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Character and Motive in Evidence Law

David P. Leonard

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INTRODUCTION

Motives affect behavior. Thus, although "motive" is not an essential element of any charge, claim, or defense,[1] evidence that a person has a particular motive can be relevant to an ultimate fact in both civil and criminal cases.[2] The variety of circumstances in which motive might be relevant is endless, and thus any effort to catalog the possibilities would fail.[3] The principle, however, is basic and

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* Professor of Law and William M. Rains Fellow, Loyola Law School. A version of this Article will appear in a volume of *The New Wigmore: A Treatise on Evidence*, currently under way. I wish to thank students Carrie Robitaille and Karl Schmidt for their research assistance, and colleagues Victor Gold, Stanley Goldman, Laurie Levenson, and Gary Williams for their insights into the *Cunningham* case, which was the subject of a faculty workshop at Loyola Law School. We did not agree about *Cunningham*, but my colleagues' thoughts helped guide me in arriving at the present analysis. Thanks also to Howard Leonard, Ph.D., for his helpful insights about the nature of addiction.

1. *See* Huey L. Golden, Comment, *Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 LA. L. REV. 179, 206 (1994) (noting that motive is not normally an element of the crime at issue in the case).

2. As Wigmore stated,

> One is perhaps apt to think of "motive" as a matter involved in criminal cases only. But . . . the process involved—that of inferring the existence of some emotion, from which in turn the doing of an act is to be inferred—shows that this process may also be equally a feature of proof in civil cases, though not as frequently as in criminal cases.

2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 389, at 416-17 (James H. Chadbourn ed. rev. 1979) [hereinafter WIGMORE (1979)].

3. Referring to proof of emotions including motive, Wigmore made the point forcefully:

> Obviously, the whole range of human affairs is involved. It would be idle to attempt to catalog the various facts of human life with reference to their potency to excite a given emotion. Such an attempt would ex-

simple: When motive is relevant, evidence tending to show its existence is usually admissible, subject to exclusion if the risk of unfair prejudice is too great.

One method of proving the existence of a motive is to offer evidence that the person alleged to have committed the act in question has committed one or more other crimes, wrongs, or acts, and a rule followed in every American jurisdiction[4] provides for admission of such "uncharged misconduct"[5] when it is relevant to prove motive.[6]

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hibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules, and that a given fact can have an unvarying quantity of emotional potency. It would also be useless, because the emotional effect of any fact must depend so often on the surrounding circumstances that no general formula could provide for the infinite combination of circumstances. Courts have therefore always been agreed that in general no fixed negative rules can be made; that no circumstance can be said beforehand to be without the power of exciting a given emotion; and that, in general, *any fact may be offered* which by possibility can be conceived as *tending with others towards the emotion* in question.

2 *id.* at 417.

4. The language most commonly used is that of Federal Rule of Evidence 404(b). That rule provides, in its entirety:

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

FED. R. EVID. 404(b).

5. The term "uncharged misconduct" appears to have been coined by Professor Imwinkelried. *See, e.g.*, EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1996). The term will be used in this Article, but its scope must be understood. "Uncharged misconduct" refers to other crimes, wrongs, or acts committed by a person currently alleged to have committed the conduct concerning which the criminal charge or other claim has been brought. Those other crimes, wrongs, or acts might well have been the subject of criminal charges, but because they are not the subject of the *current* case, they are treated as "uncharged." Though "uncharged misconduct evidence" is therefore a bit awkward, the term has caught on. A search of the Westlaw "ALLCASES" database in July 2000, produced 365 reported decisions con-

The same uncharged misconduct evidence, however, is almost always relevant for a different—and impermissible—purpose: to prove the character of the person and from that fact, the person's behavior on the relevant occasion. Thus, when offering uncharged misconduct evidence on a motive theory, the party should anticipate an objection, and should be prepared to demonstrate that the evidence proves motive without requiring an inference of the person's character, and that the probative value of the evidence justifies its admission despite the risk of unfair prejudice.

The rule is thus easy to state: The court may admit uncharged misconduct evidence when it tends to show a relevant motive other than through an inference of character. The difficulty is to determine the types of inferences sanctioned by the rule and the types forbidden. Much power rests in the hands of trial judges, subject to appellate oversight. Under-inclusiveness leads to the exclusion of too much relevant evidence, making the truth-determination function of the trial more difficult to serve. Over-inclusiveness creates great danger of unfair prejudice, which can lead both to inaccurate truth-determination and fundamental unfairness. The controversy about the scope of the rule is underscored by this fact: The "other crimes, wrongs, or acts" rule, in its entirety, has been the subject of more appeals than any other evidence rule.[7] A good-sized chunk of those cases concern "motive."[8]

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taining the phrase.

6. Wigmore wrote that "the fact that the circumstance offered involves also *another crime* by the defendant charged is in itself no objection, if the circumstance is relevant [to show motive]." 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 389, at 330 (3d ed. 1940) [hereinafter WIGMORE (1940)].

7. *See* IMWINKELRIED, *supra* note 5, § 1:04, at 18 ("The admissibility of uncharged misconduct evidence is the most frequently litigated evidentiary issue on appeal."). Imwinkelried reports that a mid-1980s Westlaw search of key numbers relating to uncharged misconduct evidence (157K369, 157K370, 157K371) revealed 11,607 state cases and 1894 federal cases. *See id.* In July 2000, the same search revealed 17,120 state cases and 4860 federal cases.

8. Of the more than 17,000 state cases uncovered by the July 2000, Westlaw search, nearly 6000 fell into key number 157K371 (acts showing intent, malice, or motive); of the nearly 5000 federal cases, more than 1600 fell into that category.

The purpose of this Article is to examine closely the use of uncharged misconduct evidence to prove motive. The problem with motive, as with all other theories under the "other crimes, wrongs, or acts" rule, is always the same: Does the relevance of the evidence to the case depend on the application of a character inference—an inference as to the person's character-based propensity to behave in a particular way or possess a particular state of mind? If the chain of inferences leading from the evidence to the fact it is offered to prove *requires* a character inference, the evidence is inadmissible.[9] If it does not, it is potentially admissible.[10] Exactly when the evidence passes this threshold test is a complex and controversial question, and exposition of a complex problem can always benefit from a good framing story. Ours is provided by the recent case of *United States v. Cunningham*.[11]

Constance Cunningham, a nurse, was charged in connection with the theft of the controlled substance Demerol, a pain killer, from a locked hospital cabinet. The drug had been contained in syringes. In police interviews, Cunningham and the other four nurses who had access to the cabinet all denied tampering with the syringes. Cunningham admitted, however, that she had once been addicted to Demerol, and a urine test result was consistent with recent Demerol use.[12]

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9. The general proposition is stated in Federal Rules of Evidence 404(a): "Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." FED. R. EVID. 404(a). The principle is applied to the matter at issue in Rule 404(b), which states: "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." FED. R. EVID. 404(b).

10. I say the evidence is "potentially" admissible because the absence of a character inference does not automatically make the evidence admissible. The court must also determine that the evidence is not overly prejudicial, for example. *See* FED. R. EVID. 403; Huddleston v. United States, 485 U.S. 681, 687-91 (1988) (stating that the trial court must assess "whether the probative value of similar acts [of] evidence is substantially outweighed by its potential for unfair prejudice").

11. 103 F.3d 553 (7th Cir. 1996).

12. *See id.* at 555.

At trial, the court permitted the prosecution to present evidence that four years earlier, Cunningham had been addicted to Demerol, that she had stolen the substance from the hospital at which she then worked, that as a result of her theft, her nurse's license had been suspended, that her license was reinstated subject to her agreement to submit to periodic drug tests, and that she had falsified the results of some of those tests. The court excluded evidence that she had been convicted of the Demerol theft.[13] The prosecution's theory was that Cunningham remained addicted to the drug, and had stolen it to feed her addiction. The evidence of her earlier addiction, theft of Demerol, suspension from practice, and falsification of test results was offered to demonstrate that Cunningham's addiction gave her a motive to steal the drug, that she is more likely to have acted on that motive than one who did not suffer such addiction, and that she was therefore the person who stole the drug from the locked cabinet.

The jury convicted Cunningham,[14] and she appealed, in part because of the court's alleged error in admitting this evidence. On appeal, a unanimous panel of the Seventh Circuit affirmed in an opinion by Judge Richard Posner. The court first stated the general proposition that a person's prior conduct could not be offered "for the purpose of showing a propensity to act in accordance with the character indicated by that conduct."[15] The question, then, was whether the evidence was relevant to Cunningham's guilt on some basis that did not require an inference as to her character. The court answered that although "propensity" and "motive" sometimes overlap, creating danger of jury misuse,[16] in this instance, the evidence

13. *See id.* at 556.

14. *See id.* at 555. Specifically, Cunningham was convicted of violating 18 U.S.C. § 1365(a) (1994), "tampering with a consumer product 'with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk.'" *Id.* (quoting 18 U.S.C. § 1365(a)).

15. *Id.* at 556.

16. *See id.* at 556-57 ("The greater the overlap between propensity and motive, the more careful the district judge must be about admitting under the rubric of motive evidence that the jury is likely to use instead as a basis for inferring the defendant's propensity, his habitual criminality, even if instructed not to.").

did not violate the character rule:

> We do not have a complete overlap between evidence of propensity and evidence of motive in this case. Most people don't *want* Demerol; being a Demerol addict gave Cunningham a motive to tamper with the Demerol-filled syringes that, so far as appears, none of the other nurses who had access to the cabinet in which the syringes were locked had. No one suggests that any of the five nurses might have wanted to steal Demerol in order to resell it rather than to consume it personally. Because Cunningham's addiction was not to *stealing* Demerol but to consuming it, this case is like [*People v. Moreno*, 61 Cal. App.3d 688, 132 Cal. Rptr. 569 (1976)], where the defendant's sexual fetish supplied the motive for his stealing women's underwear, and [*People v. McConnell*, 335 N.W.2d 226 (Mich. Ct. App. 1983)], where the defendant's drug addiction supplied the motive to rob—he needed money to buy drugs. Cunningham was in a position to steal her drug directly.[17]

The trial court thus did not err in admitting the evidence. The Seventh Circuit affirmed her conviction.[18]

Whether the *Cunningham* court reached the proper result depends on whether it correctly construed the limits of the motive theory. In this Article, I attempt to explore those limits in detail. Part I describes the meaning and uses of motive in evidence law, and analyzes the overlap between it and other accepted theories for admission of uncharged misconduct, particularly that of "plan." Part II discusses the degree of similarity required to justify admissibility of uncharged misconduct evidence to prove motive, and analyzes the importance of both the probative value of the uncharged misconduct evidence and the need for similarity as a factor weighing in the admissibility determination. Part III discusses the use of motive to prove: (1) the identity of the actor who committed the act at issue in the case; (2) that the charged act occurred; and (3) that a person acted with a mental state required for the charged act. Some of these uses

17. *Id.* at 557.
18. *See id.*

of motive clearly avoid the character problem, while others do not. Part IV returns to *Cunningham*, analyzing the case in light of the foregoing material. Part V contains a suggestion for clarifying the motive theory and for reforming the law.

