in American jurisprudence is fundamental axiom that "a defendant must be tried for what he did, not for who he is" (quoting United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978))); Government of Virgin Is. v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) (suggesting government's evidence of other crimes undermines presumption of innocence); State v. Manrique, 531 P.2d 239, 241 (Or. 1975) (holding accused has constitutional right to be held to answer only to crime charged).

6. Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, 1 CRIM. JUST. 6, 7 (1986).

pears that courts often fail to apply the prohibition on character evidence properly—especially the prohibition expressed in Rule 404(b).[7] As a result, courts have carved an absolute exception to Rule 404(b)'s proscription—an exception which permits the use of specific acts evidence to show a propensity for aberrant sexual conduct and conformity therewith on a particular occasion.[8] This misapplication appears to have arisen from a general misunderstanding of the prohibition itself, a misunderstanding that has led to the creation of the Depraved Sexual Instinct Theory. The theory reveals the problems with the current admissibility analysis under Rule 404(b).[9]

Application of Rule 404(b) in the area of sex crimes demonstrates the dangers inherent in the rule.[10] This Comment discusses the narrow application of Rule 404(b) in the area of sex crimes to demonstrate that the Depraved Sexual Instinct Theory is actually nothing more than character propensity evidence.[11] While Rule 404(b) is important in the civil context, this Comment focuses on criminal cases involving sexual offenses. The analysis consists of two parts. First, this Comment briefly examines the theory behind Rule 404(b) and the character propensity analysis.[12] This Comment then analyzes the application of 404(b) in the specific area of sex crimes at both the federal and state levels with particular regards to the Depraved Sexual Instinct Theory.[13]

This Comment concludes that courts should return to a strict adherence to the fundamental principle of our jurisprudence that a person be tried only for what he has done and not for who he may be.[14] The Author recommends that Rule 404(b) should no longer be regarded as a rule

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7. *See infra* notes 130-54 and accompanying text.

8. *See infra* notes 69-77 and accompanying text.

9. *See infra* notes 48-70 and accompanying text.

10. *See infra* notes 152-70 and accompanying text.

11. *See infra* notes 155-70 and accompanying text.

12. *See infra* notes 144-54 and accompanying text. Throughout this Comment the phrase "character propensity inference" is used. This term of art refers to the inference that a jury makes based on specific acts evidence admitted at trial. The inference drawn is that the accused has acted or will act in conformity with a character trait.

13. *See infra* notes 171-272 and accompanying text.

14. Throughout this Comment, the accused is referred to by the masculine pronoun. This is only for the author's convenience and to prevent awkward sentence structure. The masculine pronoun was chosen over the feminine because in the vast majority of cases involving sex crimes, men are the perpetrators and women and children their victims. Although there are cases of women committing sex crimes, their victims tend to be children only. As men constitute the primary perpetrators of sex crimes in general, and as this Comment is not limited to merely crimes against children, it seemed more appropriate and convenient to limit references to the accused to the masculine gender. The use of the masculine pronoun is not intended in any manner to imply that only men are defendants in sex crime cases.

of inclusion[15] and suggests that Rule 404(b) should be considered a rule of exclusion except where it is used for the very limited purpose of admitting specific acts evidence clearly offered for a non-character propensity purpose.[16] Finally, this Comment concludes that the current application of Rule 404(b) in the area of sex crimes is unmanageable and opens the rules governing character evidence to limitless exceptions. Consistency demands that, on the one hand, we either strictly enforce the prohibition against specific acts evidence offered to create a character propensity inference or, on the other hand, eliminate Rule 404(b) in its entirety and abandon the fundamental principle that protects an accused from being convicted for who he may be.

II. BACKGROUND

The prohibition against character propensity evidence has a long history in Anglo-American jurisprudence.[17] This prohibition is distinct

15. *See infra* notes 280-82 and accompanying text.

16. *See infra* note 283 and accompanying text.

17. *See, e.g.*, State v. Lapage, 57 N.H. 245, 275, 276 (1876) (holding in case charging murder committed during attempted rape, admission of accused's rape of another woman was improper). The New Hampshire Supreme Court in 1876 recognized the inherent problem with specific acts evidence and articulated both the difficulty and the state of the law as it then stood:

> If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature—the teaching of human experience.
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> If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . .
>
> Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise.

Id. at 299-300 (Ladd, J., concurring).

from the traditions in Continental criminal trials in which evidence of the character of the accused, along with evidence of specific acts, was given considerable weight and was freely used.[18] The inadmissibility of specific acts evidence in Anglo-American jurisprudence has been explained in terms of the uncontrovertible relevancy which such evidence bears to the character of the accused.[19] The purpose of this prohibition is to prevent the improper conviction of an innocent person on the basis of his character.[20]

Federal Rule of Evidence 404(b) essentially has codified this prohibition, yet it is structured in accord with the general tendency of the Federal Rules to admit all relevant evidence.[21] The Federal Rules of

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18. RENE DAVID & HENRY P. DE VRIES, THE FRENCH LEGAL SYSTEM 77 (1958) (issues of reasonable doubt in criminal trials were also resolved by evidence of other acts, prior convictions and general character).

19. JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1212 (Tillers rev. 1983). The objection to specific acts evidence arises from the fact that such evidence has only marginally probative value. However, in spite of this, the fact finder often attributes excessive weight to the evidence.

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

Id.

Wigmore suggests that the practical conclusion of the rule is that specific acts evidence should be excluded from the prosecution's rebuttal of the defense because the use of evidence of the accused's bad character in any form is already prohibited from being introduced by the prosecution until the accused has first opened the issue of his character. *Id.*

20. Because of the inferential process involved in character reasoning, Professor Imwinkelried is of the opinion that jurors inevitably judge the accused based on his character, and herein lies the danger. He writes:

> The first inferential step in character reasoning requires the jury to focus on the accused's disposition or propensity. The jurors must ask themselves: What type of person is the accused? Is the accused a law-abiding, moral person or a lawbreaking, immoral individual? At a conscious level, the jurors must dwell on the accused's personal character.
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> While consciously deciding whether to infer the accused's subjective bad character from the accused's uncharged crimes, at a subconscious level the jurors may be tempted to punish the accused for the other crimes. The temptation may be especially acute when the testimony indicates that the accused has not as yet been convicted of and punished for the uncharged crime. The uncharged misconduct evidence may create the impression that to date, the accused has unjustly escaped punishment for the uncharged misdeeds. The jurors may be tempted to rectify that injustice by punishing the accused now for the uncharged crimes—even though they have a reasonable doubt about the accused's guilt of the charged offense.

Edward J. Imwinkelried, *The Use of Evidence on an Accused's Uncharged Misconduct to Prove* Mens Rea: *The Doctrines That Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 47-48 (1990).

21. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 797-98 (1981).

Evidence have provided a model for most state jurisdictions,[22] and most states seem to follow the Federal Rules' prohibition against the use of character evidence.[23] While in general these jurisdictions prohibit specific acts evidence for the purpose of showing character propensity, these states employ the inclusionary rule which presumes admissibility unless the evidence is shown to be otherwise improper.[24]

However, it appears that the federal courts, while supporting the inclusionary tendency of 404(b),[25] are particularly lax when analyzing the admissibility of specific acts evidence. The courts articulate a general purpose for which the evidence is relevant and couch their analysis in the language of the permissible "other purposes" clause of Rule 404(b).[26] These decisions then rely almost entirely on whether the trial court abused its discretion in determining the admissibility of the evidence.[27]

A. Federal Rule of Evidence 404: Character Propensity Prohibition

Rule 404 sets forth the restrictions regarding character evidence in general.[28] The rule is one of several which limit the admissibility of specific types of evidence.[29]

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22. WIGMORE, *supra* note 19, at 1218.

23. *Id.* at 1193.

24. *See, e.g.*, State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979) (stating evidence of prior assaults not "so unduly prejudicial that trial court abused its discretion in admitting this relevant evidence").

25. *See infra* notes 57-68 and accompanying text.

26. Courts demonstrate this in approving of prosecutors' endeavors to create new theories under which specific acts evidence should be admitted. *See, e.g.*, United States v. Woods, 484 F.2d 127, 133-34 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); People v. Spoto, 795 P.2d 1314, 1317-18 (Colo. 1990); State v. Allen, 725 P.2d 331, 333 (Or. 1986). Professor Imwinkelried discusses one of these theories, the doctrine of objective chances, and seems to conclude that this theory allows prosecutors to smuggle "inadmissible bad character evidence into the record under the guise" of a legitimate non-character theory of relevance. Imwinkelried, *supra* note 20, at 54.

27. *See, e.g.*, United States v. Hadley, 918 F.2d 848, 850 (9th Cir. 1990); United States v. Fawbush, 900 F.2d 150, 151 (8th Cir. 1990); United States v. Cuch, 842 F.2d 1173, 1175 (10th Cir. 1988). A few cases provide better analyses of the admissibility of specific acts evidence. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 910-11, 913-18 & nn.18-23 (5th Cir. 1978) (en banc) (holding determination of proper purpose required; proper purpose must be other than to show character), *cert. denied*, 440 U.S. 920 (1979); United States v. O'Connor, 580 F.2d 38, 40-43 (2d Cir. 1978) (stating prosecution must show evidence relevant on issue other than character); United States v. Ring, 513 F.2d 1001, 1003-09 (6th Cir. 1975) (holding prosecution must make affirmative showing of proper purpose; mere recitation that specific acts evidence falls within recognized exception insufficient). However, these few decisions with arguably adequate discussions of the question are not representative of the practice among the federal courts.

28. See notes 4 and 35 for text of the rule.

29. Huddleston v. United States, 485 U.S. 681, 689 (1988); *see also* FED. R. EVID. 405 (governing methods of proving character); FED. R. EVID. 406 (governing admissibility of evi-

Generally, under the scheme of the Federal Rules, the prosecution may not offer any evidence of the accused's bad character[30] until the accused offers evidence of his good character.[31] This prohibition does not arise because of irrelevancy[32] but rather from concerns that prejudice, confusion or time-consumption will outweigh the probative value of such evidence.[33] Moreover, this general prohibition against character evidence encompasses the more frequently invoked rule, Rule 404(b),[34] which prohibits the prosecution from introducing evidence of other acts of the accused for the purpose of creating a character propensity inference.[35]

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dence showing habit or routine practice); FED. R. EVID. 407 (governing admissibility of evidence of subsequent remedial measures); FED. R. EVID. 408 (governing admissibility of evidence of compromise and offers to compromise); FED. R. EVID. 409 (governing admissibility of evidence of payment of medical and similar expenses); FED. R. EVID. 410 (governing admissibility of evidence of pleas, plea discussions and related statements); FED. R. EVID. 411 (governing admissibility of evidence of liability insurance); FED. R. EVID. 412 (governing admissibility in sex offense cases of victim's past behavior).

30. The prosecution may not proffer direct evidence of the accused's bad character nor ask questions or proffer other types of evidence that insinuate that the accused has committed other "bad acts" or crimes. *See* United States v. Shelton, 628 F.2d 54, 56-57 (D.C. Cir. 1980) (reversing conviction for assault because prosecution's cross-examination of defendant and defense witnesses suggested that all were members of "drug underworld involved in all sorts of skullduggery"); United States v. Fosher, 568 F.2d 207, 213 (1st Cir. 1978) (holding mug shots from police department's "rogues gallery" inadmissible); State v. Kelly, 526 P.2d 720, 729 (Ariz. 1974) (finding mug shot improperly admitted as implying prior criminal record), *cert. denied*, 420 U.S. 935 (1975). *But cf.* State v. Hicks, 649 P.2d 267, 273 (Ariz. 1982) (explaining testimony that defendant's fingerprints were "known prints" was admissible under rule).

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

32. *See* FED. R. EVID. 402 (stating "Evidence which is not relevant is not admissible.").

33. *See* FED. R. EVID. 403, *infra* note 99; United States v. Cook, 538 F.2d 1000, 1004 (3d Cir. 1976) (discussing "long standing tradition that protects a criminal defendant from 'guilt by reputation' and from 'unnecessary prejudice' "); People v. Cardenas, 31 Cal. 3d 897, 905, 647 P.2d 569, 573, 184 Cal. Rptr. 165, 169 (1982) (reversing on grounds of cumulative prejudice from evidence of other crimes not related to charge of attempted murder).

34. *See* FED. R. EVID. 404(b) advisory committee's note.

35. Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b). The last part of the Rule includes the recent amendment which took effect on December 1, 1991. While this amendment is primarily procedural, it is likely to have significant effect on the substantive application of the Rule. As the amendment has only been operative for a short while, there has been little opportunity for courts to examine its effects. For a brief examination of the potential effects of the amendment, as they might relate to the Depraved Sexual Instinct Theory, see *infra*, note 276.

1. Character evidence in general—Rule 404(a)

Subsection (a) of Rule 404 addresses the threshold question of the admissibility of character evidence in general.[36] The Rule states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."[37]

Admissibility of character evidence depends on the purpose for which it is offered.[38] Rule 404(a) provides three instances in which character evidence is properly admissible.[39] The Rule begins by emphasizing that only evidence of pertinent traits of character are admissible.[40] If the evidence demonstrates relevant traits of character, such evidence is admissible when offered by an accused in the defense's case-in-chief or by the prosecution on cross-examination to rebut the defense's showing of the accused's character.[41] If this evidence is admissible, the next step in the analysis is to determine the proper method of proof under Rule 405.[42]

The second instance where character evidence is admissible involves two exceptions regarding the character of the victim of a crime.[43] First, a pertinent character trait of the victim is admissible when offered by the accused or by the prosecution in rebuttal once the accused has placed

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36. *See* FED. R. EVID. 404(a) advisory committee's note.

37. FED. R. EVID. 404(a).

38. *See id.*; David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 16 (1987) (admitting evidence of character is limited to three purposes).