I. THE MEANING AND USES OF "MOTIVE" IN EVIDENCE LAW

Motive is a state of mind. A general dictionary defines it as "something that prompts a person to act in a certain way or that determines volition," and equates the term with inducement and incentive.[19] Wigmore classified "motive" as a desire or emotion and treated it along with evidence of "feeling" and "passion."[20] Wright and Graham assume that the "other crimes rule" uses the term motive "in the generally accepted sense of an emotion or state of mind that prompts a person to act in a particular way; an incentive for certain volitional activity."[21] A turn-of-the-century court defined motive as "the moving power which impels to action for a definite result."[22] Another source defines motive in the relevant context as "an inducement or state of feeling that impels and tempts the mind to indulge a criminal act,"[23] and notes that emotions such as hostility and jealousy can be the source of motives to act in a particular way.[24]

When it is defined in these similar ways, motive appears distinct from other states of mind that might be at issue or relevant in a particular case, such as intent.[25] It would also appear to be distinct from

19. RANDOM HOUSE COLLEGE DICTIONARY 871 (rev. ed. 1979).

20. *See* 2 WIGMORE (1940), *supra* note 6, § 385, at 327.

21. 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5240, at 479 (1978).

22. People v. Molineux, 61 N.E. 286, 296 (N.Y. 1901).

23. M.C. Sough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 328 (1956); *see also* Clinton J. Morgan, Note, *Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence*, 3 VAND. L. REV. 779, 779 (1950) ("Motive has been defined as 'an inducement, or that which leads or tempts the mind to indulge the criminal act.'" (quoting People v. Fitzgerald, 50 N.E. 846, 847 (N.Y. 1898))).

24. *See* Sough & Knightly, *supra* note 23, at 328 (citing State v. Browman, 182 N.W. 823 (Iowa 1921) (discussing motive for homicide)).

25. "Intent spells purpose to use a particular means to obtain a desired end, whereas motive supplies the reason that nudges the will and prods the mind to indulge the criminal intent." *Id.* (citing Jones v. State, 68 So. 690, 694 (Ala.

the state of mind of one who possesses a "plan" that includes the charged act. The distinction can be illusory, however, when one carefully considers the chain of reasoning under which the evidence is offered. As Wright and Graham note:

> For example, the person moved to act by a particular motive may form an explicit plan to accomplish his purpose; and once the act has been completed, knowledge of the motive may lead us to infer that the act was done with the intent of reaching the goal implied by the motive. Thus evidence that a person acted in accordance with a particular plan may permit us to infer back to the motive that produced the plan and forward to the intent with which a subsequent act was carried out. It is not surprising, then, to find the same sort of evidence being admitted under each of these three different categories.[26]

Thus, when one has a reason to act in a certain way, it is just as easy, and accurate, to state that the person had a "motive" to act in a certain way as it is to state that the person developed the "intent" to behave that way, or developed a "plan" to do so. In all three cases, the inference flows from the initial reason. Thus, a person charged with arson in burning a building to collect insurance proceeds could be said to have had a motive to burn the building for that reason, and also to have had a plan to do so. Obviously, the evidence also demonstrates that the person acted with intent, rather than by accident, in causing the fire. Evidence of other insured properties burned by defendant potentially would be admissible on any of the three theories if, for example, defendant denies committing the charged offense, or claims the fire began accidentally.[27]

Crim. App. 1915)).

26. 22 WRIGHT & GRAHAM, *supra* note 21, § 5240, at 479-80. This blending of categories has been noted for some time. To quote an influential early twentieth century New York decision: "In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them." *Molineux*, 61 N.E. at 296.

27. *See, e.g.*, State v. Shindell, 486 A.2d 637 (Conn. 1985) (holding that in prosecution for arson, evidence that defendant and his agents had attempted to burn other insured buildings was admissible to prove continuing plan of which charged crime was a part).

The facts of *Hazel v. United States*[28] further illustrate the overlap between motive and plan. Defendant was charged with assault with intent to kill while armed and carrying a pistol without a license. To prove that defendant was the person who shot the victim, the prosecution offered evidence that the two were involved in an illegal drug operation, and that they were engaged in an ongoing violent battle caused by each suspecting the other of stealing drugs. The court held the evidence admissible under both the "motive" and "common scheme or plan" theories.[29] Both theories apply logically to the facts of *Hazel*; it is equally logical to infer that defendant was motivated by his suspicions to attack the victim as to say that defendant's suspicions caused him to develop a plan to attack the victim.

Although this discussion will focus on the motive theory for admission of uncharged misconduct to prove that an act occurred, the identity of the actor, or the actor's state of mind, in many cases the evidence could also be analyzed under other theories such as "plan."

Because motive cannot be proven directly, it is necessary to resort to circumstantial evidence of its existence. As Wigmore stated,

> circumstances may be offered as tending to show its existence; as when the argument is to the existence of this desire in A (a) from an injury which B has done to A, or (b) from A's outward conduct expressing such a desire, or (c) from the prior or subsequent existence of such a desire.[30]

Thus, one must infer the existence of a motive from matters that can be evidenced more or less directly, including other crimes, wrongs, or acts committed by the person. From the existence of motive, to the behavior of a person on the occasion in question requires, of course, a second inferential step.[31] That step can lead to one of three facts: (1) that the person is the one who committed the act in question (identity); (2) that the act in question occurred [actus reus]; and (3) that the actor behaved with the required state of mind (in criminal cases, [mens rea]).

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28. 599 A.2d 38 (D.C. 1991).
29. *See id.* at 40-43.
30. 2 WIGMORE (1940), *supra* note 6, § 385, at 327.
31. *See* 22 WRIGHT & GRAHAM, *supra* note 21, at 480-81 (noting the two-step process).

To begin with the use of uncharged misconduct to prove identity by means of motive, suppose *D* is charged with the murder of *V*. *D* claims not to have been involved. If the prosecution possesses evidence that prior to the killing, *D* had been involved in a car theft, that *V* had learned about the theft, and that *V* had threatened to reveal the theft to the police, evidence of the theft could be admissible to prove *D*'s motive, and from that, *D*'s possible behavior.[32] In its most general outlines, the reasoning would be as follows:

EVIDENCE: *D* stole a car, *V* was aware of the fact, and *V* threatened to inform the police.

→*INFERENCE*: *D* had a motive to prevent *V* from revealing the theft to the police.

→*CONCLUSION*: *D* murdered *V* to prevent *V* from revealing the theft to the police.

Notice that the same reasoning just described also tends to show that a killing took place. If, therefore, *D* alleges that *V* was not killed, but died of natural causes or from an accident unconnected to *D* in any way. In that situation, the same evidence that identifies the possible killer also suggests that a killing took place:

EVIDENCE: *D* stole a car, *V* was aware of the fact, and *V* threatened to inform the police.

→*INFERENCE*: *D* had a motive to prevent *V* from revealing the theft to the police.

→*CONCLUSION*: *V* died at the hands of another, and *V* did not perish of natural causes or other cause unrelated to *D*.

32. *See, e.g.*, United States v. Clark, 988 F.2d 1459, 1465 (6th Cir. 1993) (indicating that defendant's involvement with theft activity is probative of defendant's motive and intent).

Uncharged misconduct evidence such as that in the hypothetical murder case could also be used to show that a person acted with the requisite intent. Thus, in the hypothetical case, if *D* admitted killing *V* but claimed the killing was an accident, the theft evidence could be admissible against *D* to prove *D* intended to kill *V*. The evidence of *V*'s threat to reveal *D*'s auto theft would give rise to an inference of a motive to prevent the revelation, and existence of a motive would suggest that in killing *V*, *D* acted intentionally rather than by accident. Thus:

> *EVIDENCE*: *D* stole a car, *V* was aware of the fact, and *V* threatened to inform the police.
>
> →*INFERENCE*: *D* had a motive to prevent *V* from revealing the theft to the police.
>
> →*CONCLUSION*: *D* purposely killed *V* to prevent *V* from revealing the theft to the police.

The inferential steps from the evidence to the existence of a motive, and then from the motive to the behavior at issue, can be strong or weak. In some cases, the evidence gives rise to a strong inference of a specific motive, and the likelihood of the motive gives rise to a strong inference of action in conformity with that motive or the existence of a relevant state of mind. In other cases, one or both of the inferences is hardly persuasive. One reason such an inference is often weak is that the motive is too general and too unlikely to be acted upon to be useful. As an English commentator noted, "almost every child has something to gain from the death of his parents, but rarely on the death of a parent is parricide even suspected."[33] For purposes of this Article, however, my concern is not with the strength of the inferences, but with their logical validity in establishing a noncharacter theory of relevance.

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33. RUPERT CROSS, EVIDENCE 30 (3d ed. 1967) (citing WILLIAM MAWDESLEY BEST, PRINCIPLES OF THE LAW OF EVIDENCE 384 (12th ed. 1922)).

How does the motive reasoning differ from the forbidden character reasoning? To address this question, it is first important to define character. Unfortunately, there is no general agreement about the precise meaning of the term. Some definitions equate character with propensity,[34] but at least for purposes of evidence law, this is unwise. The primary reason evidence rules restrict character evidence is the danger of unfair prejudice it engenders. A well established principle of Anglo-American law is that a person is to be judged according to what she has done on a particular occasion, not according to her character.[35] The admission of character evidence, particularly evidence of a person's past misdeeds, threatens the sanctity of the prohibition by inviting the fact finder to judge the person rather than the person's charged acts. Only those aspects of a person that bear on her morality create this danger. In a murder prosecution, there is obviously no danger of trial by character in learning that the defendant has a strong propensity to lock the doors of her car when

34. *See, e.g., id.* at 291 ("The term 'disposition' is employed to denote a tendency to act, think or feel in a particular way."); WEBSTER'S NEW COLLEGIATE DICTIONARY 185 (1979), *available at http://www.m-w.com/cgi-bin/dictionary* (last visited Sept. 23, 2000) (listing disposition as synonym for character); DICTIONARY.COM, *at http://www.dictionary.com/cgi-bin/dict.pl* (last visited Sept. 23, 2000) (offering a definition of propensity as "disposition to do good or evil").

35. In 1907, an English commentator wrote:

> The English law of evidence . . . will not permit a man's chances of proving his innocence of the offence with which he is charged to be prejudiced by a revelation to the jury of other misdeeds of a like character committed by him, or of any evidence the purport of which is to proclaim him a "bad man," and as prima facie likely to be guilty of the offence with which he is charged. The accused is on his trial for the specific crime alleged in the indictment: he is not in the dock to answer for his life-history.

Ernest E. Williams, *Evidence to Show Intent*, 23 L.Q. REV. 28, 30 (Frederick Pollack ed., 1907). In *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980), the court wrote: "It is fundamental to American jurisprudence 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)). For a discussion of the history and foundations of the ban on character evidence, see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998) [hereinafter Leonard, *In Defense*].

she leaves it in a parking lot, or to turn on the television when she comes home from work. The danger lies in the fact finder being told, for example, that the defendant has acted violently in the past, or that she is short-tempered. This is what the character evidence rule forbids. The rule permitting evidence of uncharged misconduct to prove a fact, by the same token, does not forbid all propensity inferences, but only those based on character.[36]

Thus, from the perspective of the law of evidence, it is best to conceive of character as a subset of propensity, embracing only moral aspects of a person. As one author put it, "[a]ll character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence."[37] This is consistent with many definitions of character that can be found in the authorities. Wigmore, for example, defined character as "the actual moral or psychical disposition or sum of traits . . . ."[38] In an often quoted passage, McCormick defined it as "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."[39] The Advisory Committee on the Federal Rules of Evidence suggested that "character is defined as the kind of person one is,"[40] and distinguished it from habit, which is certainly a form of propensity evidence.[41]

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36. *See* Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264-65 (1995) (distinguishing types of propensities ranging from morality tinged propensities known as character to specific, nonmorality based propensities such as habits).

37. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 794 (1981).

38. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 52, at 1148 (Peter Tillers ed., rev. ed. 1983).

39. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 162, at 340-41 (1954).

40. FED. R. EVID. 405 advisory committee's note.

41. Quoting McCormick, the Advisory Committee wrote:

> "Habit," in modern usage, both lay and psychological, is more specific [than character]. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice

In determining whether certain reasoning from uncharged misconduct evidence violates the character rule, therefore, it is necessary to inquire whether the chain of inferences depends, at any point, on a judgment about the person's moral tendencies. This is what the character evidence rule forbids. Returning to the hypothetical theft-murder case, one type of character-based reasoning would be as follows:

> *EVIDENCE*: *D* stole a car, *V* was aware of the fact, and *V* threatened to inform the police.
>
> →*INFERENCE*: *D* is the kind of person who would commit a criminal act.
>
> →*CONCLUSION*: *D* acted in accordance with the criminal character by murdering *V*.

By this reasoning, evidence of a person's criminal conduct is used, first, to demonstrate a criminal character, and second, to prove action in conformity. This is the type of reasoning forbidden by the evidence rules.

Though motive reasoning also involves an inference of action in conformity, it is different from character-based reasoning. Motive, for one thing, is more specific than character, and its existence in a given situation does not depend on the person's general moral fiber. Under the right set of circumstances, even nonviolent people can possess a motive to act violently, and honest people can have a motive to lie. Therefore, the first step in the reasoning—from the uncharged misconduct to the existence of a motive—does not violate the character evidence rule. We assume that a motive might exist because *any person* might possess one under those specific circumstances.

> of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.

MCCORMICK, *supra* note 39, § 162, at 341.

This is not to say that motive evidence is always extremely specific in nature. It is possible both for a person to possess a motive to act in a certain way toward a specific individual and to act in that way toward a group of people. Hatred, for example, can be directed toward a single individual or toward a group of people sharing some common characteristic. Even this type of generalized motive is not the same as character. However, the more generalized the motive inference, the more like character it becomes, and the greater the danger of misuse.

One can rightly suggest that *X* has a motive to kill a homicide victim, and that evidence of prior attempts to kill that person would not violate the character evidence ban. But evidence that *X* had previously killed other people could hardly be justified as motive evidence when offered to prove that *X* committed the charged homicide. In such a case, the evidence almost certainly should be classified as character and excluded. This point is well illustrated by virtually all courts' traditional willingness in sexual assault cases to admit evidence of uncharged sexual assaults with the same victim, but not with others. In the latter situation, admission of the evidence on a motive theory is fatally flawed.[42]

The dangers of defining motive too generally are vividly illustrated by the infamous prosecution of Leo Frank, superintendent of a pencil factory, for the murder of a young girl who worked in the factory.[43] At trial, the prosecution called a janitor, who testified that Frank asked him to keep watch while he spent time with the victim. He testified that Frank appeared later, trembling, with rope in his hands, and told the janitor that the girl died after he hit her when she refused to "be with" him. According to the janitor, Frank then asked him to help dispose of the body.[44] The court also permitted the

42. *See infra* notes 48-51 and accompanying text.

43. *See* Frank v. State, 80 S.E. 1016 (Ga. 1914).

44. *See id.* at 1020-21. The trial was conducted in a highly charged atmosphere. Frank, a Jewish man, was found guilty of murder and sentenced to death. Before the sentence could be carried out, a mob lynched Frank. Later, it became clear that the janitor had committed the crime. Frank was officially pardoned seventy years after he was lynched. *See Georgia Pardons Victim 70 Years After Lynching*, N.Y. TIMES, Mar. 12, 1986, at A16. For discussions of the trial, its anti-Semitic overtones, and its meaning in history and jurispru-

prosecution to elicit testimony from the janitor that Frank had often asked the janitor to keep watch while Frank carried on illicit relations with other female employees.[45]

A majority of the Georgia Supreme Court held that this evidence was admissible to prove both "motive" and "common scheme or plan." The court's definition of motive was very broad, as indicated by its explanation:

> It is contended that proof of independent crimes was not admissible on the trial of the accused for murder. A theory of the state, which finds a basis in the evidence, was that the murderer desired to have a sexual relation of some character, natural or unnatural, with the deceased; that she resisted his attempt for that purpose; that he struck her, not with the intent at first to kill her, but in pursuance of his purpose above mentioned; that the blow produced unconsciousness; and that, in fear of her regaining consciousness and that his criminality would be exposed, he choked his victim with a cord. Here the question of whether the accused had a motive in regard to his conduct on that occasion which might induce him to commit the homicide, in the effort to carry out his purpose, was of the utmost materiality.[46]

The motive, then, was one of "lechery," which the court noted was common to the charged crime and the uncharged misconduct to which the janitor testified.[47]

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dence, see, e.g., JOEL WILLIAMSON, THE CRUCIBLE OF RACE 471-72 (1984); Clark J. Freshman, *By the Neck Until Dead*, AM. POL., Jan. 1988, at 29; Symposium, *Introduction, What Ought to be Done—What Can be Done—When the Wrong Person is in Jail or About to be Executed? An Invitation to a Multi-Disciplined Inquiry, and a Detour About Law School Pedagogy*, 29 LOY. L.A. L. REV. 1547, 1563-68 (1996); Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241 (1990).

45. *See Frank*, 80 S.E. at 1020-21.

46. *Id.* at 1022.

47. *See id.* at 1023. Clearly, the court felt the evidence was needed in order to convict Frank:

> There was no question that the girl was killed, and that her body was found in the factory of which the accused was the superintendent. There was evidence from which the jury could find that the killing oc-

Clearly, the court in *Frank* had in mind a rather broad definition of motive that differs little, if at all, from character. Frank's "motive" of "lechery" cannot be distinguished from a "lecherous" character. Two justices, in dissent, argued that the court's definition of motive was too broad and not in accord with the authorities:

> [A]ll evidence tending to show that the person of the deceased had been violated was admissible to support the theory that she was killed to prevent a discovery of the assault

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curred on the second floor, on which was located the office where the accused admitted that he was when the girl entered the building, went to the office, and spoke to him. There was also evidence from which it might be inferred that the person who committed the crime sought to have some character of sexual relation, natural or unnatural, with the girl. Practically all other persons were eliminated from suspicion except the accused and Conley, the leading witness for the state. The accused was a white man, married, and superintendent of the factory. The witness was a negro employé, who admitted that he drank intoxicating liquors. Naturally it would be urged with great earnestness to the jury that there could be no possible motive why the accused should kill one of the employés of the factory, and that it would be improbable that he would indulge in lechery in his office or in his place of business, while the negro sweeper would be more likely to do so. Thus the question, not whether some unknown criminal had a lecherous motive, but whether or not the accused had a lecherous motive which might lead to the effort to accomplish it upon the girl, and, upon her resistance, then to murder, was vitally involved. The question would naturally be asked: What motive was there to prompt the accused to commit the act? The evidence tended to show a practice, plan, system, or scheme on the part of the accused to have lascivious or adulterous association with certain of his employés and other women at his office or place of business, in which place the homicide occurred. Some of these acts were shown specifically to have occurred not long before the homicide, and others must have taken place at no great distance of time, because Conley was only employed at the factory a little more than two years. It tended to show a motive on the part of the accused, inducing him to seek to have criminal intimacy with the girl who was killed, and, upon her resistance, to commit murder to conceal the crime. There was not only evidence of the practice of the accused with other women, but during the trial there was also introduced evidence tending to show that in pursuance of his general practice he made advances toward the deceased. We think that the evidence was admissible, both on the subject of motive and of plan, scheme, or system, and as tending to show identity.