39. FED. R. EVID. 404(a).

40. *Id.* The specific analysis behind the admissibility of relevant evidence is governed by Federal Rules of Evidence 401-403. FED. R. EVID. 401-403. For an overview of the analysis, see Huddleston v. United States, 485 U.S. 681, 687-89 (1988).

41. FED. R. EVID. 404(a)(1). The issue of the prosecution introducing evidence of the accused's character during cross-examination only arises once the accused has introduced evidence of his own character. The prosecution may not raise the issue of the accused's character unless the accused has raised it first. Usually this will arise when the accused introduces evidence of his good character. The prosecution, on cross-examination, may then introduce evidence of the accused's bad character, but only to rebut the evidence of the accused's good character. *Id.*

42. FED. R. EVID. 404 advisory committee's note. Rule 405 states:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
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> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

FED. R. EVID. 405. Examination of the analysis behind all character evidence and the methods of proof is beyond the scope of this Comment.

43. FED. R. EVID. 404(a)(2).

character at issue.[44] The second exception is a special application of the first in homicide cases: the prosecution may rebut a defense that the victim was the first aggressor by introducing evidence that the victim was of a peaceful character.[45]

Finally, evidence of the character of a witness is admissible according to Rules 607, 608 and 609.[46] These rules govern impeachment of witnesses at trial.[47]

2. Specific acts evidence and the character propensity prohibition—Rule 404(b)

Rule 404(b) governs the specialized application of the general prohibition against introducing evidence of character to show conduct on a specific occasion.[48] The Rule focuses on evidence that creates a character propensity inference, namely evidence of specific acts.[49] This type of evidence involves the notion that "character" contains qualities of personality having some moral overtone conveying something good or bad about a person.[50]

Rule 404(b) prohibits the admission of evidence of other crimes, wrongs or other acts when such evidence is offered for the sole purpose of creating a character propensity inference.[51] The second sentence of the Rule asserts that such evidence is properly admissible for certain non-

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44. *Id.*; *see also supra* note 4.

45. FED. R. EVID. 404(a)(2). However, it is important to note that in all cases, the prosecution's introduction of character evidence may only be used to rebut some issue raised by the accused, and, for the most part, this issue must involve character. *See* FED. R. EVID. 404(a)(1), (2), 607, 608, 609.

46. FED. R. EVID. 404(a)(3) (stating that evidence of witness's character only admissible as provided in Rules 607, 608 and 609).

47. Federal Rule of Evidence 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." FED. R. EVID. 607. Rule 608 discusses the proper methods for attacking the credibility of a witness by using evidence of the witness's character as shown by opinion and reputation and specific instances of the witness's conduct. FED. R. EVID. 608. Rule 609 governs impeachment of a witness by introducing evidence of a conviction of a crime. FED. R. EVID. 609.

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

49. *Id.*

50. Kuhns, *supra* note 21, at 779. "The notion that character connotes a moral quality is buttressed by the fact that evidentiary rules traditionally make a distinction between inadmissible specific acts evidence offered to prove 'character' and potentially admissible specific acts evidence offered to prove 'habit'." *Id.* at 779 n.7. *Compare* FED. R. EVID. 404(b) *with* FED. R. EVID. 406 (recognizing absence of limitations on use of evidence to show habit in proving action in conformity with such habit).

51. FED. R. EVID. 404(b). This demonstrates a second part of the concept of "character" which seems to support the notion that "character" affects behavior. Kuhns, *supra* note 21, at 779. However, the prohibition against specific acts evidence to prove character does not apply when character is itself an element of a claim or defense. *See* FED. R. EVID. 405(b).

character purposes even if the evidence might also be the source of a character propensity inference.[52] Rule 404(b) lists numerous "other purposes" for which evidence of specific acts is properly admissible,[53] and the list is neither mutually exclusive nor collectively exhaustive.[54] It is the "other purposes" clause that courts have used to justify the creation of absolute exceptions to the general prohibition—exceptions which, in effect, have swallowed the rule.[55]

Improper application of Rule 404(b) arises from a misunderstanding of the Rule's general prohibition against character propensity inferences and the permissible "other purposes" for which the very same evidence may be admitted.[56] The Rule tries to balance two often conflicting principles that form the basis for our system of criminal justice: the general admissibility of relevant evidence[57] and the policy of judging an accused solely for the charge before the court.[58] Specific acts evidence may be relevant to prove the accused's guilt.[59] As the relevancy standard in the Federal Rules of Evidence is a relatively low threshold,[60] evidence of other acts of the accused that relate in any way to the crime charged would probably be admitted at trial. However, the danger of prejudice weighs heavily in favor of excluding such evidence. This evidence might lead the fact finder to convict the accused improperly: the accused would be found guilty, not because the prosecution proved guilt beyond a reasonable doubt, but rather because the accused was shown to be a bad

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

53. "[Specific acts evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

54. United States v. Wesevich, 666 F.2d 984, 988 (5th Cir. 1982) (explaining evidence of other offenses admissible for purposes other than those expressly listed in Rule 404(b)); United States v. Diggs, 649 F.2d 731, 737 (9th Cir.) (stating "[r]ule 404(b) is an inclusionary rule—i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal propensities"), *cert. denied*, 454 U.S. 970 (1981).

55. See discussion of the theory of 404(b) analysis *infra* notes 103-54 and accompanying text.

56. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 911, 913-18 & nn.18-23 (5th Cir. 1978) (en banc) (holding determination required to show relevance of extrinsic evidence to issue other than character), *cert. denied*, 440 U.S. 920 (1979); United States v. O'Connor, 580 F.2d 38, 40-43 (2d Cir. 1978) (holding prosecution required to show purpose of extrinsic evidence relevant to issue other than character). The "other purposes" clause of Rule 404(b) lists those commonly applied proper purposes for admitting specific acts evidence. *See* FED. R. EVID. 404(b); *infra* notes 130-43 and accompanying text.

57. FED. R. EVID. 402.

58. United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980); State v. Manrique, 531 P.2d 239, 241 (Or. 1975).

59. Imwinkelried, *supra* note 20, at 48.

60. *See* FED. R. EVID. 401.

person.[61] It is precisely this danger of prejudice that forms the basis for the general prohibition in the Federal Rules against introducing character propensity evidence.[62]

Despite the general prohibition against character propensity evidence, Rule 404(b) operates, or is applied, as a rule of inclusion.[63] As such, any analysis must start from the premise that if the evidence is relevant, it is admissible.[64] This places the burden on the party opposing the introduction of the evidence. Under Rule 404(a) evidence is excluded to avoid the prejudicial effects of character propensity inferences.[65] Rule 404(b) goes one step further by prohibiting evidence of other acts of the accused offered to show character.[66] Such evidence is often referred to as "specific acts evidence."[67] However, Rule 404(b) then qualifies the prohibition by permitting specific acts evidence of the accused if that evidence is offered for other purposes and not solely to show character.[68]

A primary example of the problem with such exceptions is especially manifest in cases involving sex crimes where specific acts evidence is offered to show the accused's prior sexual conduct.[69] The admission of specific acts evidence in order to show a passion or propensity for unusual, abnormal or depraved sexual relations has been permitted under an absolute exception carved out of the prohibition against using evidence of specific conduct to prove character—the Depraved Sexual Instinct Theory.[70]

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61. *See supra* note 5 and accompanying text.

62. *See infra* notes 103-15 and accompanying text.

63. *See* Huddleston v. United States, 485 U.S. 681, 687-88 (1988) (holding Rule 404 does not flatly prohibit introduction of evidence but merely limits purpose for introducing such evidence); Kuhns, *supra* note 21, at 781.

64. *See* FED. R. EVID. 402.

65. *See supra* notes 36-47 and accompanying text.

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

67. *See* Kuhns, *supra* note 21; Leonard, *supra* note 38.

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

69. The question of the admissibility of alleged sexual misconduct has recently enjoyed publicity as perhaps never before. This was one of the pivotal issues that arose in the rape trial of William Kennedy Smith—a media event almost rivaling coverage of the Gulf War. Susan Estrich, *What the Verdict Means—and Doesn't*, U.S.A. TODAY, Dec. 12, 1991, at 11A; Paul Hoversten, *Poll: Jury Did the Right Thing*, U.S.A. TODAY, Dec. 12, 1991, at 2A; David Margolick, *Why Jury in Smith Case Never Heard From 3 Other Women*, N.Y. TIMES, Dec. 13, 1991, at B14.

70. Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948) (recognizing admissibility of other acts in prosecution for crimes involving "depraved sexual instinct"); Maynard v. State, 513 N.E.2d 641, 647 (Ind. 1987) (recognizing "depraved sexual instinct" exception); Woods v. State, 235 N.E.2d 479, 486 (Ind. 1968) (admitting specific acts evidence under "depraved sexual instinct" exception) (citing Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948)); *see* State v. Schut, 429 P.2d 126, 128 (Wash. 1967) (recognizing "lustful inclination" exception to general prohibition against character propensity evidence).

B. *Specific Acts Evidence and the Depraved Sexual Instinct Theory*

The prohibition against character propensity inferences appears particularly lax in the area of sex crimes.[71] While admission of evidence of other sex crimes initially was limited to those offenses involving the same parties,[72] the modern trend appears to be to admit such evidence even when the parties are not the same.[73] Some courts, while not expressly allowing evidence of sex crimes with other victims to show a character propensity, have sought to find other means of admitting such evidence.[74] In so doing, they achieve the same result.[75]

Among the state jurisdictions, there appears to be a growing trend toward creating an absolute exception to character propensity inferences in the case of sex crimes.[76] Even those jurisdictions that do not expressly

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71. *See* United States v. Leight, 818 F.2d 1297, 1299-1300, 1303-04 (7th Cir.) (recognizing trial court's discretion in child abuse cases for admitting prior instances of abuse even when instances involve different victims), *cert. denied*, 484 U.S. 958 (1987), *disapproved on other grounds*, Huddleston v. United States, 485 U.S. 681 (1988) (specific acts evidence need not be proven by clear and convincing evidence); *Woods*, 235 N.E.2d at 486 (admitting specific acts evidence in cases of sexual child abuse); *Schut*, 429 P.2d at 128 (admitting specific acts evidence in cases of sex crimes); Gezzi v. State, 780 P.2d 972, 974 & n.4 (Wyo. 1989) (recognizing "nationally predominant trend" toward greater flexibility in admitting specific acts evidence in sex crimes); *cf.* State v. Crossman, 624 P.2d 461, 464 (Kan. 1981) (admitting specific acts evidence in cases involving "indecent liberties with a child").

72. *Woods*, 235 N.E.2d at 486; *Schut*, 429 P.2d at 128.

73. *See* Nordskog v. Wainwright, 546 F.2d 69, 72 (5th Cir. 1977) (holding admission of evidence of prior rape of different victim proper); People v. Williams, 115 Cal. App. 3d 446, 452, 171 Cal. Rptr. 401, 404 (1981) (admitting evidence of prior sex offenses involving two other victims); People v. Webster, 14 Cal. App. 3d 739, 745-47, 93 Cal. Rptr. 260, 263-65 (1971) (holding evidence of other similar assaults admissible where victims were murdered in course of rape); Lamar v. State, 195 N.E.2d 98, 101 (Ind. 1964) (permitting evidence of other improper sex acts of accused); State v. Schlak, 111 N.W.2d 289, 291 (Iowa 1961) (admitting evidence of accused's conduct toward others); State v. Bolden, 241 So. 2d 490, 491-92 (La. 1970) (admitting evidence of conduct with minor female other than victim).

74. *See Leight*, 818 F.2d at 1304 (noting greater latitude in admissibility of specific acts evidence in child abuse cases); United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986) (holding permissible use of specific acts evidence set forth in Rule 404(b) neither exhaustive nor conclusive), *cert. denied*, 480 U.S. 922 (1987); United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976) (discussing Rule 404(b)'s expansion of admissibility of specific acts evidence from rule at common law). *But see* United States v. Cobb, 588 F.2d 607, 611 (8th Cir. 1978) (holding specific acts evidence admissible only in limited circumstances), *cert. denied*, 440 U.S. 947 (1979).

75. *See Leight*, 818 F.2d at 1303-04; *Mendez-Ortiz*, 810 F.2d at 79; *Cook*, 538 F.2d at 1003.

76. *See* George v. State, 813 S.W.2d 792, 797 (Ark. 1991) (holding in cases of child abuse involving depraved sexual instinct, evidence of similar unnatural sex acts admissible); People v. Deavers, 580 N.E.2d 1367, 1380 (Ill. App. Ct. 1991) (holding specific acts evidence admissible under Depraved Sexual Instinct Doctrine to show penchant for sexual conduct charged); *Woods*, 235 N.E.2d at 486 (recognizing longstanding case law precedent admitting specific acts evidence in sex cases); State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978) (holding specific acts

recognize such an exception have effectively recognized one by "expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule."[77]

California appears to be one of the few states that has restricted the use of specific acts evidence in sex crimes in certain circumstances.[78] California's evidence law has long prohibited the introduction of specific acts evidence for the purpose of proving criminal disposition or propensity.[79] This prohibition has been recognized in the past half century as necessary because of the danger of the prejudicial effect of such evidence.[80] The California Supreme Court has extended section 1102 of the California Evidence Code, making evidence of specific acts of the accused inadmissible to prove disposition to commit such acts even if the defendant has opened the question by introducing evidence of his good character.[81] However, with the adoption of Proposition 8 in 1982,[82] California's strict adherence to the prohibition against specific acts evi-

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evidence admissible to show lewd and lascivious disposition); State v. Rankin, 181 N.W.2d 169, 171 (Iowa 1970) (holding specific acts evidence admissible to show propensity in sex crime cases); State v. Holstead, 354 So. 2d 493, 498 (La. 1977) (admitting similar act evidence in sex crime case); State v. Kitson, 817 S.W.2d 594, 598 (Mo. Ct. App. 1991) (recognizing while "depraved sexual instinct doctrine . . . has been rejected in name, it has been adopted in fact"); State v. Lachterman, 812 S.W.2d 759, 766 (Mo. Ct. App. 1991) (recognizing exception to general prohibition in cases of sex crimes to prove accused's emotional propensity); State v. Adams, 264 S.E.2d 46, 50 (N.C. 1980) (holding criminal statute constitutional which proscribes unnatural and perverted sexual conduct indicative of depraved sexual instinct).