Id. at 1026-27.

> that had been committed upon her. But . . . evidence of prior lascivious transactions by the defendant with other women with their consent was not relevant, either to show that the defendant assaulted the deceased for the purpose of having some sort of sexual relation with her, or to prove that he had a motive for killing her, notwithstanding the defendant may have been engaged in the other libidinous acts a[t] or near the same place where the homicide occurred. To our minds the evidence in the case utterly failed to show any logical connection between the other lecherous acts of the defendant with different women . . . and the assault made upon the deceased and the killing of her to prevent its disclosure.[48]

Thus, the dissenting judges recognized that the concept of common motive seen by the majority is not a valid theory,

> unless the expression "common motive" as used is to be taken to mean substantially the same as "like motive" or "similar motive"; and that it does not have this meaning appears from numerous decisions holding that proof of extraneous crimes, even in cases involving what is commonly called "sexual offenses". . . , is not admissible, unless the offense was between the same parties.[49]

In *Frank*, the other crimes evidence should not have been admitted if the rule excluding evidence of character is to be maintained. That the case occurred in a different time and under different social circumstances than those prevailing today must not diminish the level of diligence courts show in evaluating a purported "motive" theory for admission of uncharged misconduct evidence.

Thus, motive and character can be difficult to distinguish. The court in *Cunningham*, with which this analysis began, recognized as much when it wrote of an "overlap" between "propensity" and motive in certain situations.[50] The more "overlap" there is in a given

48. *Id.* at 1037 (Fish, C.J., & Breck, J., dissenting).

49. *Id.* at 1041 (Fish, C.J., & Breck, J., dissenting).

50. *See* United States v. Cunningham, 103 F.3d 553, 556 (7th Cir. 1996). The *Cunningham* court suggested that "motive" and "propensity" (character) overlap when the crime is motivated by a taste for engaging in that

case, the greater the danger the fact finder will misuse the evidence, and the more cautious the trial judge must be in deciding on admission or exclusion.[51] Many factors can make the distinction between motive and character difficult to draw, but generally speaking, the more specific the motive, the less danger will exist in admission of the evidence. To take just one pair of possibilities, consider a case in which *D*, a person of one racial group, is charged with the murder of *V*, a person of another group. *D* admits killing *V* but claims the act was unintentional. Uncharged misconduct evidence tending to show that *D* hated *V* as an individual (a past violent act toward *V*, for example) would carry significant probative value on the question of *D*'s state of mind in killing *V*. Though the jury might misuse the evidence by considering it for its tendency to prove *D*'s bad character, it is not very likely that the jury will misuse it in this way. If, however, the uncharged misconduct evidence tended only to show a hatred of people of *V*'s racial group, for example, a past act of violence toward another member of that group, and not of *V* specifically; that evidence usually would have significantly less probative value for its permissible use, such as motive, and would carry very real risk of the jury's use of the evidence for character purposes.

The second leap in the inferential chain—from motive to conduct or state of mind—is also problematic. What generalization would support such a conclusion? Remember that the rules only forbid propensity inferences based on character,[52] which tend to be generalized inferences about the person (the person is a "violent" type, for example). If there is a legitimate theory to explain this rule, perhaps it resides in the specificity of the propensity that can be involved in the case of motive. When one acts on a specific motivation, the behavior is in response to a narrow stimulus. In the theft-murder hypothetical discussed earlier,[53] if defendant committed the act of murder, it was in response to a specific problem created by a

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crime or a compulsion to engage in it (an "addiction"), rather than by a desire for pecuniary gain or for some other advantage to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route.

51. *See id.* at 556-57.

52. *See supra* notes 9-10 and accompanying text.

53. *See supra* notes 32-33 and accompanying text.

narrow set of circumstances; the possibility of being charged with a crime as a result of a specific person's revelation of that crime to the authorities. Arguably, at least, to make the inference we need not ask whether defendant possesses a violent character, nor is the inference based on the sorts of general motivations that might affect all people.[54] We need only note the possibility that *any* person with this specific motive is more likely to act on the motive than is a randomly chosen person without such a motive.[55] As such, the likelihood of our inferring defendant's commission of the act is based not on the strength or weakness of defendant's moral character, but on the strength or weakness of defendant's motive. Perhaps an analogy to habit is in order. If habit, as McCormick asserted, is "one's regular response to a repeated specific situation,"[56] and if we can base an assessment of a person's actions on the occasion in question on the force of the person's habit, then perhaps we can do the same with the strength of the person's motive.

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54. One author has stressed the need for evidence of a specific motive:

> [T]he relationship between the other act and the crime for which the defendant is charged must be singularly interwoven. A general motive, such as greed or lust, shared by all with similar drives, is insufficient. For if the motive of greed were sufficient to establish the independent relevance required by [the rule], any time a person is charged with doing something criminal to acquire a pecuniary gain, . . . any act in which he has evinced a similar state of mind would be admissible. So, too, would any lustful act be admissible against a defendant charged with a sexual crime. There should be more. There should be some connexity between this defendant and this crime. It should be some motive sufficiently unique that it points unerringly at this defendant.

Golden, *supra* note 1, at 207.

55. "By the introduction of evidence which provides a motive, the prosecution is able to establish the defendant was more likely to have committed the crime than a person without a similar motive." *Id.* at 206. See also GEORGE W. PUGH, LOUISIANA EVIDENCE LAW 33-34 (1974), stating:

> If the defendant had a particular reason to accomplish a crime and the crime was effected, proof of defendant's motive renders more probable the fact that he was the actor. In order to have independent relevance, the motive reflected by other crimes should be factually peculiar to the victim and the crime charged.

56. MCCORMICK, *supra* note 39, § 162, at 340.

The crucial question in any case is precisely how uncharged misconduct evidence can tend to show motive and thus demonstrate the possibility of any of the following conclusions:

(1) Defendant committed the act at issue.

(2) The act at issue, which defendant claims did not occur, did indeed occur.

(3) Defendant, who admits committing the act at issue but denies intent, in fact intended to commit the act.

To return to the first iteration of the theft-murder hypothetical, in which *D* denies being the person who murdered *V*, the specific way in which the motive-based reasoning permits us to move from the defendant's motive to her actions is as follows:

MOTIVE INFERENCE: *D* had a motive to kill *V*.[57]

GENERALIZATION: People with motives to act in a particular way are somewhat more likely to do so than are people without such motives.

→*CONCLUSION*: *D* committed the murder.

In theory, at least, this reasoning differs from the generalization supporting the character-based reasoning:

INFERENCE FROM THEFT: *D* has a criminal character.

GENERALIZATION: People with criminal characters have a tendency to commit crimes.

→*CONCLUSION*: *D* committed the murder.

The distinction between the reasoning from motive and the reasoning from character thus can be described fairly easily, even if it is difficult to apply. Motive theory is distinct from the character theory

57. The motive will have been supplied by the uncharged misconduct evidence.

because the jury is simply being asked to compare the defendant who has a motive to a person who lacks such a motive. On that basis, the jury need not resort to the character inference because the inference supporting motive—arising from a universal human tendency—offers a chance to consider the likelihood of defendant doing the act as opposed to anybody else without a motive, and it would seem that the evidence has at least some genuine probative value for that purpose. Nevertheless, intellectually understanding the distinction does not mean it will be followed. It remains to be seen whether juries will understand the distinction, but nevertheless employ the forbidden character inference. The temptation to do so can be very strong, requiring the court to assess the dangers with care.

Consider, next, whether this reasoning also holds true when the motive evidence is offered either to prove that the act at issue did take place, or that defendant who admits the act but denies the essential mental element did indeed act with that state of mind. In those situations, the reasoning once again involves a comparison between a person with a motive and a person without one. Returning to the theft-murder hypothetical, and positing now that the defendant denies acting with the intent required by the crime of murder, a plausible motive-based inferential chain would be as follows:

MOTIVE INFERENCE: *D* had a motive to kill *V*.

GENERALIZATION: Normal people with a motive to kill a person are more likely to have killed that person intentionally than people who kill that person without a motive to do so.

→*CONCLUSION*: *D*'s killing of *V* was intentional.

This reasoning is plausible, and once again does not require an inference from character (though as before, it does involve a propensity inference). Similarly, no character inference is required when evidence of motive is offered to prove that a particular act occurred, though the generalization supporting the inference is somewhat different. In the example, if *D* claims that there was no murder—that *V* committed suicide, for example—evidence that *D* had a motive to

kill *V* makes it somewhat more likely that *D* acted than it would be without the evidence. Here, the reasoning would be as follows:

> *MOTIVE INFERENCE*: *D* had a motive to kill *V*.
>
> > *GENERALIZATION*: An event is more likely to occur if a person has a motive to cause the event than if no person has such a motive.
> >
> > →*CONCLUSION*: *D* killed *V*.

Here, the generalization does not seek a comparison between *D* (possessing a motive) and any other person without a motive. It is simply an assessment of the likelihood of suicide given another person's motive to kill the victim, as compared with the likelihood of suicide in the absence of another person's motive to kill. Once again, the fact finder is not asked to infer *D*'s actions from *D*'s character, but from *D*'s motive to act. And if motives are normal aspects of human psychology and behavior, and not the kinds of "character" traits falling within the prohibition, the evidence is potentially admissible.

Despite the theoretical difference between the motive theory and the character theory, the danger that the jury will misuse the evidence always lurks when uncharged misconduct evidence is the source of the motive inference. In fact, the danger of jury misuse is considerably greater than with some other uses of uncharged misconduct evidence, where the noncharacter inference is more intuitively accessible. When the motive theory is involved, the fact finder frequently will be tempted to enter the realm of the individual's own mind and soul: of the depth of the person's inhibitions against antisocial or illegal behavior. If we accept the proposition that characteristics internal to the individual supply the necessary inhibitions, then it is most difficult to maintain a distinction between such a concept and that of character.[58] The temptation to consider the evidence not only

58. One author has noted that traditionally prohibited propensity inferences ask the fact finder "to make an 'individualized' propensity inference in the sense that the defendant's propensity . . . is not a propensity shared by the populace at large." Kuhns, *supra* note 37, at 783.

in relation to humanity as a whole but also as an indicator of the bad character of the defendant is all but overwhelming in many cases. Jurors will most naturally want to ask not simply whether defendant had a motive and acted or resisted, as would any human being, but whether there is something about the defendant that makes it more likely that she acted on the motive. To use the uncharged misconduct as a predictor of defendant's actual conduct on the charged occasion would, however, violate the character evidence prohibition.