77. WIGMORE, *supra* note 19, at 1336.

78. *See* People v. Kelley, 66 Cal. 2d 233, 241-43, 424 P.2d 947, 954-57, 57 Cal. Rptr. 363, 370-73 (1967) (recognizing use of specific acts evidence in sex crimes as limited to similar offenses not too remote from charged conduct). For a more thorough examination of the California rule, see *infra* notes 256-72 and accompanying text.

79. People v. Lee Dick Lung, 129 Cal. 491, 492-93, 62 P. 71, 71-72 (1900); People v. Lynch, 122 Cal. 501, 502-03, 55 P. 248, 248 (1898); People v. Dye, 75 Cal. 108, 112-13, 16 P. 537, 539-40 (1888).

80. *See* People v. Burton, 55 Cal. 2d 328, 351, 359 P.2d 433, 443-44, 11 Cal. Rptr. 65, 75-77 (1961).

81. People v. Wagner, 13 Cal. 3d 612, 618-19, 532 P.2d 105, 108-09, 119 Cal. Rptr. 457, 460-61 (1975).

82. Article I, § 28 of the California Constitution (also known as Proposition 8) states, in pertinent part:

> (d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art I, § 28.

dence appears to be weakening.[83]

Under the guise of showing intent, motive, continuing scheme or plan, and even identity, the Depraved Sexual Instinct Theory is becoming an absolute exception to the prohibition against admitting specific acts evidence to create a character propensity inference.[84] The theory permits the prosecution to introduce evidence of specific instances of the accused's sexual conduct in order to show the accused has a propensity or proclivity—an "instinct"—for deviant sexual behavior.[85] Once established, the prosecution is then permitted to argue that as the accused possesses this inclination for aberrant sexual behavior, he is more likely to be motivated, to intend or to plan to commit a crime involving sexually depraved conduct.[86] Moreover, it is argued, because the accused possesses this depraved sexual instinct, it is more likely that he committed the crime charged than another person without such a proclivity.[87] The Depraved Sexual Instinct Theory is often couched in terms of the permissible purposes for admitting specific acts evidence[88] and is also justified as necessary to assist in the prosecution of sex crimes.[89] However, the Depraved Sexual Instinct Theory is simply a means of introducing character propensity evidence despite the prohibition against it.

The Depraved Sexual Instinct Theory undermines the prohibition against evidence offered to create a character propensity inference. If the rule against using specific acts evidence for the purpose of proving character is justified, the broad exception for evidence of sexual proclivity cannot be explained.[90] In many areas of our jurisprudence, the law creates, recognizes and affirms legal fictions[91] to serve what the courts and

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83. *See infra* notes 269-72 and accompanying text.

84. *See, e.g.*, State v. Lachterman, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991).

85. Eldridge v. State, 580 N.E.2d 726, 729 (Ind. Ct. App. 1991) (recognizing specific acts evidence as admissible to show defendant's depraved sexual instinct).

86. Free v. State, 732 S.W.2d 452, 455 (Ark. 1987) (holding specific acts evidence of sexual deviance admissible to prove depraved sexual instinct of accused); Lawrence v. State, 464 N.E.2d 923, 924 (Ind. 1984) (holding evidence of prior rape admissible as circumstantial evidence of guilt of sexual misconduct toward minor female).

87. *See, e.g.*, State v. McDaniel, 298 P.2d 798, 802-03 (Ariz. 1956); *Free*, 732 S.W.2d at 455.

88. *See, e.g.*, State v. Fraction, 782 S.W.2d 764, 768 (Mo. Ct. App. 1989) (holding similarity of conduct in child abuse cases is equivalent to common scheme); State v. Christeson, 780 S.W.2d 119, 122-23 (Mo. Ct. App. 1989) (holding evidence of prior sexual conduct with same victim relevant to show motive of seeking satisfaction of sexual desire from that particular minor victim).

89. *See infra* notes 223-26 and accompanying text.

90. WIGMORE, *supra* note 19, at 1345.

91. Legal fiction, or fiction of law, is an "[a]ssumption of fact made by court as basis for deciding a legal question. A situation contrived by the law to permit a court to dispose of a

legislatures have deemed to be in the best interests of justice. The reason for excluding specific acts evidence is not that such evidence lacks probative value,[92] but rather that such evidence is likely to be given improper weight by the finder of fact.[93] In this, the law has created a fiction—a fiction which is axiomatic to the fundamental principle of our system of justice[94]—that each person approaches every situation independently, not predestined by "hapless fate"[95] to criminal behavior because of his character.[96] Each defendant stands before his tribunal with a clean record regardless of what he has done before and regardless of what type of person he may be.[97] This is the fundamental principle, standing on an equal plane with the presumption of innocence, that the accused is tried for what he did, not for who he is.[98] The prohibition against specific acts evidence offered to create a character propensity inference protects this fundamental goal. However, the differential treatment of sexual proclivity evidence only defeats this rule.

This exception to 404(b) accentuates the conflict between the funda-

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matter, though it need not be created improperly." BLACK'S LAW DICTIONARY 320 (6th ed. 1990).

92. Kuhns, *supra* note 21, at 777 & n.2.

93. WIGMORE, *supra* note 19, at 1212.

94. *See* United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (stating part of presumption of innocence in American jurisprudence is fundamental axiom that accused must be tried only for what he did and not for who he is); *see also* Imwinkelried, *supra* note 6, at 48 ("Under our accusatory criminal justice system, it is axiomatic that the accused need answer only for the crime he or she is currently charged with.").

95. SOPHOCLES, OEDIPUS THE KING (Sir George Young trans., Caxton House, Inc. 1946). This famous tragedy serves as a poignant distinction from American jurisprudence. According to the story, Oedipus' parents, the King and Queen of Thebes, left Oedipus on a mountain, his ankles nailed together so that he would die. His parents did this because of the prediction of the Oracle at Delphi that Oedipus would grow up to kill his father and marry his mother. However, despite their efforts to save themselves (and Oedipus) from such a horrible fate, a shepherd had compassion on the child and gave him to the King of a different city who raised him as his own. Once Oedipus had grown, he too learned of the prediction of the Oracle and left his adopted royal family to avoid his fate. In so doing, he came across a man of royalty who gave him great insult. Oedipus killed him. This man was the King of Thebes, his true father. Later, Oedipus saved the City of Thebes from the curse of the Sphinx and in reward, was given the hand of Queen Jocasta in marriage. Jocasta was Oedipus' true mother. Thus, despite all efforts to avoid the prediction of the Oracle, Oedipus' attempts only led him to fulfill his fate. Fortunately, the criminal defendant is not so shackled by destiny or character in American jurisprudence.

96. WIGMORE, *supra* note 19, at 1345.

97. *See supra* note 5. While prior convictions are admissible in limited circumstances, such evidence is *not* admissible for any character propensity inference purposes. *See* FED. R. EVID. 609(a) (evidence of prior conviction of an accused is admissible only "[f]or the purpose of attacking the credibility of [an accused] subject to the restrictions of Rule 403" and only if prior conviction involved crime of dishonesty or false statement).

98. *Foskey*, 636 F.2d at 523.

mental admissibility of all relevant evidence and the concern for a fair trial of an accused. Under the protection of Rule 403, even relevant evidence is inadmissible if the concerns of prejudice substantially outweigh the probative value of the evidence.[99] Permitting specific acts evidence to show sexual proclivity of the accused—"evidence of a most inflammatory type"[100]—eviscerates these protections as well. Under the current application of Rule 404(b), along with the states' interpretation of the prohibition in their own evidentiary codes, the courts have created inconsistency in the law. On the one hand, the prohibition against introducing evidence for the purpose of creating character propensity inferences is vociferously affirmed.[101] On the other hand, the courts destroy this very prohibition by creating an exception that effectually swallows the rule.[102]

III. ANALYSIS

Understanding the application and effect of the Depraved Sexual Instinct Theory first requires examination of the concept of character and propensity inferences.

A. Character Propensity Prohibition: The Theory Behind 404(b)

To fully understand the application of Rule 404(b), and the Depraved Sexual Instinct Theory, the Rule itself must first be examined.

1. Specific acts evidence may not be admitted to establish character propensity

a. the prohibition in general

Rule 404(b) expressly prohibits evidence of other crimes, wrongs or acts from being admitted for the purpose of proving conduct on a particular occasion.[103] The Rule recognizes the importance of being cautious in using specific acts evidence.[104]

The prohibition recognizes the danger of prejudice inherent in this type of evidence that may otherwise be relevant to the issue of the

99. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") (emphasis added).

100. WIGMORE, *supra* note 19, at 1345.

101. *See infra* notes 103-09 and accompanying text.

102. *See infra* notes 197-208 and accompanying text.

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

104. Kuhns, *supra* note 21, at 797.

case.[105] The Advisory Committee's Note expressly states that the admissibility of any specific acts evidence requires a determination of whether prejudice outweighs the probative value of such evidence.[106] While the intent of the Rule appears to require analyzing the use of specific acts evidence in light of Rule 403,[107] the Advisory Committee's Note adds a limiting factor to the balancing test of Rule 403, namely that balancing the potential prejudicial effect against the probative value of the evidence must be made "in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."[108] Therefore, while Rule 404(b) appears to protect the accused from specific acts evidence in the same manner that he is protected from other relevant evidence under Rule 403, this additional factor to the Rule 403 balancing test seems to weigh in favor of the admissibility of such evidence.[109]

Moreover, the rule expressly provides for admitting specific acts evidence in certain circumstances.[110] The rule states that while specific acts evidence may not be used to show character and thereby conformity with that character, there are permissible purposes for introducing such evidence.[111] The rule lists eight permissible purposes,[112] but from the language of the rule this list is not meant to be exclusive,[113] and as such there is no need to pigeonhole the evidence into one of these traditional permissible categories.[114] Thus, the permissible purposes allow the introduction of specific acts evidence even if that evidence might create a character propensity inference. This result might seem incongruous with the general prohibition, but because the evidence is offered for a permissible purpose, the mere possibility that the fact finder could use the evidence for the improper purpose does not violate the prohibition.[115]

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105. FED. R. EVID. 404(b) advisory committee's note.

106. *Id.*

107. *See id.* Rule 403 governs the exclusion of relevant evidence because of prejudice and other factors. For the text of Rule 403, see *supra* note 99.

108. FED. R. EVID. 404(b) advisory committee's note (citation omitted).

109. *See id.*

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

111. *Id.*

112. The rule lists as its permissible purposes proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

113. *See id.* ("It may, however, be admissible for other purposes, *such as* proof of motive, opportunity." (emphasis added)).

114. *See* Kuhns, *supra* note 21, at 797.

115. The concerns with evidence of limited admissibility are addressed by Rule 105: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Whether

b. defining other crimes, wrongs or acts

Rule 404(b) is not restricted to the criminal arena, and therefore, more than prior crimes are considered part of the prohibition.[116] The language of the Rule supports this conclusion in that the prohibition is against "[e]vidence of other crimes, wrongs, *or acts*."[117]

In addition, the rules do not define "crimes, wrongs or acts," although most cases have interpreted the phrase to mean some type of "bad act" as opposed to any general conduct.[118] Even seemingly innocuous acts are viewed as bad acts because in the context of the case for which they are introduced, such acts generally reflect adversely on the accused.[119]

Failure to define these terms raises the question of the appropriate standard of proof necessary to establish that the accused actually committed the prior bad act. While a charge of criminal conduct must be proven beyond a reasonable doubt,[120] introduction of evidence of that

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a jury will, or is even able to properly restrict the application of specific acts evidence to the permissible purpose as instructed by the court is beyond the scope of this Comment.

116. There appears to be a prevailing pattern among both the federal and state courts to exclude all forms of character evidence in civil cases when the evidence is employed merely to support an inference that conduct on a particular occasion was consistent with a person's character. *See, e.g.*, Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988); Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791 (5th Cir. 1979); Barbieri v. Cadillac Const. Corp., 389 A.2d 1263 (Conn. 1978); Feliciano v. City and County of Honolulu, 611 P.2d 989, 991 (Haw. 1980).

117. FED. R. EVID. 404(b) (emphasis added). The question of admissibility of specific acts evidence in the civil context is most often discussed with regards to "accident proneness" among automobile drivers. The conflict has arisen from the divergence of opinion on the propriety of trying to prove "accident proneness" through specific acts evidence (which appears to be improper under the general prohibition of Rule 404(b)) and the psychological studies which suggest that there are identifiable characteristics which account for the bulk of automobile accidents. However, there appears to be some suggestion in civil matters outside the arena of automobile accidents that evidence of departure from a customary standard should be admissible. The argument seems most strongly asserted in the context of medical malpractice cases where it is argued the jury should be allowed to consider the number of times a physician performs a medical procedure in its determination of whether or not that physician performed an unnecessary procedure on a specific occasion. The application and analysis of 404(b) in the civil context is beyond the scope of this Comment. For a more complete discussion of these issues see RICHARD O. LEMPERT & STEPHAN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE (2d ed. 1983); Flemming James Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 772-75 (1950); Frank E. Maloney & William J. Rish, *The Accident-Prone Driver: The Automotive Age's Biggest Unsolved Problem*, 14 U. FLA. L. REV. 364 (1962); Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 399-400 (1952).

118. *See* Huddleston v. United States, 485 U.S. 681, 685 (1988) (explaining Rule 404(b) as prohibiting introduction of specific acts evidence which "adversely reflect[s] on . . . character").

119. *Id.*

120. *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 378 (1986) (Stevens, J., dissenting).

criminal conduct in a different proceeding does not require the same burden of proof.[121] The United States Supreme Court held in *Huddleston v. United States*[122] that evidence offered under Rule 404(b) as specific acts evidence, whether a criminal act or not, need not be proved beyond a reasonable doubt, nor by clear and convincing evidence, and not even by a preponderance of the evidence.[123] The preliminary fact question[124] regarding such evidence—whether the accused actually committed the specific acts—is a matter of the trial court's discretion.[125] As long as the court determines that there is "sufficient evidence to support a finding by the jury that the defendant committed the [other] act,"[126] the evidence of that other act should be admitted.[127] The Court stated what quantum of evidence was insufficient to sustain a finding by the jury that the accused committed the other act. However, the rule which the Court established simply put forth Rule 104(b) as the standard by which a trial judge should make the determination.[128] Therefore, as long as the evidence is more than unsubstantiated innuendo and the jury can reasonably conclude that the accused committed the other act, the evidence is admissible.[129]

c. the "other purposes" clause

While the first sentence of Rule 404(b) creates an absolute prohibition against admitting specific acts evidence for the purpose of showing character,[130] the second sentence explains that there are permissible purposes for introducing specific acts evidence even when such evidence

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121. *Huddleston*, 485 U.S. at 686.

122. 485 U.S. 681 (1988).

123. *Id.* at 689.

124. Preliminary fact questions are governed by Federal Rule of Evidence 104(b), which provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b).

125. *See id.*

126. *Huddleston*, 485 U.S. at 689.

127. *See* FED. R. EVID. 104(b).

128. *Huddleston*, 485 U.S. at 689.

129. *Id.* The Court stated:

> We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant.

Id. (footnote omitted).

130. FED. R. EVID. 404(b). For the full text of the Rule, see *supra* note 35.

might create a character propensity inference.[131] Thus, Rule 404(b) is viewed as a rule of inclusion consistent with the general principles favoring admissibility.[132] The permissible "other purposes" do not prove character for the purpose of showing action in conformity therewith.[133] These permissible purposes simply demonstrate that specific acts evidence is admissible when offered to establish the accused's non-character propensities germane to an issue in the case.[134]

The permissible purposes under this exception include: (1) to establish motive;[135] (2) to show opportunity;[136] (3) to show, without considering motive, that the accused acted with the requisite intent;[137] (4) to show preparation by completing the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings;[138] (5) to show the existence of a larger plan, scheme or conspiracy of which

131. *See* FED. R. EVID. 404(b).

132. United States v. Diggs, 649 F.2d 731, 737 (9th Cir.) ("Rule 404(b) is an inclusionary rule . . . ."), *cert. denied*, 454 U.S. 970 (1981); United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980) (Rule 404(b) follows previous federal practice in adopting inclusionary rule); United States v. Waldron, 568 F.2d 185, 187 (10th Cir. 1977) (Rule 404(b) "unequivocally and very broadly sets out recognition of the admissibility of prior crimes for other purposes including . . . identity"), *cert. denied*, 434 U.S. 1080 (1978); United States v. Brown, 562 F.2d 1144, 1147 (9th Cir. 1977) (Rule 404(b) is one of inclusion); United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (Rule 404(b) represents rule of inclusion).

133. *See* FED. R. EVID. 404(b).

134. Generally, the misunderstanding of Rule 404(b) arises from viewing the "other purposes" clause as a list of *exceptions* to the prohibition—not permissible non-character purposes, but rather character purposes for which evidence is admissible despite the prohibition. *See, e.g.*, Williams v. State, 110 So. 2d 654, 662 (Fla.) (discussing permissible purposes as exceptions to the prohibition), *cert. denied*, 361 U.S. 847 (1959); State v. Schlak, 111 N.W.2d 289, 291 (Iowa 1961) (recognizing the "exception" of admitting evidence of accused's other sexual misconduct); Commonwealth v. Brown, 342 A.2d 84, 90 (Pa. 1975) ("While it is true that generally evidence of crimes other than the one for which the defendant is being tried is not admissible, there are certain well-defined *exceptions* to that rule.") (emphasis added); James Georges, Note, *Other Crimes or Misconduct Evidence*—Commonwealth v. Perkins *519 Pa. 149, 546 A.2d 42 (1988)*, 62 TEMP. L. REV. 771, 774-78 (1989); John McCorvey, Note, *Corroboration or Propensity? An Empty Distinction in the Admissibility of Similar Fact Evidence*, 18 STETSON L. REV. 171, 175-78 (1988).

135. United States v. Wasler, 670 F.2d 539, 542 (5th Cir. 1982); United States v. Cyphers, 553 F.2d 1064, 1069 (7th Cir.), *cert. denied*, 434 U.S. 843 (1977); United States v. Haldeman, 559 F.2d 31, 88 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); People v. Cardenas, 31 Cal. 3d 897, 906, 647 P.2d 569, 573-74, 184 Cal. Rptr. 165, 169-70 (1982).

136. United States v. DeJohn, 638 F.2d 1048, 1052 (7th Cir. 1981).

137. United States v. Mitchell, 666 F.2d 1385, 1389-90 (11th Cir.), *cert. denied*, 457 U.S. 1124 (1982); United States v. Guerrero, 650 F.2d 728, 734 (5th Cir. Unit A Mar. 1981); United States v. Beechum, 582 F.2d 898, 911-12 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

138. United States v. Ulland, 643 F.2d 537, 540-41 (8th Cir. 1981); United States v. Masters, 622 F.2d 83, 86-87 (4th Cir. 1980); State v. Villavicencio, 388 P.2d 245, 246 (Ariz. 1964); State v. Dlotter, 142 N.W.2d 568, 571 (Minn. 1966).

the crime on trial is a part;[139] (6) to prove knowledge;[140] (7) to establish identity;[141] and (8) to show absence of mistake or accident.[142] When specific acts evidence is offered to show a passion or propensity for unusual and abnormal sexual relations,[143] however, the evidence is nothing more than character evidence under a different name and should therefore be inadmissible.

2. The 404(b) analysis

Understanding the theory behind 404(b) requires first understanding the propensity inference process involved in using specific acts evidence.[144] An analysis of the propensity inference approach to specific acts evidence demonstrates the difficulties encountered in distinguishing between permissible propensity inferences and the impermissible character propensity inference of Rule 404(b).

While several forms of propensity inferences exist,[145] the inferential process behind them may be divided into three categories: non-propen-

139. United States v. Lewis, 693 F.2d 189, 193 (D.C. Cir. 1982); United States v. Parnell, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); United States v. Bermudez, 526 F.2d 89, 98-99 (2d Cir.), *cert. denied*, 425 U.S. 970 (1975); United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); United States v. Leftwich, 461 F.2d 586, 589 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972).

140. United States v. Estabrook, 774 F.2d 284, 288 (8th Cir. 1985); United States v. Hernandez-Miranda, 601 F.2d 1104, 1108-09 (9th Cir. 1979); United States v. Cobb, 588 F.2d 607, 611 (8th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979).

141. United States v. Woods, 613 F.2d 629, 635 (6th Cir.), *cert. denied*, 446 U.S. 920 (1980); United States v. Phillips, 599 F.2d 134, 136-37 (6th Cir. 1979); United States v. Myers, 550 F.2d 1036, 1046-48 (5th Cir. 1977); United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

142. *See* United States v. Harris, 661 F.2d 138, 142 (10th Cir. 1981); United States v. Witschner, 624 F.2d 840, 842-43 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980); United States v. Ross, 321 F.2d 61, 67-68 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

143. Woods v. State, 235 N.E.2d 479, 486-87 (Ind. 1968); State v. Crossman, 624 P.2d 461, 464 (Kan. 1981); State v. Schut, 429 P.2d 126, 128 (Wash. 1967).

144. To understand the analysis behind admitting evidence, an inferential chain analysis is most useful. *See* Imwinkelried, *supra* note 6; Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 835, 849 (1992); Leonard, *supra* note 38.

145. *See* Kuhns, *supra* note 21, at 781-82.

sity evidence,[146] non-character propensity evidence[147] and character pro-

146. Non-propensity evidence does not require any inference by the trier of fact. *See* Kuhns, *supra* note 21. Often this type of evidence arises when the prosecution seeks to narrow the "identifiable group" of persons who could have committed the crime in question. The most common types of non-propensity evidence arises when specific acts evidence is offered to show ability or opportunity. In some instances, non-propensity evidence is used to show identity, although there is a strong argument that such evidence actually involves a propensity inference of some sort—albeit of the non-character type. See *infra* notes 149-51 and accompanying text for a more detailed discussion.

147. Rule 404(b)'s prohibition only relates to character propensity inferences. The Rule expressly states several permissible forms of propensity inferences for which specific acts evidence is admissible. *See* FED. R. EVID. 404(b).

Professor Imwinkelried emphasizes the use of inferential chain analyses in explaining the theory of admissibility of evidence. Three steps comprise the analysis: first, we must consider the item of evidence itself; second, we draw an intermediate inference from that evidence; third, we draw the ultimate inference—the conclusion—which explains the justification for admitting the evidence. *See* Imwinkelried, *supra* note 20, at 42, 45, 55, 65. Thus, the specific acts evidence (the evidence offered at trial) leads to the intermediate inference of the accused's subjective, personal character, disposition or propensity. From this intermediate inference, we draw the conclusion that the accused acted in conformity with his character during the incident in question. *Id.* Professor Leonard refers to this process as "circumstantial proof." Professor Leonard explains that circumstantial proof involves a logical relevancy analysis: "[C]ircumstantial proof of a fact involves the offer of evidence not of the fact of proposition ultimately sought to be proved, but of some other fact which, if believed, will make that fact or proposition more or less likely true." Leonard, *supra* note 38, at 9.

Courts have generally permitted the use of specific acts evidence to show intent and absence of accident. *See supra* notes 137-42 and accompanying text. Often the propensity inference arises from a neutral act. In theory, introduction of this kind of specific acts evidence which requires the fact finder to make a propensity inference poses no threat of prejudice. Such evidence is often used to show that individuals who plan a certain course of action tend to follow through with those plans. For example, when a prison escapee claims that his escape was a spontaneous act because of duress, evidence that the prisoner had arranged to have a car waiting outside the prison wall at the time of the escape is admissible to show the prisoner's intent. Kuhns, *supra* note 21, at 790.

Following Professor Imwinkelried's inferential chain analysis, the logical relevancy of the waiting car would flow as follows: (1) the item of evidence is the waiting car; (2) the intermediate inference drawn from the evidence is that people who plan for a car to wait at a designated location intend to meet that car at the predetermined time and place; (3) the conclusion is that the prisoner intended to escape and thus did not act spontaneously.

Another example of this type of permissible propensity inference might involve the issue of the accused's knowledge. The specific acts evidence in such a case requires the propensity inference that a person who obtains knowledge of some fact tends to retain that knowledge. If the accused on a prior occasion had possessed a substance which he knew was heroin, evidence of this prior possession is admissible to rebut the accused's defense in a subsequent case for a similar possession that he did not know the substance he possessed was heroin. *See* United States v. Wixom, 529 F.2d 217, 220 (8th Cir. 1976).

Here, the inferential chain might be as follows: (1) the item of evidence is that the accused has once possessed a substance which he knew to be heroin; (2) the intermediate inference drawn is that the accused is familiar with heroin and is more likely to remember the substance and be able to identify it at a later time; and (3) the conclusion is that the accused knew that the substance in his possession was heroin at the time in question. The prior knowl-

pensity evidence.[148]

a. non-propensity and non-character propensity evidence

Specific acts evidence offered to show identity, ability or opportunity does not necessarily create any propensity inference. For example, a non-propensity inference use of specific acts evidence would be to prove the identity of the accused as the perpetrator of a crime.[149] Evidence that the accused had previously burglarized a safe by using some intricate and highly sophisticated technical device would be admissible to identify the accused as the perpetrator of a burglary of a safe or vault that was carried out in a similar manner.[150] This type of specific acts evidence is not introduced to show that the accused is the type of person who breaks into safes and thus is a "bad person"; it merely demonstrates that the accused is part of an identifiable "group" of persons who have the ability to commit such an act because of their specialized knowledge or skill.[151]

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edge creates the inference that the accused will be able to recognize heroin at a later time—he has the wherewithal to know what is and is not heroin.

148. Kuhns, *supra* note 21, at 782. While Professor Kuhns actually discusses the types of evidence under five categories, ("traditionally prohibited propensity inferences," "permissible individualized propensity inferences from a defendant's bad conduct," "permissible generalized propensity inferences from a defendant's bad conduct," "permissible generalized propensity inferences from a defendant's neutral conduct" and "permissible generalized inferences from the conduct of third persons"), these five are grouped more generally for the purposes of this Comment to provide a more cursory overview of the analytical theory behind 404(b).

149. *See supra* note 141.