In sum, it seems appropriate to conclude that the distinction between character-based propensity and motive-based propensity is subtle but theoretically valid. In line with existing practice, therefore, evidence of uncharged misconduct may be admitted when offered to prove that the person had a motive that might have affected her conduct or state of mind. Still, there is the strong possibility that the jury will resort to the forbidden character logic when it is more compelling: that a person who would steal would also kill, or, more persuasively in this case, that a person who would steal would have fewer inhibitions against killing to prevent disclosure than would a person who does not steal. Thus, the need for case-by-case analysis of the permissible reasoning and for careful balancing of the strength of that reasoning against the risk of unfair prejudice is particularly great. Unfortunately, as with other uses of uncharged misconduct evidence, courts often admit evidence without careful balancing, which at times leads to error and injustice.[59]

II. "MOTIVE" IN CONTEXT

Because motive is not an ultimate fact, evidence of motive will always be offered as one of the inferences along a chain of reasoning leading to an ultimate fact. There are essentially three possibilities.

59. Wright and Graham caution:

> Rather than search the digests for a category into which the proposed use can be crammed, courts should examine the complete chain of inferences necessary to make the evidence of other crimes relevant and admit or exclude the evidence on the basis of whether it is or is not offered to prove some conduct of the accused and whether it does or does not require an inference as to his character.

22 WRIGHT & GRAHAM, *supra* note 21, § 5240, at 477-78.

Motive can be relevant to determining (1) whether an act took place; (2) whether the person claimed to have committed the act in fact did so; or (3) whether the person who committed the act did so with the mental state, if any, required for the charge or claim.[60] The cases demonstrate that evidence of uncharged misconduct has been admitted widely to prove each of these three types of facts.

Although the admissibility of uncharged misconduct evidence is a highly fact-sensitive matter, several themes tend to recur throughout the cases. Before turning to the ultimate issues for which motive evidence might be offered, it is useful to consider several of these recurring issues as they apply to the motive theory. First is the degree of similarity required between the uncharged and the charged conduct.[61] Next is the importance of the probative value of the evidence, both in general and in light of other evidence offered or available in the case.[62]

A. Importance of Similarity of Charged and Uncharged Misconduct

When uncharged misconduct evidence is offered on a motive theory, the similarity between the uncharged act and the act in question is of no consequence.[63] Applicability of the various theories making motive relevant does not depend on the nature of the other act itself, but on the light the act sheds on the actor's state of mind or

60. *See* 22 *id.* at 480 (stating these three potential uses of motive evidence).

61. *See infra* note 63 and accompanying text.

62. *See infra* notes 64-80 and accompanying text.

63. *See* United States v. Shriver, 842 F.2d 968, 974 (7th Cir. 1988) (stating that when bad acts offered to show motive, similarity is not an appropriate requirement); CAROL CAMPAIGNE ET AL., 29 AM. JUR. 2D *Evidence* § 425 (1994) ("To prove motive, evidence of a defendant's other crimes, wrongs, or acts may not have to be similar to the offense with which the accused is charged in order to be admissible."); Golden, *supra* note 1, at 206 (when uncharged misconduct evidence is offered to prove motive, "there is no need for any degree of similarity between the uncharged and charged acts"); Morgan, *supra* note 23, at 780 (stating that similarity is not a factor where evidence introduced to prove motive); Debra T. Landis, Annotation, *Admissibility of Evidence of Accused's Drug Addiction or Use to Show Motive for Theft of Property Other Than Drugs*, 2 A.L.R.4TH 1298, 1300 (1980) ("It is generally recognized that in criminal prosecutions where the motive of the accused is important and material a somewhat broader range of evidence is permitted in establishing a defendant's motive than is allowed in support of other issues.").

conduct. Thus, it is not necessary for the proponent of uncharged misconduct, when offered to prove motive, to demonstrate any particular degree of similarity between the act giving rise to motive and the fact it is offered, ultimately, to prove.

B. Importance of Probative Value of the Evidence to Prove Existence of Motive

When evidence of uncharged misconduct is offered to prove motive, some courts have wisely noted the importance of examining the strength of the motive evidence, both as a general proposition and in light of the other evidence offered or available in the case. Generally speaking, the less probative value an act of uncharged misconduct adds to a case, the more likely it is that the prejudice it might cause substantially outweighs the probative value, justifying exclusion. These points are best explained through illustrations.

In *Farris v. People*,[64] an 1889 Illinois case, the defendant was charged with the murder of his ex-wife's new husband. The trial court allowed the prosecution to offer evidence of the defendant's rape of his ex-wife about a half-hour after the killing to prove that he acted with a motive of jealousy in the killing, in turn evidencing his intent in committing that act. The court held that the circumstances of the defendant's shooting of the victim were sufficient to show intent. The court stressed the need in criminal cases to confine evidence as much as possible to avoid misleading the jury or unfairly surprising the defendant.[65] It recognized that the evidence could be offered in some cases to prove such matters as guilty knowledge, absence of accident, motive, or identity, but that in this case it held that the connection between the killing and the subsequent rape was tenuous at best:

> [T]here is no evidence whatever connecting the two acts, or tending to show wherein the commission of the rape had any bearing upon or tendency to explain the commission of the homicide; and therefore, if it be held that evidence of the one tended to prove the other, it must be upon the

64. 21 N.E. 821 (Ill. 1889).
65. *See id.* at 822-23.

> ground that there is some natural or obvious connection between the two acts. Did the proof of rape in this case tend to prove the defendant guilty of murder? What element in the crime of murder was wanting when this evidence was admitted? Or what fact in evidence, necessary to make out the crime of murder, did it tend to strengthen, or corroborate? It seems clear to us that these are questions which puzzle the legal mind, and can only be answered so as to sustain the admissibility of the evidence in question, if at all, by drawing exceedingly fine distinctions.[66]

The trial judge's decision to admit the evidence on the ground that it tended to establish a motive was therefore erroneous:

> In the first place, under the facts proved, it was not necessary to prove a motive . . . . [I]n this case the state, having shown the deliberate shooting, under circumstances showing both express and implied malice, proof of motive was not necessary to a conviction; and, while the prosecution doubtless had the right to add [to] that proof by competent evidence, it may well be doubted whether testimony so strongly calculated to prejudice the jury against the defendant should have been admitted, even though it tended to prove a motive . . . . But no theory has been suggested upon which it can be said that the commission of the crime of rape tended to show a motive for the homicide; and . . . we can discover no rational connection between the two acts, whereby it can be inferred that desire, purpose or intent to commit the crime upon Mrs. McGehee could have influenced the mind of defendant to take the life of deceased. To so hold seems to us not only illogical, but unnatural and unreasonable.[67]

Concerned that the jury might have been prejudiced by "the disgusting and abhorrent facts attendant upon the commission of that most brutal and infamous crime given in detail,"[68] thus contributing to the

66. *Id.* at 823.
67. *Id.*
68. *Id.* at 824.

jury's verdict and sentence of death, the court held that admission of the evidence constituted reversible error.[69]

Courts have also required that evidence of the motive be more than speculative. In *United States v. Madden*,[70] for example, defendant's robbery conviction was reversed where the government had been permitted to present evidence of defendant's drug use to prove motive, but had failed to show that his habit was significant and that defendant did not have the financial means to support it.[71] It is crucial for the court to analyze the applicability of the theory to the facts at hand, determine the strength of the motive evidence, and then to weigh its probative value against its potential prejudice. In *United States v. Labansat*,[72] for example, where defendant was charged with bank robbery, the trial court erred by permitting the prosecution to present evidence of defendant's possession of drugs at the time of his arrest.[73] The court held:

> The only evidence pertaining to drugs was that [defendant] possessed marijuana, cocaine and heroin when he was arrested. This alone is insufficient to support an inference of financial need to establish a motive to rob a bank. Many defendants who possess drugs are dealers whose very possession of drugs diminishes, not enhances, any potential financial need to rob a bank.[74]

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69. *See id.*; *see also* People v. Fitzgerald, 50 N.E. 846, 846 (N.Y. 1898) (holding in prosecution of pastor for arson in the burning of a parochial schoolhouse, allegedly motivated by a desire to recover insurance proceeds from which he could be paid, trial court should not have admitted evidence of other misconduct including additional fires to which defendant may have been connected.) In *Fitzgerald*, though the evidence related to prosecution's motive theory, risk that the jury would lose sight of the essential issues in the mass of collateral facts, together with interest in protecting defendant from having to answer for all possible wrongdoings in his life, required exclusion. The court also noted the speculative nature of evidence of other misconduct.

70. 38 F.3d 747 (4th Cir. 1994).

71. *See id.* at 752; *see also* United States v. Mullings, 364 F.2d 173, 175 (2d Cir. 1966) (holding that evidence of the defendant's lack of money and drug addiction alone were too speculative to be admitted to show a motive to steal).

72. 94 F.3d 527 (9th Cir. 1996).

73. *See id.*

74. *Id.* at 531. The court found the error harmless, however. *See id.*

The strength of the first inference in the motive cases—from the uncharged misconduct to the existence of a motive—is thus a crucial part of the admissibility analysis.

Where motive to commit a crime can be proven without resort to uncharged misconduct evidence, an examination of the need for the evidence in light of the prejudice it might cause is especially appropriate. This was the case in *United States v. Latouf*,[75] where defendants were charged, inter alia, with scheming to burn a restaurant one of them owned in order to collect insurance proceeds.[76] To prove motive, the government offered evidence that Latouf had commented to two of her employees that she wanted to have her house burned down and that she would pay them $5000 to do so. On appeal, the court stressed the need for careful balancing of probative value and prejudicial impact,[77] and held that admission of this evidence was error:

> [O]ther proof was available to render the testimony of [the employees] redundant and, therefore, the statements were highly prejudicial. The government had ample evidence of Latouf's financial problems to prove motive and plan . . . . Thus, taking into consideration the other evidence available to the government, it is clear that the statements were unneeded and unduly prejudicial.[78]

Though the court held that the error was harmless,[79] its point is well taken. The availability of motive evidence that does not necessitate exposing the jury to uncharged misconduct is an important factor in determining the admissibility of the latter evidence.