150. United States v. Porter, 881 F.2d 878, 885-86 (10th Cir.), *cert. denied*, 493 U.S. 944 (1989) (regarding prosecution for bank robbery; evidence of attempted burglary of grocery store admissible to show common method of committing crimes). The federal courts have permitted use of prior crimes the evidence of which did not demonstrate the same level of intricate skill or knowledge as set forth in the above example. As long as the prior act can be linked to the crime charged, the evidence is properly admissible. For example, in Lewis v. United States, 771 F.2d 454, 456 (10th Cir.), *cert. denied*, 474 U.S. 1024 (1985), in a case charging burglary of a post office, evidence that the accused had committed a separate prior burglary of a garage was held admissible despite the dissimilarity between the two crimes. The court held that where the accused burglarized the garage in order to take equipment needed for the burglary of the post office, the prosecution could establish a relevant link between the prior act and the crime charged. *Id.*

151. Kuhns, *supra* note 21, at 786. Of course, it can be argued that this example actually involves a non-character propensity inference. For example, in order for the fact that the accused has the specialized skill to be relevant, the trier of fact must believe that a person with such skill is more likely to use that skill to break into the safe. Professor Imwinkelried considers this a clear example of a propensity inference, for the trier of fact must make the inference that the accused has the propensity to employ such a skill in order to conclude that the accused more likely than not used his skill on the occasion charged. *See* Imwinkelried, *supra* note 20, at 51-52.

b. character propensity evidence

Specific acts evidence that creates a character propensity inference is inadmissible.[152] The issue of admissibility of specific acts evidence most frequently arises in the context of a prosecutor's offer to prove that a criminal defendant has committed various bad acts. Relevance of specific acts evidence in this context is wholly dependent upon the propensity inference. There are typically three steps in the inferential process of proof regarding specific acts evidence that creates a character propensity inference.[153] First, the fact finder must infer from the specific acts evidence that the accused has some unique propensity not generally held by the populace at large—a propensity that demonstrates that he is of a certain character or possesses a certain character trait. Next, the fact finder must make the inference that a person with such a propensity or character trait is more likely to act in accordance with that propensity on any given occasion than a person who does not possess that propensity. Finally, in the last step of the inferential chain, the fact finder must infer that this particular character trait is one that will manifest itself repeatedly.[154]

B. Specific Acts Evidence in Sex Crimes

Rule 404(b), as currently applied, prohibits any effort to introduce evidence of the propensity of a person to act in accordance with a character trait associated with a certain prior act.[155] However, there appears to be a general trend in the prosecution of sex crimes to admit evidence of the accused's sexual proclivities.[156] Although it appears that the federal

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

153. *See* Imwinkelried, *supra* note 20, at 42, 45, 55 and 65; Kuhns, *supra* note 21, at 783; Leonard, *supra* note 38, at 9.

154. *See* Imwinkelried, *supra* note 20, at 45, 50-53; Kuhns, *supra* note 21, at 784; Leonard, *supra* note 38, at 9. A simple example of this is a case of assault. Evidence that the accused has committed other acts of assault is introduced to show that the accused was the assailant in the case in question. The other act of assault is only relevant because of the propensity inference. The fact that the accused has been violent on previous occasions leads to the inference that he is the kind of person who is violent. He has a propensity for violence and therefore is more likely to act violently on any given occasion than a person who has never before been violent. Therefore, it is more likely than not that the accused was violent at the particular time in question. The accused committed a prior act which allows the fact finder to infer that he has a character trait representative of that act, and therefore the fact finder determines that he acted consistently with that character trait on a particular occasion. Where the relevancy of any evidence depends on an assumption about how a person or the populace at large acts, the assumption creates a character propensity inference. Kuhns, *supra* note 21, at 782-83.

155. *See* FED. R. EVID. 404(b).

156. *See infra* notes 157-70 and accompanying text.

courts are more hesitant to admit evidence for this purpose,[157] such evidence *will* be permitted in the case of repeated sex crimes between the same parties.[158] This view relies on the theory that evidence is admissible concerning acts of intercourse between an accused and the complaining witness prior to the specific acts for which the accused is charged.[159] The mental disposition of the accused, at the time of the act charged, is relevant.[160] Similarly, evidence that at some prior time the accused possessed the same mental disposition would also be relevant.[161] Therefore, evidence of prior acts between the same parties is admissible as showing a disposition to commit the act charged.[162] The theory itself is based upon the probability that an emotional predisposition or passion will continue beyond the prior incident.[163]

The logical relevance analysis would follow this inferential chain: (1) the item of evidence is that the accused forced the victim to engage in sexual intercourse on a prior occasion; (2) the intermediate inference drawn therefrom is that the accused has an abnormal, lustful inclination for the victim and is more likely to give in to that predisposition and act on it; (3) thus, the accused is more likely than not to be the one who forced the victim to engage in sexual intercourse on the charged occasion. Clearly, this chain of reasoning is nothing more than a character propensity inference chain. As there is evidence that the accused forced this victim to have sexual intercourse before, the trier of fact concludes that he must be the type of person who would force a woman to submit to his sexual desires. Therefore, he must have forced the victim to submit on this occasion as well. The specific acts evidence would be irrelevant without the intermediated inference about the accused's character or propensity.[164] The difference here, in this inferential chain, is that the inference that the accused is of an abominable character is made paramount. Thus, the accused, who may in fact be a loathsome person, is found guilty in part because of an inference as to his character.

This is different from a case in which the victim was raped in some particularly distinctive manner. For example, if the prosecution offered

157. *See, e.g.*, United States v. Cobb, 588 F.2d 607, 611 (8th Cir. 1978) (specific acts evidence only admissible in limited circumstances), *cert. denied*, 440 U.S. 947 (1979).

158. Bracey v. United States, 142 F.2d 85, 88 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944); Hodge v. United States, 126 F.2d 849 (D.C. Cir. 1942).

159. *Bracey*, 142 F.2d at 88.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* Imwinkelried, *supra* note 20, at 52.

evidence that the accused had raped a woman in a particular fashion—perhaps binding her and gagging her with a sweat sock, raping and sodomizing her, and then slashing a giant "X" across her back with a knife—such evidence would be properly admissible against the accused in a later case involving a similarly perpetrated crime.[165] The evidence would be non-character propensity evidence tending to show the identity of the perpetrator, or perhaps modus operandi, was more likely than not that of the accused.[166] Thus, the evidence, though certainly allowing a character propensity inference—that the accused has a violent and depraved sexual inclination—is properly admitted as non-character propensity evidence when offered for a permissible purpose such as to prove identity or modus operandi.

While federal courts have recognized the exception in cases of sex crimes involving the same parties as early as 1944,[167] the federal courts also have recognized that logically the exception should be extended to include sex offenses involving different parties.[168] Perhaps this implication arises from the nature of aberrant sexual conduct. The courts seem to have been more flexible and lenient in admitting evidence of specific acts demonstrating a lustful inclination.[169] The older cases from many state jurisdictions support this same conclusion.[170]

1. Application in the federal courts

The federal courts use the "other purposes" clause as the basis for admitting evidence of an accused's sexual proclivities purportedly for the

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165. *See, e.g.*, McGahee v. Massey, 667 F.2d 1357, 1360 (11th Cir.) (holding that where man wearing white, see-through bikini swimming suit approached woman sunbathing at beach and raped her, evidence that accused on two prior occasions, wearing red, see-through bathing suit, exposed himself to other woman at same beach was admissible to demonstrate manner of operation, identity and type of clothing worn by accused), *cert. denied*, 459 U.S. 743 (1982); Williams v. State, 110 So. 2d 654, 663 (Fla.), *cert. denied*, 361 U.S. 847 (1959) (holding as admissible to show identity in trial for attempted rape where attacker had hidden in back seat of complaining witness's car in a shopping center parking lot, evidence that accused had raped another woman in same parking lot after hiding in back seat of her car).

166. *McGahee*, 667 F.2d at 1360.

167. *See Bracey*, 142 F.2d at 85.

168. *McGahee*, 667 F.2d at 1360.

169. *See Bracey*, 142 F.2d at 88. The court stated:

> The emotional predisposition or passion involved in raping one little girl would seem to be the same as that involved in raping another. Evidence of such a crime committed upon one little girl shows a disposition to commit the same crime upon another, and the probability that the emotional predisposition or passion will continue is as great in one case as the other.

Id.

170. *See, e.g.*, State v. Cupit, 179 So. 837, 839 (La. 1938); State v. Shtemme, 158 N.W. 48, 49 (Minn. 1916).

purpose of showing intent.[171] With regard to sex crimes,[172] the "intent" purpose under Rule 404(b) is applicable where, for example in a rape case, the act is assumed as otherwise proved and the issue is actual intent to commit the act.[173] In such a case, the prosecution's only goal would be to prove the specific intent and negate any other intent than the intent to rape.[174] Thus, specific acts evidence is relevant to negate the claim that the accused's intent was anything other than to commit the crime in question.[175]

a. the theory in Lovely v. United States

This application of the Depraved Sexual Instinct Theory as one of the permissible "other purposes" of Rule 404(b) has been well established over the past several decades. For example, in *Lovely v. United States*[176] the Fourth Circuit examined the general prohibition against character propensity inferences and the application of the permissible purpose of showing intent in rape cases.[177] *Lovely* involved an appeal from a life sentence for rape. The defendant appealed on the grounds of improperly admitted evidence of a prior rape upon another victim.[178] Because the defendant admitted the intercourse, the only issue at trial was whether or not the victim had consented.[179] The court in *Lovely* recognized the Depraved Sexual Instinct Theory as an exception to the general prohibition in its explanation of why the trial court had improperly admitted the evidence of the prior rape. "[E]vidence of other similar offenses is held admissible for the purpose of establishing intent in cases of assault with intent to commit rape, and evidence of other offenses of like character is admissible in prosecutions for crime involving a depraved sexual instinct . . . ."[180]

171. Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948) (admitting similar offenses in cases of assault with intent to rape).

172. Sex crimes to which the Depraved Sexual Instinct Theory has generally been applied extends beyond merely rape crimes and encompasses most cases of sexual child abuse, molestation and even murder in which some sexual perversion was involved. *See infra* notes 217-26.

173. *See Lovely*, 169 F.2d at 390.

174. *Id.* Because the purpose would be to negate any other intent of the accused, there should be no limitation on the victim. Wigmore considers a previous rape assault on another victim as having the same probative value for negating a non-rape intent because such crimes generally involve satisfying aberrant desires, "and no particular [victim] is essential for this." *See* WIGMORE, *supra* note 19.

175. *See* WIGMORE, *supra* note 19.

176. 169 F.2d 386 (4th Cir. 1948).

177. *Id.* at 389.

178. *Id.* at 387.

179. *Id.* at 388.

180. *Id.* at 390 (citation omitted).

The court held that the evidence of the prior rape was improperly admitted at trial.[181] Yet, it appears that the prejudicial effect of the error might have arisen more from the detail of the evidence rather than purely from its admission.[182] Yet the court, while recognizing the applicability of a Depraved Sexual Instinct Theory as an exception to the general prohibition, adhered to the "established" law that specific acts evidence is inadmissible in prosecutions for rape.[183] In explaining this restriction on the depraved sexual instinct exception, however, the court set the stage for the very abuse that it sought to avoid. The court observed:

> Acts showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character. The fact that one woman was raped, however, has no tendency to prove that another woman did not consent.
>
> It is argued that since the defendant might have been convicted of assault with intent to rape under this indictment, it was proper to admit any evidence that would have been proper on a prosecution for assault with intent to rape. The answer is that this was not a prosecution for assault with intent to rape and every one so understood.[184]

The court recognized that a "perverted sexual instinct" is relevant to connect an accused with a sexual crime. Thus, the court expressly stated that if an accused can be shown to have a depraved sexual instinct—a character trait of such an instinct—it is relevant: it has a tendency in reason to link the accused with a crime which involved deviant sexual conduct.[185] The court, however, implicitly concluded that rape:

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181. *Id.* at 389.

182. The appellate court noted that the trial court permitted the prosecution to offer evidence of the prior rape in specific detail. The appellate court viewed this as requiring the accused to defend against the prior charge of rape

> while his hands were full defending the charge contained in the indictment, and the jury was necessarily given the impression, although his character had not been placed in issue, that he was a bad man who had been guilty of other crimes and who might well be convicted on that account.

Id. The court emphasized the importance of the prohibition against character propensity inferences:

> The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence.

Id.

183. *Id.* at 390.

184. *Id.*

185. *Id.*

(1) does not fall within the definition of depraved sexual conduct, and (2) that forcing a woman to have sexual intercourse on one occasion has no tendency in reason to show that the accused would force another woman to have sexual intercourse on a different occasion.[186]

This reasoning is inherently flawed. The court errs in failing to recognize that rape is aberrant sexual behavior. The simple fact that our society punishes this behavior should demonstrate that rape is considered unacceptable conduct.[187] The relevance is clear—the prior crime creates a character propensity. Logically, a jury would conclude that the accused will act in accordance with that character propensity.[188] Herein lies the danger—the jury convicts because the accused is a bad person—the type of person who would force a woman to have sexual intercourse. The jury convicts the accused because of his character and not because the prosecution has met its burden of proof.[189]

The court in *Lovely* improperly emphasized the relevancy question. The United States Supreme Court addressed the issue of the relevancy of character evidence in *Michelson v. United States*.[190] The Court held that the issue is not one of relevancy. Character evidence is inadmissible not

186. *See id.*

187. Perhaps because the case was decided nearly half a century ago, the court did not consider rape a perversion—that rape goes beyond merely a lustful inclination toward another, and that it might demonstrate a need of the perpetrator to perform violent acts upon women, or that the perpetrator has the need to degrade, humiliate and terrify his victims as part of his sexual gratification. Perhaps when expressed in these terms, recognizing rape as depraved sexual behavior becomes more evident.

188. The simple fact that the accused forced one woman to have sexual intercourse demonstrates that the accused is not beyond using force to achieve his goal—be it sexual gratification through fear and intimidation or merely a need to commit acts of violence against women. For example, the Indiana Supreme Court held in Lawrence v. State, 464 N.E.2d 923 (Ind. 1984), that evidence of prior rape was admissible as circumstantial evidence of the accused's guilt of sexual misconduct toward a minor female. The court stated:

> In this case, appellant was twenty-two years old in 1959 and forty-four years old in 1981. Throughout this span of years, a man normally maintains an active sexual interest in and at least some degree of sexual aggression toward women. Achieving sexual connection with a nine year-old child is a sexually aggressive act, accomplished by overpowering and intimidation. It is similar in character to the sexual aggressive attitudes accompanying an approach to a woman by force, threat and engendering fear. Since the male sexual attitude normally continues and persists through these years, the passage of time alone would not end any strand of relevance having it as its basis.