The court should also exclude the evidence if the issue for which the evidence is ultimately offered—whether it be actus reus, identity of the actor, or relevant state of mind—is uncontested. Suppose,

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75. 132 F.3d 320 (6th Cir. 1997).
76. *See id.* at 323.
77. *See id.* at 329.
78. *Id. Contra* Stanley v. State, 171 S.W.2d 406 (Tenn. 1943) (holding that in prosecution for procuring the burning of a house, evidence that the defendant carried fire insurance on the house for an amount greater than its value was admissible to prove motive to defraud insurer).
79. *See Latouf*, 132 F.3d at 328.

therefore, that in a murder prosecution, defendant admits killing the victim but claims she was legally insane at the time. Because defendant has conceded that she killed the victim, evidence that defendant had a motive to kill the victim should not be admissible on the issues of actus reus or identity. In addition, proof that the killing was intentional would not weaken the insanity defense, as one may intend an act but be unable to appreciate its unlawfulness or exercise the proper control of her behavior at the time.[80]

III. THE USES OF MOTIVE EVIDENCE: IDENTITY, ACTUS REUS, AND RELEVANT STATE OF MIND

As noted previously, motive is not an ultimate fact in any crime, claim, or defense.[81] The presence of a motive, however, can make the existence of ultimate facts more likely. This part of the Article will examine the use of motive evidence to prove identity,[82] whether the act itself occurred,[83] and a required state of mind.[84] As the fact patterns will reveal, some uses of motive are easily distinguishable from character, and, as a result, should generally be allowed, subject to a proper limiting instruction. Other uses of motive are difficult to distinguish from character and require considerably greater scrutiny.

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80. Under the Model Penal Code, insanity is defined as a defect of mind that causes the actor to lack substantial capacity either to appreciate the criminality of the act or to conform her conduct to the law's requirements. *See* MODEL PENAL CODE § 4.01; 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 4.3, at 462-64 (1986). The Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1994), tightened the insanity standard for federal crimes by eliminating the "volitional" language of the Model Penal Code standard. Under the new federal test, insanity requires proof that defendant, as the result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. *See* Jay M. Zitter, Annotation, *Construction and Application of 18 U.S.C.S. § 17, Providing for Insanity Defense in Federal Criminal Prosecutions*, 118 A.L.R. FED. 265 (1994). Even under the new federal standard, the defendant's intent to commit the act does not negate the insanity defense.

81. *See supra* notes 61-79 and accompanying text.

82. *See infra* notes 85-166 and accompanying text.

83. *See infra* notes 167-216 and accompanying text.

84. *See infra* notes 217-301 and accompanying text.

A. The Use of Motive to Prove Identity

When an act has been committed, and the issue is whether a particular individual, rather than another, is responsible, evidence that the individual had a motive to act in that way is relevant. Generally, the evidence is offered to prove the identity of the act at issue in the case, such as the killing in a homicide prosecution or the questioned transaction in a prosecution or civil action for fraud.[85] The reasoning behind the motive-to-identity theory is relatively straightforward: A person who has a motive to act is somewhat more likely to have acted than is a person without a motive. One type of evidence from which that person's motive might be inferred is her uncharged misconduct.

Although there is no limit to the fact patterns in which motive evidence might be admissible to prove that a person committed an act, there are some repeating scenarios. In each, we will assume that the issue is identity rather than whether the act occurred at all or whether the actor behaved with a required state of mind. As the discussion will show, the motive-to-identity theories reasoning in some of these cases is relatively straightforward and does not threaten a violation of the character rule. In others, it is much more difficult to distinguish this use of "motive" from character evidence.

85. The motive-to-identity reasoning can also be applied to identify the person who committed a different act that relates in some way to the identity of the person who committed the act at issue (often the same person). Suppose, for example, that a defendant is charged with murder. The prosecution's theory is that the defendant, a homeless person with no legal means of support, committed the murder to prevent the victim from identifying the defendant's participation in a bank robbery to which the victim had been a witness. The defendant denies involvement in either the uncharged bank robbery or the murder. Evidence that the defendant is a heavy user of illegal drugs would be admissible to prove defendant had a motive to participate in the bank robbery, and from the existence of a motive, proof of defendant's actual participation. That evidence would, in turn, shed light on the defendant's possible involvement in the murder at issue by virtue of a motive to eliminate witnesses to the bank robbery. The initial motive, therefore, evidenced not the ultimate fact, the identity of the murderer, but an intermediate fact in a chain of inferences that leads, eventually, to the charged crime.

1. Evidence of uncharged misconduct suggesting enmity toward the victim of the charged act

Perhaps the simplest example of motive-to-identity evidence is of behavior tending to prove enmity toward the victim of the charged crime. The cases have long recognized this theory. In the 1898 Idaho case of *State v. Davis*,[86] for example, defendant Davis was charged with the murder of Wilson.[87] The case arose in the context of a wider struggle between sheep herders and cattlemen for control of land in the area. Davis was a cattleman, and Wilson was a sheep herder.[88] Davis asserted an alibi defense.[89] To prove that Davis killed Wilson, the prosecution offered evidence that prior to the killing, defendant had repeatedly threatened the lives of sheep men, had specifically threatened those who did not stay off a certain range, and was involved in an attack on the camp of certain sheep herders.[90] The court held this evidence admissible to show a motive for defendant to commit the charged crime, and thus, to prove the essential element of identity.[91]

Similarly, in *State v. Halleck*,[92] defendant was charged with burning several buildings on a single night. All of the buildings were owned by one Rehberg. To connect defendant with the crime, the prosecution offered evidence that on the night of the fire, defendant stole a chicken from a nearby barn. Also, the prosecution offered evidence that on the same night, Rehberg's watch-dog was poisoned with strychnine-laced meat, and that when defendant was arrested, defendant was found in possession of two pieces of meat poisoned with strychnine and tied with twine. On post mortem examination, strychnine-laced meat, paper, and twine were found in the dog's stomach. This evidence was admitted over defendant's objection that it was irrelevant and that it tended to prove crimes not charged in

86. 53 P. 678 (Idaho 1898).
87. *See id.*
88. *See id.* at 679-80.
89. *See id.* at 678-79.
90. The court gave a detailed account of the struggle and of defendant's threats. *See id.* at 679-81.
91. *See id.* at 682.
92. 26 N.W. 572 (Wis. 1886).

the information.[93] The Wisconsin Supreme Court affirmed defendant's conviction, emphasizing first the probative value of and the need for the evidence:

> If the only object was to prove that the defendant committed these crimes, the evidence would have been improper, except in order to show a motive for the commission of the crime charged. In cases depending wholly on circumstantial evidence, some motive or the malice of the defendant towards the party injured may be shown as bearing upon the question whether the defendant committed the crime charged, as an important and pertinent fact or circumstance. In this view, it was proper to show that the defendant poisoned the watch-dog of the person injured, which might imply malice towards him and furnish a motive for the arson. Or the dog might have been killed to prevent an alarm before the consummation of the crime, or detection afterwards. The killing of the dog by poisoned meat, and proof that similar packages of poisoned meat were found on the person of the accused, afforded important evidence of his identity with the person who killed the dog, and that he was present on the premises of Rehberg that night and about the time the fire was set. These were facts and circumstance bearing directly on the crime charged, and the proof of another crime was only incidental to this main purpose.[94]

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93. *See id.* at 573.

94. *Id.*; *see also* Hazel v. United States, 599 A.2d 38 (D.C. 1991) (in prosecution for assault with intent to kill while armed and carrying a pistol without a license, evidence of an ongoing violent battle between defendant and the victim over a period of time was admissible to prove motive, and from that, the identity of the shooter on the charged occasion; "bad blood" between the defendant and the victim, both involved in illegal drug operation, and arising from the suspected theft of drugs, was evidence of motive that helped identify the shooter; for further discussion of *Hazel*, see *supra* note 28 and accompanying text); People v. Murphy, 32 N.E. 138 (N.Y. 1892) (in prosecution for arson in burning a barn, evidence that other animals and property of the victim were also destroyed on same night was admissible to show both identity of the perpetrator and intent); State v. Hallock, 40 A. 51, 51-52 (Vt. 1899) (in arson prosecution, evidence that about six weeks before the fire in the victim's barn, defendant set fire to the same person's home, that defendant had predicted that

The theory relied on by *Davis* and *Halleck* is clearly tenable, and is not based on an inference from character. All people are subject to the highly motivational emotion of hatred, as well as similar strong emotions. In the context of witness impeachment, for example, the United States Supreme Court has repeatedly stressed that a criminal defendant's right to inquire into the possible bias or motive of prosecution witnesses is constitutionally protected.[95] Thus, one should expect courts to admit such evidence routinely, and only exclude it in the presence of substantial risk of unfair prejudice.

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all of the victim's buildings would burn, and that defendant had tried to hire other persons to burn the other buildings was admissible to show a motive on defendant's part that connected him with the fire in question and to prove that the subject fire was not accidentally set).

Contrary to the above cases, the court in *State v. Smith*, 106 P. 797 (Or. 1910), found error in the trial court's admission of evidence offered under this type of motive-to-identity theory. Defendant, a cattle rancher, was charged with arson for burning a sheep shearing shed owned by the victim. Defendant denied participation in the offense, despite testimony from his alleged accomplice that the two of them had committed the crime. To prove defendant's participation, the trial court permitted the prosecution to present evidence that not long after the charged crime, defendant and the accomplice committed other acts against the victim's property, including placing poison near the sheep, setting fire to a tent and other property used by the victim's herder, and cutting wire from the victim's fence. On appeal, the court held the admission to be error because the uncharged misconduct constituted a "separate and independent offense subsequently perpetrated, and did not relate to the same property [n]or were [they] connected in any manner by time, place, or circumstance with the destruction by fire of the building in question . . . ." *Id.* at 799.

The reasoning is erroneous. The victim's business threatened defendant's financial interests, establishing a motive to act against the victim or his business. Unless the rather substantial probative value of the evidence as tending to show defendant's identity as a perpetrator was substantially outweighed by the danger of unfair prejudice, the court should have held that the trial court acted properly in admitting the evidence.

95. *See, e.g.*, Olden v. Kentucky, 488 U.S. 227 (1988) (holding that refusal to permit defendant to establish bias was constitutional error); United States v. Abel, 469 U.S. 45 (1984) (recognizing viability of bias impeachment method despite lack of explicit mention in Federal Rules of Evidence); Davis v. Alaska, 415 U.S. 308 (1974) (holding defendant's constitutional confrontation right violated by trial court's refusal to permit defendant to inquire into bias of prosecution witness; Court held that a witness's partiality is always relevant to credibility); Alford v. United States, 282 U.S. 687 (1931) (recognizing right, later held to be grounded in the Constitution in *Smith v. Illinois*, 390 U.S. 129 (1968), to question prosecution witness to show bias).

2. Evidence of uncharged misconduct suggesting motive of greed

Emotional states other than enmity toward the victim can also be the source of a relevant motive. One such state is greed, and that emotion has formed the basis of a long recognized route to admissibility of uncharged misconduct evidence. An early and useful example is *People v. Wood*,[96] in which defendant was charged with the poisoning murder of his sister-in-law. To prove that defendant committed the crime in order to obtain the sister-in-law's property, the prosecution offered evidence that at the same time he administered the poison to her, he also gave it to her husband (defendant's brother) and the couple's two children. This evidence supported the motive theory, and thus the possibility that defendant was his sister-in-law's killer.

Once again, this is a legitimate noncharacter theory. The evidence in *Wood* was not offered to prove that defendant was an evil person who would murder, but to show that he had a reason to kill, which would make it more likely that he committed the crime than would a person without a reason. Naturally, not all people with a motive act on it, but people with a motive are more likely to act on it than people without one.

Similarly, in *State v. McCall*,[97] defendant was convicted, inter alia, of first-degree murder. That the murder took place was a given; defendant's defense was based on the claim that he was not involved in the crime.[98] To prove defendant's guilt, the prosecution offered evidence of a plot in which defendant was involved to take over the illegal drug business in the South Phoenix area.[99] Over defendant's objection, the trial court admitted the evidence, and this decision was upheld. The court held that:

> [The evidence] helped explain to the jury what appellant meant when he told Mr. Merrill that he (appellant) was "changing sides" to join Bracey and Hooper and would be

96. 3 Park. Crim. 681 (N.Y. Sup. Ct. 1858).

97. 677 P.2d 920 (Ariz. 1983).

98. Defendant also sought to have his trial severed from that of his co-defendant. The appellate court upheld the trial court's refusal to sever. *See id.* at 925.

99. *See id.*

> living "life in the fast lane." We find such evidence properly admitted either as evidence of appellant's motive in joining Bracey and Hooper in the Redmond murder or as evidence completing the story for the jury.[100]

Thus, the evidence demonstrated that defendant had a motive to commit the crime. The existence of a motive, in turn, would tend to make it somewhat more likely than it would be without the motive that defendant did indeed take part in the murder.

3. Evidence of uncharged misconduct suggesting a need for or other motive to obtain money

One recurring use of uncharged misconduct evidence to prove motive, and from that, a person's commission of the relevant act, arises in robbery and other property crime cases where the evidence tends to show that defendant needed money and often, that defendant was living beyond his or her means.[101] In *People v. Talaga*,[102] for example, defendant was charged with armed robbery. To prove defendant's participation in the crime, the prosecution asked defendant on cross-examination whether he was a heroin addict. On appeal, defendant claimed that evidence of his heroin addiction should have been excluded. The court affirmed, holding that the evidence tended to establish a motive for the crime charged, and that the motive, in turn, "would tend to rebut defendant's contention that he was at home and knew nothing of the charge made against him."[103]

As discussed previously, evidence of motive from uncharged misconduct must be more than speculative.[104] In the cases involving

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100. *Id.* at 926 (citation omitted).

101. *See* United States v. Saniti, 604 F.2d 603, 604 (9th Cir. 1979) (holding that evidence of defendant's $250 per day drug habit was admissible to prove motive, and noting that "[e]vidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain").

102. 194 N.W.2d 462 (Mich. Ct. App. 1971).

103. *Id.* at 463; *see also* United States v. Cyphers, 553 F.2d 1064, 1069-70 (7th Cir. 1977) (in bank robbery prosecution, evidence that shortly after the robbery, defendant asked government informer to purchase heroin for him was admissible to prove defendant's motive for and participation in the robbery); People v. McConnell, 335 N.W.2d 226, 230 (Mich. Ct. App. 1983) (similar).

104. *See supra* notes 29-41 and accompanying text.

motive to obtain money, courts have been reluctant to admit evidence where the inference of motive is weak. In *United States v. Mullings*,[105] for example, defendant was charged, inter alia, with theft of property valued at more than $100. To prove motive and thus participation in the crime, the trial court allowed the prosecution to present evidence of defendant's meager take-home pay and that he used narcotics. On appeal, the court held that admission of the evidence was reversible error because there was no evidence to show how often defendant used narcotics, what his habit cost him, or that a shortage of money prevented him from obtaining the narcotics. At most, the court held, the evidence showed that defendant might have lacked money and thus might have had a motive to commit the crime.[106] Many other similar cases can be found.[107] The weaker the inference of motive, the less probative the evidence on the ultimate issue of identity, and the more likely the court should exclude the evidence to avoid the risk of unfair prejudice. Facts such as the link between the theft and the drug use, the need for the evidence, and the presence or absence of evidence suggesting the defendant was short of funds will be crucial.[108]

Another common fact pattern involves arson cases in which defendant is alleged to have set the fire to collect insurance proceeds. Cases have long recognized the admissibility of uncharged misconduct to prove such a theory. In *Commonwealth v. McCarthy*,[109] for example, defendant was originally charged with three counts of arson, one of which concerned the burning of a building owned by one Gleason, and two of which concerned fires shortly before the other

105. 364 F.2d 173 (2d Cir. 1966).

106. *See id.* at 175-76.

107. *See, e.g.*, United States v. Madden, 38 F.3d 747, 752-54 (4th Cir. 1994) (in prosecution for robbery, evidence of defendant's use of drugs was inadmissible in the absence of direct evidence of defendant's financial need or drug use extensive enough to suggest great expense); People v. Reid, 133 Cal. App. 3d 882, 184 Cal. Rptr. 186 (1982) (in prosecution for committing several robberies, evidence that defendant was a drug user should not have been admitted where there was no reasonable basis for inferring the monetary burden of defendant's use). For discussion of cases admitting and excluding the evidence in these types of prosecutions, see Landis, *supra* note 63.

108. *See* 67 AM. JUR. 2D *Robbery* § 58 (1985).

109. 119 Mass. 354 (1876).

fire in a shed close to Gleason's building.[110] The government proceeded at trial only on the count involving Gleason's building.[111] Defendant kept goods in Gleason's building and had insured those goods for more than their value. The government's theory was that defendant set the fire in order to collect the insurance money. Allegedly to prove that the Gleason fire was intentionally set, the prosecution offered evidence concerning the two shed fires.[112]

Before trial, defendant conceded that the charged fire had been set intentionally, but claimed that he was not the one responsible. Thus, defendant objected to the evidence concerning the shed fires, presumably on relevance grounds. The trial court admitted the evidence nonetheless, and the appellate court affirmed. The court did not explain either why defendant's pretrial admission did not preclude evidence proving intent or why the evidence in question tended to prove that fact. It merely stated that the government's theory was that defendant acted on a motive to burn the building to collect the insurance money.[113]

Assuming the government was properly entitled to prove intent even though defendant conceded that point, the evidence would have been relevant for that purpose if the evidence established that defendant had in fact insured the goods for more than their value, and if defendant had in fact intentionally burned the sheds. Under these circumstances, it would be reasonable for the jury to conclude that defendant had a motive to burn Gleason's building, and that if defendant did in fact set the fire, he did not do so accidentally. Of course, the evidence was also admissible to prove that defendant was the one who burned the building. Though courts frequently admit uncharged misconduct in situations similar to that in *McCarthy*, others have

110. *See id.* at 354-55.
111. *See id.* at 354.
112. *See id.* at 355.
113. *See id.*; *see also* Regina v. Gray, 176 Eng. Rep. 924, 924-25 (K.B. 1866) (in prosecution for arson, fire occurred several months after defendant obtained buildings and took out substantial fire insurance policies on them; evidence of previous fires in buildings defendant occupied and insured was admissible, most likely to prove identity of perpetrator).

excluded the evidence where it is not needed, where the risk of unfair prejudice is too great, and for other similar reasons.[114]

Recall that in *United States v. Cunningham*,[115] the prosecution alleged that defendant's prior addiction to Demerol and activities related to it could be used to establish a continuing addiction to the drug, and that her addiction, in turn, supplied a motive to steal it from the hospital cabinet. If *Cunningham* fits any of the motive-to-identity fact patterns, it is most likely the one just discussed. Though the cases typically involve a motive to obtain money for a needed item such as drugs, an analogy can be drawn between these cases and *Cunningham*. Whether these cases and the variation represented by *Cunningham* constitute a valid noncharacter theory for admission of uncharged misconduct evidence will be considered at length later in this Article.[116] For present purposes, it is sufficient to note that courts commonly admit such evidence on this basis.

4. Evidence of misconduct subsequent to charged offense suggesting reason to commit charged offense

Another recurring motive-to-identity fact pattern involves defendant's conduct after the charged crime. That conduct, in turn, helps to identify defendant as the perpetrator of the crime. In some of the cases, the reasoning is similar to that discussed to this point: defendant, as shown by the uncharged misconduct evidence, had a

114. *See, e.g.*, United States v. Latouf, 132 F.3d 320, 323, 328-29 (6th Cir. 1997) (in prosecution for conspiracy to commit arson [allegedly committed] to recover insurance proceeds, trial court admitted evidence that one defendant had told employees that she wanted to have her house burned down and that she would pay them $5000 to do so; court erred in admitting evidence because other evidence of motive was available and risk of prejudice great; the court held that the error was harmless under the circumstances, however); *see also* People v. Fitzgerald, 50 N.E. 846, 846-51 (N.Y. 1898) (in arson prosecution of pastor for burning parochial schoolhouse to recover insurance proceeds from which his salary could be paid, trial court should not have admitted evidence of other misconduct including additional fires to which defendant may have been connected; evidence was too speculative, risk of distraction of jury was too great, and defendant would not be prepared to answer for all alleged wrongdoing in his life).