Id. at 924.

In *Lovely* the court's conclusion that rape of one woman is irrelevant to the issue of another woman's consent assumes a character trait of the accused that he is not the type of person who would force a woman to have sexual intercourse. Yet, the fact that the accused used force on a prior occasion demonstrates that he might very well be the type of person to use force.

189. *Lovely*, 169 F.2d at 390.

190. 335 U.S. 469 (1948).

because it is irrelevant but rather because it creates the danger of weighing too greatly with the jury and thereby creating a prejudice against the accused.[191] As a result, the defendant is denied a fair opportunity to defend against the particular charge.[192] Thus, in *Lovely*, the court's conclusion was erroneous—the prior rape was relevant through a character propensity inference.[193]

The court in *Lovely* refused to define rape as aberrant sexual behavior and concluded that one rape has no relevancy on the issue of another woman's consent.[194] Therefore, the prior rape was held inadmissible—not because of any prejudicial effect the specific acts evidence might bring to bear or because the evidence might violate the general prohibition against character propensity inferences—but rather because the court concluded that the evidence was simply irrelevant.[195] By limiting its analysis merely to the *definition* of Depraved Sexual Instinct, and in failing to recognize the relevancy of the prior rape from a character propensity standpoint, the court set the stage for the abuse of the Depraved Sexual Instinct exception. As long as the crime can be defined as depraved sexual conduct the exception would apply, and despite the character propensity inference the prior act would be relevant to connect the accused with any crime of that nature.[196] By excluding the evidence on grounds of irrelevancy, the court left open whether the evidence would have been admissible if it had been found relevant. *Lovely* has never been overturned.

b. the federal courts' analysis under the exception

As Federal Rule of Evidence 404(b) codified the common law prohibition against character propensity inferences,[197] case law interpretation seems to have continued to set the stage for an exception based on the Depraved Sexual Instinct Theory—an exception so broad that it swallows the rule. More recent cases have emphasized that as long as the specific acts evidence is relevant to an actual issue in the case, as long as it can fit one of the recognized permissible purposes, and as long as the probative value is not substantially outweighed by any potential for undue prejudice, the evidence is admissible.[198]

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191. *Id.* at 475-76.
192. *Id.* at 476.
193. But because of the danger of prejudice, perhaps it should have been excluded anyway.
194. Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948).
195. *Id.* at 388.
196. *See id.* at 390.
197. Leonard, *supra* note 38, at 22.
198. *See* United States v. Lyles, 593 F.2d 182, 193 (2d Cir.), *cert. denied*, 440 U.S. 972

Rule 404(b) is an inclusionary rule and as such follows the federal practice of admitting all evidence of other crimes that is relevant to the issue in trial.[199] The analysis under Rule 404(b) therefore starts from the premise that if the specific acts evidence is relevant it should be admissible. Consequently, because specific acts evidence will at least create a character propensity and therefore be relevant, character propensity evidence would be admissible. Yet, as a matter of policy, Rule 404 prohibits evidence when offered for the purpose of creating such a character propensity inference, and thus, the evidence despite its relevance is excluded.[200]

The analysis does not end here. The next step is to determine if there is a permissible purpose for the evidence. As long as the evidence has some other permissible purpose, the evidence, though it allows an impermissible character propensity inference, is admissible.[201]

Although the permissible purposes under Rule 404(b) might permit an improper character propensity inference, a limiting instruction from the judge protects the accused from the improper use of the evidence by the jury.[202] Nevertheless, the courts have encouraged the broad application of the Depraved Sexual Instinct Theory by couching the theory in terms of the permissible purposes for specific acts evidence. Thus, any act of an accused that for some special reason tends to link the accused to the crime charged becomes admissible under the rule.[203]

Federal courts seem to recognize the general prohibition against character propensity inferences but in a very flexible manner. The problem is not one of "pigeon-holing" specific acts evidence into a permissible purpose under Rule 404(b); rather, the difficulty arises in the balancing test. On one side, the court must consider the need for the specific acts evidence in light of the issues at trial, the other evidence available to the prosecution, the persuasive value of the evidence that the other acts were committed and that the accused was the actor,[204] and the strength or

(1979); United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979); United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979).

199. United States v. Masters, 622 F.2d 83, 85 & n.2 (4th Cir. 1980).

200. *See* FED. R. EVID. 404.

201. *Masters*, 662 F.2d at 86; United States v. Waldron, 568 F.2d 185, 187 (10th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); United States v. Brown, 562 F.2d 1144, 1147-48 (9th Cir. 1977).

202. *See Lyles*, 593 F.2d at 190 (providing jury with cautionary instruction regarding use of specific acts evidence sufficient to protect accused against undue prejudice).

203. *See* Smith v. Wainwright, 568 F.2d 362, 363-64 (5th Cir. 1978).

204. This is a very low threshold standard under Huddleston v. United States, 485 U.S. 681, 689 (1988) (stating specific acts evidence need not be proved by preponderance of evidence although proof may not consist only of unsubstantiated innuendo).

weakness of the specific acts evidence.[205] The court must weigh these factors against the degree to which the evidence is unduly prejudicial.[206]

An exception to Rule 404(b) based on the Depraved Sexual Instinct Theory demonstrates the ease with which additional exceptions can be created while raising the concerns of the grave prejudicial potential of such an exception. The federal courts, while not clearly applying the Depraved Sexual Instinct Theory to rape,[207] recognize the necessity of the exception with regards to child abuse cases.[208] For example, in *United States v. Leight*[209] the Seventh Circuit Court of Appeals recognized that some courts admit specific acts evidence in child abuse cases more readily because of the difficulties commonly encountered in proving cases of child abuse.[210] In *Leight* the defendant was convicted for murdering her infant son.[211] On appeal, the defendant argued that similar acts evidence introduced at trial turned the trial into an attack on her character and that she was convicted on the basis of an impermissible character propensity inference.[212] The court rejected this notion, articulating the greater policy concerns arising in child abuse cases.[213]

The court in *Leight* emphasized the necessity of admitting specific acts evidence for the purpose of circumstantially proving the crime charged. "In child abuse prosecutions, there are usually no eyewitnesses to identify the source of the injuries. Rather, such prosecutions are commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse."[214] As a result, the court stated that a proper analysis of the propriety of admitting specific acts evidence in cases of child abuse is a matter within the discretion of the trial court.[215]

This extension and flexibility increases the danger of the abuse that exceptions to Rule 404(b) permit—particularly the Depraved Sexual In-

205. United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

206. *Id.*; United States v. Hines, 470 F.2d 225, 228 (3d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973); *see, e.g.*, Dirring v. United States, 328 F.2d 512, 515 (1st Cir.), *cert. denied*, 377 U.S. 1003 (1964).

207. *See supra* notes 176-96 and accompanying text.

208. *See infra* notes 217-26 and accompanying text.

209. 818 F.2d 1297 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987).

210. *Id.* at 1303.

211. *Id.* at 1299.

212. *Id.*

213. *Id.* at 1303-04.

214. *Id.* at 1301.

215. *Id.* at 1302.

stinct exception.[216] In *United States v. Hadley*[217] the trial court took on the task of finding a permissible purpose for evidence under Rule 404(b).[218] An elementary school teacher was charged with aggravated sexual abuse and abusive sexual contact with a minor.[219] The defense argued that the specific acts evidence of prior abuse did not speak to a material element in the case.[220] The prosecution offered no permissible purpose for the testimonial evidence of the prior abuse, but the court on its own initiative articulated a possible permissible purpose for which the evidence may be admitted.[221] The appellate court found no abuse of discretion[222] in the trial court forcing the admissibility of the evidence in recognition of the policy concerns surrounding child abuse cases.[223]

Federal courts appear gravely concerned with the prosecution of child abuse crimes and therefore appear far more willing to admit specific acts evidence under the Depraved Sexual Instinct Theory. The court in *Leight* held that the trial court did not abuse its discretion by concluding that the probative value of the prior acts of child abuse was not outweighed by any unfair prejudice, even though such prior acts were "of a reprehensible character."[224] However, precisely because of the nature of the crimes involved, the danger for prejudice is extraordinarily high. The same is certainly true with respect to sex offenses—crimes that should universally be recognized as being of a reprehensible character. Yet, because of their distinctive nature, sex crimes would more readily fall

216. For example, in United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974), where the defendant was convicted of infanticide, the trial court admitted evidence of prior incidents where children died from similar causes. The defendant's child had died from cyanosis, which is a sign of oxygen deprivation—usually the result of smothering. *Id.* at 129-30. The court permitted the prosecution to introduce evidence of twenty other episodes of cyanosis among nine different children to whom the defendant had access or of whom she had custody. Seven of these other children died as a result of the cyanosis. *Id.* at 130. However, no evidence was introduced to show that the defendant had ever been implicated in the other deaths, except for one. *Id.* at 133. The trial court admitted the evidence because of the greater need in such cases for evidence. *See id.* at 135. The court of appeals then employed a balancing test to determine if the necessity of the evidence outweighed any undue prejudice. *Id.* Thus, loosely related evidence was made admissible because of the difficulty that the prosecution faced in proving its case.

217. 918 F.2d 848 (9th Cir. 1990), *cert. granted*, 112 S. Ct. 1261 (1992).

218. *See id.* at 851.

219. *Id.* at 850.

220. *Id.* at 851.

221. *Id.*

222. *Id.*

223. *See id.* The court also held that the specific acts evidence was properly admitted under the *Huddleston* threshold test as the prior victims were able to testify in detail regarding the prior acts. *Id.* However, there was no corroboration of either witness's testimony. *Id.*

224. *Id.* at 1304.

within the definition of other acts that for some special reason—uniqueness of the depravity of the offense—tends to link an accused with the crime charged.[225] Not only are all sex crimes similarly reprehensible, but they share the same difficulty in their prosecution.[226] While society is legitimately concerned about prosecuting such crimes, there is no justification for ignoring the highly prejudicial impact that specific acts evidence will have on the jury. The exception based on the Depraved Sexual Instinct Theory especially emphasizes the problems of prejudice because the very nature of the offense makes the evidence of prior acts more prejudicial.

2. Application among the states

Several state courts have taken the admissibility of an accused's sexual proclivities one step further than the federal courts by creating an express exception to the rule.[227] The state jurisdictions that do not expressly recognize the Depraved Sexual Instinct Theory in effect follow it as an exception by interpreting the existing exceptions broadly in cases involving sex crimes.[228]

a. the Michigan example

The Michigan Supreme Court in *People v. Oliphant*[229] addressed the propriety of the Depraved Sexual Instinct Theory. The case represents a vivid example of the problems inherent in the application of the exception and the semantic games courts appear ready to play to justify the use of character propensity inferences. In *Oliphant* the defendant was

225. *See* Smith v. Wainwright, 568 F.2d 362, 364 (5th Cir. 1978).

226. This difficulty is that typically no other percipient witness exists other than the accused and the prosecuting witness, and often little *objective* evidence is available at trial.

227. *See* Woods v. State, 235 N.E.2d 479, 486 (Ind. 1968); State v. Rankin, 181 N.W.2d 169, 171 (Iowa 1970); Commonwealth v. Wilson, 205 A.2d 673, 674 (Pa. Super. Ct. 1964); State v. Golladay, 470 P.2d 191, 204 (Wash. 1970) *overruled in part on other grounds by* State v. Arndt, 550 P.2d 1328 (Wash. 1976).

228. *See, e.g.*, Critchlow v. State, 346 N.E.2d 591, 597-98 (Ind. 1976) (admitting evidence of subsequent act for purpose of showing common scheme or plan in prosecution for sodomy, rape and kidnapping although subsequent crime did not involve sodomy or rape; court stated that jury could conclude that but for police intervention, woman would have suffered similar fate); State v. Spreigl, 139 N.W.2d 167 (Minn. 1965) (stating admission of evidence of prior molestation of children was proper in case charging indecent liberties with minor; conviction reversed on other grounds); State v. Johnson, 371 P.2d 611 (Wash. 1962) (admitting evidence of subsequent misconduct to show common scheme or plan in cases involving indecent liberties with child); Hendrickson v. State, 212 N.W.2d 481, 481-83 (Wis. 1973) (articulating policy of granting greater latitude of proof as to other similar occurrences in cases of sex crimes).

229. 250 N.W.2d 443 (Mich. 1976).

charged with forcible rape.[230] After a mistrial arising from a hung jury, the defendant was convicted in a second trial in which the court allowed evidence that the defendant had committed rape in a similar manner on three previous occasions.[231] The manner in which the defendant committed these rapes demonstrated that he had a strong understanding of the effect of certain forms of evidence in criminal trials—especially regarding the credibility of the victim.[232] The rapes were staged to make it appear that the victim consented in each case. The initial encounter was friendly, and in each instance, the victim removed her own clothes (albeit because of threats made by the defendant). Thus, there was no evidence of any initial struggle or violence.[233] Moreover, in two instances, the defendant gave the victim information about his identity, such as his name, address and car license number.[234] Such information tended to lessen the credibility of the victims when they reported the incident.[235] On the night of the alleged fourth rape, the defendant even went so far as to go to the police himself claiming that he had an argument with the victim and was concerned about what she might do as a result.[236] This detailed orchestration of his crimes presents a picture of a defendant who a jury could easily believe is guilty and yet might be able to escape conviction because of his ability to manipulate evidence.

The court appears to have justified its decision to admit the evidence of the prior rapes through semantic manipulation. The court concluded that the specific acts evidence was admissible on the issue of the victim's lack of consent because such evidence had a tendency in logic to show a plan or scheme by which the defendant made it difficult for the prosecution to show the victim's lack of consent.[237] In dissent, however, Justice

230. *Id.* at 445.
231. *Id.* at 445-46.
232. *See id.* at 450.
233. *Id.* at 445-49.
234. *Id.* at 448.
235. *Id.* at 449.
236. *Id.* at 446.
237. *See id.* at 449. The court also stated:

> [T]he People did not offer the prior acts to prove prior rapes, or that the defendant is a bad man with criminal propensities. The People offered the prior acts to show the scheme . . . employed by the defendant in raping the complainant *in a manner and under circumstances* which gave the appearance of consent should he meet with resistance.

Id. at 450. This explanation is flawed in its reasoning. As each prior incident was distinct and separate, there is no logical inferential chain which demonstrates the relevance of the prior rapes to the claim of continuing plan or scheme. Thus, the proper, and probably only, inferential chain would be as follows: one who manipulates evidence to create the appearance of consent during a rape is more likely to manipulate evidence in a similar fashion than is one who has never before so manipulated evidence (and arguably would not know how to do so).

Levin recognized that the majority was side-stepping the propensity problem. Justice Levin dissented because the majority failed to state any basis for creating a justifiable exception to the general rule against the admission of specific acts evidence.[238] He focused primarily on the dangers of recognizing an exception that truly underlay the court's decision—one which essentially articulates the Depraved Sexual Instinct Theory.[239]

In *Oliphant* the Michigan Supreme Court appeared unwilling to pay the price of sacrificing what is arguably just for society for the principles of justice embodied in the exclusionary rules. However, in so doing, the court only obscured its true intentions thereby making the rule arising from the decision more difficult to understand and apply.

b. the Florida example

In Florida the specific acts evidence rule is derived primarily from the Florida Supreme Court's holding in *Williams v. State*.[240] In *Williams* the defendant attacked a woman in her car in which he had been hiding.[241] He claimed to have mistaken the car for his own and was only taking a nap in the back seat.[242] The prosecution offered evidence of a prior occurrence in which a young girl found the defendant in the back seat of her car, screamed and scared him off. This other incident occurred in the same parking lot as the occasion charged, and the defendant, upon being apprehended by the police, claimed he had mistaken the car for his brother's and was only taking a nap.[243] The court held the specific acts evidence admissible.[244]

Therefore, the accused must have manipulated the evidence on the occasion in question. Thus, the complaining witness more likely did not give her consent to the sexual intercourse. This is another example of an inferential chain showing that the relevance of the other incidents of rape are only relevant to create a character propensity inference—the accused is the type of person who will manipulate the evidence to make it appear that his victims consented.

238. *Id.* at 457 (Levin, J., dissenting).

239. *See id.* (Levin, J., dissenting). Justice Levin stated:

> The evidence that Oliphant is a rapist is inadmissible to prove a character trait or propensity to commit the charged offense to support an inference that he may have raped the complainant. Such evidence, while probative of a propensity to use force to have sexual intercourse if advances are resisted, is indistinguishable from what may not be proven, propensity to rape.

Id. (Levin, J., dissenting). However, Justice Levin explained that such evidence is indeed probative. "A man's propensity to use force is not probative of non-consent; it shows rather how he may react or what may occur if the woman does not consent." *Id.* (Levin, J., dissenting).

240. 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

241. *Id.* at 656.

242. *Id.* at 657.

243. *Id.* at 657-58.

244. *Id.*

The court in *Williams* held that relevant evidence is admissible if offered for any other reason than to show bad character or propensity.[245] Florida courts have freely applied the *Williams* rule in cases involving sexual abuse of minors.[246] Some Florida courts have gone so far as to expressly recommend that the legislature modify its rule prohibiting the introduction of specific acts evidence for the purpose of showing character[247] to expressly permit such evidence for the purpose of showing propensity in cases involving sexual abuse of minors.[248]

Proponents of this move argue that specific acts evidence in cases involving sex crimes is proper because of the belief that there is a strong tendency among sex offenders to repeat such offenses.[249] To hold this belief, however, is to abandon the prohibition against character propensity inferences altogether, for this belief is the same as the belief that all people accused of sex crimes have a natural propensity for aberrant sexual behavior.

Florida's District Court of Appeal allowed specific acts evidence in *Heuring v. State*[250] to show a pattern of criminality on the part of the accused.[251] The Florida Supreme Court, however, rejected this rationale in favor of admitting the evidence as relevant to corroborate the victim's testimony and to bolster her credibility.[252] The court recognized the

245. *Id.*

246. *See, e.g.*, Cotita v. State, 381 So. 2d 1146 (Fla. Dist. Ct. App. 1980) (holding in case of lewd and lascivious assault upon five-year-old daughter, evidence of accused's assaults upon neighborhood children admissible to show pattern of criminality), *petition denied*, 392 So. 2d 1373 (Fla. 1981); Cantrell v. State, 193 So. 2d 444 (Fla. Dist. Ct. App. 1966) (holding in case of lewd and lascivious assault on eight-year-old girl, evidence of other assaults on children in accused's neighborhood admissible to show accused's course of conduct); Gossett v. State, 191 So. 2d 281 (Fla. Dist. Ct. App. 1966) (holding in case of assault and rape of fourteen-year-old girl, evidence of similar assaults upon same victim by accused admissible to show pattern of criminality).

247. *See* FLA. STAT. ANN. § 90.404(2) (West 1979) (similar to Federal Rule of Evidence 404(b)).

248. *See, e.g.*, State v. Rush, 399 So. 2d 527, 529 (Fla. Dist. Ct. App. 1981).

249. *See id.* ("It is suspected that an in-depth study of such incidents would demonstrate that the actions of the aggressor constitute a pattern of conduct rather than an isolated incident.").

250. 495 So. 2d 893, 894 (Fla. Dist. Ct. App. 1986), *vacated*, 513 So. 2d 122 (Fla. 1987). *Heuring* involved a case where the accused was charged with four counts of sexual battery: two against his step-daughter and two against his step-son. Two other counts were severed, and the fourth count was dropped altogether. The accused only stood trial on the initial three counts. The state sought to introduce evidence of sexual battery of the accused's daughter—an incident that occurred nearly twenty years before. The state also sought to introduce evidence of lewd and lascivious assaults by the accused on three other children. The accused was convicted on two counts, and the appellate court affirmed. *Id.*

251. *Id.*

252. *Heuring v. State*, 513 So. 2d 122, 124 (Fla. 1987).

problems inherent in sex crimes against minors: typically the victim knows the perpetrator and is therefore more easily intimidated by his presence in the courtroom; the victim is often the only witness; corroborating evidence is usually scarce; and most often the credibility of the witness is the primary issue.[253] Thus, the court upheld the appellate court's determination that the specific acts evidence was properly admitted, though on a different theory, because the strict test governing such evidence had been relaxed in such cases.[254] The effect of this decision, though, is the same as if the court simply held that an absolute exception to the prohibition against character propensity evidence exists for cases involving sex crimes.[255]

c. the California view

California cases seem to focus on a balancing of probative value and potential for prejudice in determining the admissibility of specific acts evidence.[256] While the California Evidence Code expressly prohibits admitting specific acts evidence to prove character propensity,[257] in cases involving sex crimes California case law has recognized a limited excep-

253. *Id.*

254. *Id.*

255. For a more thorough discussion of Florida's rules regarding specific acts evidence and *Heuring v. State*, see John McCorvey, Note, *Corroboration or Propensity? An Empty Distinction in the Admissibility of Similar Fact Evidence*, 18 STETSON L. REV. 171 (1988).

256. People v. Peete, 28 Cal. 2d 306, 315, 169 P.2d 924, 929 (except when showing merely criminal disposition, relevant specific acts evidence is admissible even if revealing commission of other offenses; evidence must tend logically, naturally and by reasonable inference to establish material fact), *cert. denied*, 329 U.S. 790 (1946); People v. Donnell, 52 Cal. App. 3d 762, 774, 125 Cal. Rptr. 310, 317 (1975) (defining general test of admissibility: whether evidence tends logically, naturally and by reasonable inference to establish material fact, whether evidence embraces commission of another crime or not, whether similar or not and whether part of single design or not); People v. Maler, 23 Cal. App. 3d 973, 980, 100 Cal. Rptr. 650, 653-54 (1972) (applying California Evidence Code § 352 test for admissibility to evidence under California Evidence Code § 1101).

257. CAL. EVID. CODE § 1101 (West Supp. 1992) provides, in full:

> (a) Except as provided in this section and in sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Id.

tion to the prohibition.[258] Nevertheless, California case law seems to have created some confusion regarding the admissibility of evidence of this kind.

While California Evidence Code section 1101 expressly prohibits admitting evidence for the purpose of creating a character propensity inference,[259] the courts have invariably employed a balancing test[260] similar to that under Federal Rule of Evidence 403.[261] The confusion appears to arise from the inconsistency in the courts' application of both the prohibition and the limited exception. However, California courts have also held that, in cases involving sex crimes, evidence of other offenses that are not too remote and involve the same victim is admissible under a form of the Depraved Sexual Instinct Theory—such evidence is admissible to show a lewd disposition of the accused.[262]

California also appears more willing to expand this exception in cases involving sexual abuse of minors. In *People v. Callan*[263] the court

258. *See* People v. Sylvia, 54 Cal. 2d 115, 351 P.2d 781, 4 Cal. Rptr. 509 (1960) (holding evidence of other sex offenses with same victim, not too remote, admissible to show lewd disposition or intent of accused toward victim); People v. Stewart, 181 Cal. App. 3d 300, 226 Cal. Rptr. 252 (1986) (holding trial for attempted incest and oral copulation with person under 18, evidence of uncharged sexual offenses by accused properly admitted to show accused's lewd disposition toward victim); People v. Callan, 174 Cal. App. 3d 1101, 220 Cal. Rptr. 339 (1985) (evidence of uncharged sexual conduct with child admissible as tending to show continuing plan or design by accused to use minor females of his own household to satisfy sexual gratifications and wants).

259. CAL. EVID. CODE § 1101 (West Supp. 1992). See *supra* note 257 for the text of § 1101.

260. *Peete*, 28 Cal. 2d 306, 169 P.2d 924 (applying California Evidence Code § 352 to question of admissibility of specific acts evidence); *Maler*, 23 Cal. App. 3d 973, 100 Cal. Rptr. 650 (stating California Evidence Code § 352 applies to § 1101 specific acts evidence).

261. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The California equivalent of the Federal Rule is found in California Evidence Code § 352: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1991); *see also* BERNARD S. JEFFERSON, II CALIFORNIA EVIDENCE BENCHBOOK § 33.6, at 1203 (2d ed. 1982).

262. *Sylvia*, 54 Cal. 2d at 120, 351 P.2d at 785, 4 Cal. Rptr. at 513. The California Supreme Court also held in *Sylvia* that where acts indisputably show an "evil intent" and the accused does not specifically raise the issue of intent in his defense, evidence of specific acts should only be admitted when they involved the same victim—the prosecuting witness. *Id.* However, this narrow exception is arguably expanded where the other acts are not too remote, are similar in kind to the offense charged and are committed with persons similar to the prosecuting witness. *See* JEFFERSON, *supra* note 261, at 1212.

263. 174 Cal. App. 3d 1101, 220 Cal. Rptr. 339 (1985).

held that evidence of uncharged sexual conduct with a child was admissible as tending to show a continuing plan or design by the accused to use minor females of his own household to satisfy his sexual gratifications and wants.[264] While the court couched its holding in terms of one of the permissible purposes for introducing specific acts evidence,[265] there is little difference between holding that such evidence may be admitted to show a plan to fulfill a depraved sexual desire or holding that the evidence is admissible to show that the accused has such a depraved sexual desire with which he acted in conformity.

Moreover, California appears more willing to allow specific acts evidence under a narrow version of the Depraved Sexual Instinct Theory provided such evidence is strong enough. In *People v. Stewart*[266] the accused was convicted of attempted incest and oral copulation with a minor.[267] On appeal, the court held that evidence of uncharged acts allegedly committed by the accused was admissible to show the accused's lewd disposition toward the victim where the victim's testimony of the prior acts was corroborated by nine sexually explicit photographs of the accused and the victim.[268]

Thus, despite the express language of section 1101 of the California Evidence Code,[269] prohibiting the introduction of specific acts evidence for the purpose of creating a character propensity inference, California, while not recognizing an absolute exception under the Depraved Sexual Instinct Theory, appears willing to side-step the prohibition under a more limited exception in sex crime cases.[270] This presents the same danger as if California simply recognized an absolute exception to the general prohibition because section 1101 already employs the balancing test weighing prejudicial effect against probative value.[271] Even when ap-

264. *Id.* at 1110, 220 Cal. Rptr. at 344.

265. California Evidence Code § 1101 follows the same "other purposes" exception as Federal Rule 404(b): "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident)." CAL. EVID. CODE § 1101(b) (West Supp. 1992); *see* FED. R. EVID. 404(b).

266. 118 Cal. App. 3d 300, 226 Cal. Rptr. 252 (1986).

267. *Id.* at 302, 226 Cal. Rptr. at 253.

268. *Id.*

269. *See supra* note 257.

270. However, at least one court has held that in cases involving sex crimes, evidence of uncharged offenses is properly admissible to show sexual passion for a particular individual because in such cases the exclusion of specific acts evidence under § 1101 is inapplicable in such cases. People v. Barney, 143 Cal. App. 3d 490, 192 Cal. Rptr. 172 (1983).

271. People v. Matson, 13 Cal. 3d 35, 528 P.2d 752, 117 Cal. Rptr. 664 (1974) (determining admissibility of specific acts evidence lies within sound discretion of trial judge weighing probative value of such evidence against prejudicial effect); *see also* JEFFERSON, *supra* note 261.

plied narrowly or couched in terms of one of the permissible purposes, California's application of the Depraved Sexual Instinct Theory presents the same problem as the absolute exception of other states: specific acts evidence is introduced solely to show that the accused possesses a reprehensible character. Yet the California courts hide this by straining their analysis to make the evidence appear to fall within one of the permissible purposes. Can a jury reasonably be expected to distinguish between a permissible purpose and the impermissable purpose of using highly prejudicial evidence of prior aberrant sexual behavior to draw an impermissible character propensity inference?[272]

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272. Another element that exists in the California exception, an element that perhaps increases the danger of eradicating the prohibition against character propensity inferences in sex crimes altogether, is the admissibility of expert psychological testimony regarding the accused's mental state. In *People v. Jones*, the accused was convicted of sexually abusing his nine-year-old niece. 42 Cal. 2d 219, 221, 266 P.2d 38, 41 (1954). On appeal, Jones argued that the conviction should be reversed because the trial court refused to admit the defense expert's psychological testimony regarding Jones's psychological profile. *Id.* at 222, 266 P.2d at 41. The defense expert's conclusion, based on two examinations of Jones, was that Jones was not a sexual deviant and that "he [was] incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and a half years of age." *Id.* The defense sought to offer this evidence to show that Jones had a normal state of mind of a person not prone to commit such an act as that with which he was charged. *Id.*

The penal code section under which Jones was charged required proof of the specific intent to arouse, appeal, or gratify the lust or passions or sexual desires of the person. *Id.* at 223, 266 P.2d at 41. The California Supreme Court stated that the statutory provisions concerning persons who commit sex offenses against minors demonstrated a legislative conclusion that such persons are more likely to commit such sex crimes than persons without such propensities. *Id.* at 223, 266 P.2d at 42. The court stated:

> Evidence that a person has no such disposition is analogous to that in regard to character, for it bears upon the probability of the innocence of the accused. From evidence which tends to prove that a person is not a sexual psychopath, an inference reasonably may be drawn that he did not commit the [sexual offense charged].

Id. at 224-25, 266 P.2d at 42. The legislature created a requirement that all persons convicted of such sex crimes against minors be subject to a psychological determination of sexual psychopathy under California Welfare and Institutions Code §§ 6307-09. CAL. WELFARE & INST. CODE §§ 6307-09 (West 1984). Because of this requirement, the California Supreme Court held that the trial court should have permitted Jones to offer the expert testimony to show that he did not have such a disposition. *Jones*, 42 Cal. 2d at 225, 266 P.2d at 42.

Some courts have interpreted *Jones* to permit expert psychiatric evidence only on the issue of intent and not as permitting the accused to offer such evidence to show good character. *See, e.g.*, People v. Taylor, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963), *disapproved on other grounds*, People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). However, *Jones* may be interpreted to permit the introduction of expert psychological testimony by the state once the defense has done so. Thus, while the accused would still control whether such character evidence would be admitted at all, by choosing such a strategy of attacking the charge, the accused might be opening the door to the very kind of highly prejudicial character evidence which, arguably, an absolute prohibition against evidence creating a character propensity inference would prevent.

V. RECOMMENDATION

The Depraved Sexual Instinct Theory represents one of the clearest examples of the problems that arise when the permissible purposes for introducing specific acts evidence is misapplied. The current application of Rule 404(b) by the courts has liberalized the extent to which specific acts evidence is generally admissible.[273] A competent prosecutor seeking to introduce specific acts evidence against the accused has only a minimal burden before such evidence would be admitted. The minimal relevance hurdle of Rule 401,[274] along with the *Huddleston* standard of proof required to show that the accused committed the other acts,[275] seems to contribute to the proliferation of cases in which courts rely on the Depraved Sexual Instinct Theory to admit specific acts evidence improperly. As the Federal Rules of Evidence serve as a model for the state rules of evidence, and because Rule 404(b) is a codification of the common law, a proper understanding and strict application of Rule 404(b) is essential to preserve the protection against character propensity inferences at the federal and state court levels. With the number of state and federal courts that seem willing to adopt, if not as an absolute exception, variations of the Depraved Sexual Instinct Theory, the rule against introducing specific acts evidence for the purpose of creating a character propensity inference appears in danger of being all but wiped clear from the books. If this trend continues, other exceptions just as damaging as the Depraved Sexual Instinct Theory are bound to find a home in the "other purposes" clause of Rule 404(b) until the rule will no longer offer any substantive protection against the use of specific acts evidence.[276]

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273. *See* Huddleston v. United States, 485 U.S. 681, 689 (1988); Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); United States v. Fosher, 568 F.2d 207, 212 (1st Cir. 1978).

274. Federal Rule of Evidence 401 provides: " 'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence." FED. R. EVID. 401 (emphasis added).

275. *See Huddleston*, 485 U.S. at 689.

276. In 1990 Congress proposed an amendment to Rule 404(b), adding a pretrial notice requirement for use of specific acts evidence in criminal cases. The amendment took effect on December 1, 1991.

> Under the new amendment, Federal Rule of Evidence 404(b) reads:
> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The Depraved Sexual Instinct Theory has been used to take advantage of the misunderstood and misapplied theory of Rule 404(b). Concerns with prosecuting sex crimes, the difficulties in proof, and the heinous nature of these offenses have led many states and some federal courts to seek ways to admit additional evidence in such cases.[277] After the prosecution has met its minimal burden regarding the specific acts evidence, the accused's best, and most likely his only, argument for exclusion is that the evidence though relevant is prejudicial, distracting and time-consuming.[278] Rule 403's balancing test may be the only protection

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FED. R. EVID. 404(b).

Rule 404(b) is one of the most often cited rules in the Federal Rules of Evidence. FED. R. EVID. 404(b) advisory committee's note. Congress appears to have considered this fact in recognizing that specific acts evidence is an important element in the prosecution's case against the accused. *See id.* The 1991 amendment to Rule 404(b) provides a qualified notice requirement in criminal cases. The amendment requires the prosecution, upon the request of the accused, to provide notice to the accused in advance of trial of the nature of any specific acts evidence it intends to introduce at trial. The amendment also permits notice during trial provided the prosecution makes a showing of good cause why such notice was not provided to the accused prior to trial. *See* FED. R. EVID. 404(b) & advisory committee's note. The intent of Congress in adding this amendment to the Rule was to reduce surprise for the accused and thus help promote early resolution of the question of admissibility. *Id.*

The amendment probably will have little effect on the substantive question of admissibility as the amendment focuses primarily on the procedural aspect of introducing specific acts evidence against an accused. The pretrial notice requirement, however, may ultimately affect the admissibility of such evidence if questions arise regarding the reasonableness, timeliness or adequacy of the pretrial notice. The amendment expressly requires that once the accused has requested notice of any specific acts evidence that the prosecution may introduce at trial, the prosecution "shall provide *reasonable* notice in advance of trial." FED. R. EVID. 404(b) (emphasis added). Moreover, in cases where the prosecution fails to provide pretrial notice, the amendment implies that the court must entertain some kind of hearing to determine whether the prosecution had good cause that excuses the pretrial notice. Thus, the question becomes whether the court will sanction the prosecution for failing to provide the requisite notice without good cause by excluding the evidence altogether or by some other sanction less costly to the prosecution's case. Therefore the issue that must now be decided is whether specific acts evidence is inadmissible not because it is offered for an improper purpose but rather because the prosecution failed to make its showing of good cause that would excuse the requisite pretrial notice to the accused under the Rule.

Because the amendment has recently taken effect, there has been little time for courts to analyze any substantial effect the procedural requirement might have on the admissibility of specific acts evidence. Whether the procedural notice requirement will serve to protect the rights of the accused or facilitate the admissibility of specific acts evidence against him is unclear. However, as the defense already had the opportunity to oppose any proffer of such evidence by the prosecution prior to the enactment of the amendment to Rule 404(b), the new procedural requirement may only provide more time in which the defense may make its motion to exclude the evidence. Yet perhaps this amendment is Congress's first step in recognizing the problems with the current applications of Rule 404(b), which could lead to further reconsideration of more substantial issues arising under the growing number of exceptions and their extension to the prohibition against character propensity evidence.

277. *See supra* notes 216-72 accompanying text.

278. *See* FED. R. EVID. 403; *supra* note 261.

afforded an accused when confronted with an offering of specific acts evidence under the Depraved Sexual Instinct Theory. However, when such evidence is forced into the mold of a permissible purpose under Rule 404(b), the argument that undue prejudice substantially outweighs the probative value of the evidence becomes far less persuasive.

If Rule 404(b)'s prohibition against the use of character evidence is to have any legitimate power, the Depraved Sexual Instinct Theory has no place in the law of evidence. Character evidence is generally excluded because its prejudicial impact outweighs its probative value.[279] This rule of exclusion clearly applies to evidence of sexual proclivities—evidence that is arguably of the most inflammatory type. However, if evidence of sexual propensity is to be admissible against an accused, perhaps Rule 404(b) should be repealed.

Although eliminating Rule 404(b) entirely and allowing the balancing test of Rule 403 to take its place might solve some problems, it would ignore the fundamental purpose behind Rule 404(b)'s prohibition. Rule 403 follows the general policy of the federal rules—a bent toward admitting evidence.[280] Moreover, the Depraved Sexual Instinct Theory also leans in favor of admitting evidence of the accused's sexual proclivities. Yet Rule 404(b) starts from the opposite premise and *precludes* specific acts evidence when offered for a character propensity purpose.[281] Thus, eliminating Rule 404(b) would more likely result in greater admissibility of sexual proclivity evidence since such evidence would need only pass a minimal relevancy test.[282]

A more appropriate approach would be to adhere strictly to the general prohibition of Rule 404(b) and properly apply the "other purposes" clause. This would perhaps help curb abuses of the Rule such as the Depraved Sexual Instinct Theory. By strict adherence to the prohibition,

279. WIGMORE, *supra* note 19, at 1345.

280. Under Federal Rule of Evidence 402, "[a]ll relevant evidence is admissible." FED. R. EVID. 402. Rule 403 simply limits the general rule in favor of admissibility when the probative value of relevant evidence "is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403 (emphasis added); *supra* note 261; *see also* Kuhns, *supra* note 21, at 800 ("[R]ule 403 provides that a court may exclude relevant evidence only if its probative value is 'substantially outweighed' by the countervailing factors. Thus, the balance is likely to be struck in favor of admissibility.").

281. *See* FED. R. EVID. 404(b).

282. Without Rule 404(b), there would no longer be any need to meet the *Huddleston* standard of proof for the specific acts. *See* Huddleston v. United States, 485 U.S. 681, 687-88 (1988). This would simply lessen the number of hoops through which the prosecution would have to jump in order to have the evidence admitted—even though currently those hoops appear quite large and close to the ground.

the Rule should properly be viewed as a rule of exclusion. Courts would therefore start from the premise that character propensity evidence is inadmissible. From this starting point, a prosecutor would have to bear a true burden, as generally is the case in any criminal action, to show a permissible purpose for the evidence before it would be admitted.[283] Thus, the courts would no longer have the luxury of trying to find a permissible purpose when the prosecution fails to do so. Should the prosecution succeed in making a proper showing, the evidence should then be subject to a reverse form of Rule 403's balancing test requiring that the probative value substantially outweigh the prejudicial effect. Thus, the accused would receive greater protection than afforded under the current application of the Rule. The recommended change would properly create a presumption of inadmissibility of specific acts evidence, placing the burden of overcoming that presumption on the prosecution.

VI. CONCLUSION

The need to punish sex crimes is undeniably great. Our system of justice must provide prosecutors with ample tools to pursue and convict perpetrators of such heinous crimes. We must not, however, abandon the fundamental principle of our jurisprudence in the process. Our society must never reject the principle that justice demands that we punish people, not because of who they are but because of what they have done. The courts have demonstrated that they do not understand clearly the permissible purposes for which specific acts evidence may be admitted against an accused. The Depraved Sexual Instinct Theory is a blatant example of the misapplication of Rule 404(b) in the prosecution of sex crimes. Consistency demands that we either adhere strictly to the prohibition against admitting specific acts evidence for the purpose of showing sexual propensity or abandon our belief that justice punishes deeds and not character. An accused must be afforded protection from evidence of a highly prejudicial nature. Such evidence must remain inadmissible unless offered for a proper purpose where the probative value outweighs the danger of prejudice. Nevertheless, it appears that this concern carries little weight under Rule 404(b) as currently applied.

To continue to treat Rule 404(b) as inoperative only in cases of sex crimes is unmanageable. The Depraved Sexual Instinct Theory creates an exception that swallows the rule. It opens a Pandora's Box and frees

283. While the prosecution bears the ultimate burden of proving guilt in a criminal case and the moving party bears the burden for admissibility, specific acts evidence is more often offered by the prosecution against the accused. *See* Kuhns, *supra* note 21, at 799. Thus the better rule would require the prosecution to make a showing why the evidence should be admitted.

the evils of uncontrollable character evidence into potentially all criminal trials. It unleashes a torrent of evidence against an accused—evidence that serves only to confuse and prejudice. Without any substantial standard for proving that the accused committed the other acts, establishing a character propensity becomes merely a matter of judicial discretion. Charges that the accused committed other acts, acts not even violative of any criminal law, become admissible and create character propensity inferences—inferences that prejudice the position of the accused resulting in improper conviction. Conduct for which there was insufficient evidence in a civil matter thus serves as admissible evidence in a criminal trial to prove the accused's sexual proclivities. Thus, the jury is permitted to convict on the basis of that character propensity inference.

An accused is tried for what he has done and not for who he is or who we may think him to be. To ensure any true protection of this principle and afford the accused the protection he is due, we must start from a presumption that evidence of specific acts is inadmissible to create the inference that the accused acted in conformity with a character trait. The Depraved Sexual Instinct Theory may be one cure for the difficulties encountered in prosecuting sex crimes. However, it is a cure that is ultimately worse than the disease.

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