115. 103 F.3d 553, 555-57 (7th Cir. 1996). For discussion of *Cunningham*'s facts, see *supra* notes 11-18 and accompanying text.

116. *See infra* notes 311-313 and accompanying text.

motive to commit the charged offense. Thus, it is more likely than it would be without the evidence that defendant did in fact commit the charged offense.

In *State v. Brown*,[117] for example, defendant was charged with the murder of a deputy sheriff who had stopped defendant's car for speeding.[118] Defendant claimed that another person shot the officer.[119] At trial, the court permitted the prosecution to offer evidence that defendant had stolen the car. This evidence was relevant because it established a motive to shoot the officer. Specifically, it provided a reason why defendant might have been the actor: to avoid discovery of the auto theft.[120] As the court stated, "[p]roof that defendant had stolen the vehicle establishes a motive for defendant to fire upon the officer in order to avoid being arrested on the speeding charge."[121]

In *Pugliese v. Commonwealth*,[122] defendant was charged with robbery and murder.[123] At trial, a prosecution witness testified that after the crime was committed, defendant purchased cocaine from her.[124] The court held this evidence admissible to show that defendant spent money obtained from the victim on drugs. This suggested a motive for committing the crime, and thus that defendant was involved.[125] The only essential difference between this case and those discussed previously is that the motive for the charged crime was supplied by evidence of events taking place after, rather than before, that crime.

117. 398 So. 2d 1381 (La. 1981). The case is discussed in Golden, *supra* note 1, at 207-08.
118. *See id.* at 1382-83.
119. *See id.* at 1384.
120. *See id.*
121. *Id.*
122. 428 S.E.2d 16 (Va. Ct. App. 1993).
123. *See id.* at 20.
124. *See id.* at 23.
125. *See id.* at 23-24.

5. Evidence of uncharged misconduct suggesting motive to prevent discovery of witnesses to the charged crime or to silence those witnesses

One of the most common situations in which uncharged misconduct is admissible to prove identity on a motive-type theory involves conduct committed to prevent disclosure of a charged crime or to silence witnesses to that crime.[126]

Sometimes, the uncharged conduct takes place before the charged conduct. Once again, application of this theory has a long history. For example, in *People v. Stout*,[127] defendant was accused of murdering his brother-in-law.[128] The prosecution's theory was that defendant committed the murder to prevent the victim from revealing defendant's incestuous relationship with the victim's wife, defendant's sister.[129] To prove the motive, the prosecution offered evidence of that relationship.[130] On appeal, the court affirmed, holding:

> [The evidence] went strongly to establish a motive on the part of both of them to get the deceased out of the way. While he lived, they were at his mercy. He was more interested than any one else to prosecute them for the crime . . . .
>
> The *corpus delicti* had been proved, and the principal question for the jury to determine, was, whether the prisoner was the perpetrator of, or implicated in, the crime. The evidence on that question, though circumstantial, was strong and convincing that he was the murderer. If anything was wanting, it was a motive on his part. That motive was supplied, in connection with other facts proved, by the evidence . . . .[131]

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126. The hypothetical theft-murder case that has been used throughout this Article is an example of this fact pattern. For the basic facts of the hypothetical, see *supra* notes 32-33 and accompanying text.

127. 4 Park. Crim. 71 (N.Y. Sup. Ct. 1858).

128. *See id.* at 112-14.

129. *See id.* at 113-14.

130. *See id.* at 114.

131. *Id.* at 115 (Welles, J., alternative holding). Note that the case obviously involved a related motive: to eliminate the sister's husband to increase the op-

Another case also illustrates this route to admissibility. In *Moore v. United States*,[132] defendant was charged with the murder of Palmer.[133] At trial, the prosecution offered evidence that defendant suspected that Palmer was investigating the death of another man (Camp) and defendant's possible connection with it. The evidence tended to prove a motive for Palmer's murder, and was admissible for that purpose.[134] The reasoning is as follows:

> *EVIDENCE*: Defendant murdered Camp[135] and knew that Palmer suspected his involvement.

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portunities for continuation of the incestuous relationship. On rehearing, the court wrote:

> The object of this evidence manifestly was, to prove a motive in the mind of the defendant below to take the life of the deceased .... The motive ... was, to remove the deceased out of the way, to relieve Mrs. Littles from her difficulties with him, and to afford more full and free and safe opportunity to him for vicious intercourse with her.

Stout, 4 Park. Crim. 132, 138 (N.Y. Sup. Ct. 1858); *see also* State v. Watkins, 9 Conn. 46, 47 (1831) (in trial for murdering his wife, evidence of defendant's adulterous relationship with another woman was admissible); State v. Kent, 67 N.W. 1052, 1053, 1061 (N.D. 1896) (in prosecution of defendant for murder of his wife by procuring another person to kill her, to prove defendant's involvement, prosecution offered evidence of other criminal conduct occurring before the murder, on the theory that these crimes were relevant to prove defendant was motivated to kill his wife from fear that she would learn of these crimes and would expose him; other evidence tended to show that defendant was afraid his wife would learn of the crimes and that, in fact, his wife was suspicious of him).

132. 150 U.S. 57 (1893).

133. *See id.*

134. *See id.* at 61. The Court admitted the evidence even though there was other evidence that defendant had a different motive to kill Palmer. *See id.*; *see also* Dunn v. State, 2 Ark. 229, 243-44 (1840) (in murder prosecution, to prove defendant's motive to kill victim, evidence was admissible that defendant had killed another person and that current victim had been investigating the earlier crime; though court held evidence admissible because connected with current crime, motive theory is more apt).

135. Note that for this theory to be valid, it is not absolutely necessary that defendant have murdered Camp. If, for example, defendant feared that Palmer might wrongfully accuse him of the Camp murder, defendant might have had a motive to kill Palmer to prevent the wrongful accusation. The Court, however, appears to have assumed for purposes of resolving the evidentiary issue that defendant did kill Camp. *See Moore*, 150 U.S. at 61.

→*INFERENCE*: Defendant had a motive to kill Palmer to prevent Palmer from completing his investigation and disclosing his suspicions.

→*CONCLUSION*: Defendant killed Palmer.

Modern cases continue to recognize this type of motive-to-identity theory. In *United States v. Talley*,[136] defendant, a law enforcement officer, was charged with soliciting the murders of an FBI agent and a witness informant.[137] The informant was assisting the FBI agent's investigation of defendant's possible criminal conduct.[138] To prove defendant's motive to silence these individuals, the government offered evidence of conversations revealing defendant's numerous illegal activities.[139] On appeal, the court held that this evidence was properly admitted

> to illustrate Talley's motive for wanting [the individuals] killed. As the government noted, it was required to show why a deputy sheriff, held in such high repute, would seek to have an FBI agent and witness killed. Thus, the statements demonstrated the severity of the charges against Talley and explained why he would want those witnesses eliminated.[140]

In other cases, the uncharged misconduct offered to prove motive occurs after the charged act. In these cases, the individual is identified through a motive supplied by the charged conduct itself.

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136. 164 F.3d 989 (6th Cir. 1999).
137. *See id.* at 993.
138. *See id.* at 993-94.
139. *See id.* at 998.
140. *Id.* at 999-1000; *see also* State v. Simborski, 182 A. 221, 225 (Conn. 1936) (in prosecution for murder of police officer, evidence that officer was investigating defendant for committing robberies was admissible to prove motive); State v. Green, 652 P.2d 697, 701 (Kan. 1982) (in prosecution for murder of wife where defendant claimed intruder committed crime, evidence that defendant had previously assaulted wife admissible to prove motive to kill, and thus that defendant was responsible); State v. Pancoast, 67 N.W. 1052 (N.D. 1896) (in prosecution for murder of wife, evidence of other offenses admissible to show that defendant procured murder of wife to prevent her from exposing him).

That motive leads to commission of other misconduct, which in turn identifies the actor as the perpetrator of the charged offense. Though the logic is a bit complex, the idea is both simple and compelling, as the following example demonstrates: Suppose *D* is charged with the murder of *V1*. At trial, the prosecution wishes to introduce evidence that after the murder, *D* killed *V2*, an accomplice in the *V1* killing. If offered to prove *D*'s identity, the inferential sequence is as follows:

> *EVIDENCE*: *D* murdered *V2*, an alleged accomplice in the murder of *V1*.
>
> →*INFERENCE*: *D* had a motive to kill *V2* to prevent *V2* from disclosing *D*'s participation in the *V1* murder.
>
> →*CONCLUSION*: *D* killed *V1*.

Thus, *D*'s participation in the murder of *V1* supplies the motive to kill *V2* to prevent *V2*'s potential disclosure of the original crime.[141] The theory is an old one: "From the days of Moses to the present time it has been the law that a person who fabricates, suppresses, or destroys evidence must take the consequences of the honest indignation which his conduct naturally excites. Moses declared, '[c]ursed be he that removeth his neighbor's landmark.'"[142] The reasoning supporting admissibility in these cases has sometimes been referred to as behavior evidencing a consciousness of guilt.[143] When the evidence suggesting consciousness of guilt consists of uncharged

141. *See, e.g.*, People v. Spaulding, 141 N.E. 196, 202 (Ill. 1923) (in prosecution for murder of a police officer, evidence that defendant murdered an alleged accomplice who had spoken to the police after the crime was admissible to prove defendant's participation in the crime).

142. *Id.* (quoting *Deuteronomy* 27:17).

143. *See, e.g., id.* ("Modern decisions establish the rule that all efforts by either party to a suit . . . to destroy, fabricate or suppress evidence may be shown as a circumstance indicating that the party's cause is an unrighteous one."); State v. Shaw, 648 P.2d 287, 290 (Mont. 1982) ("Presenting evidence of an attempted intimidation of a witness . . . pertains to the crime charged by indicating consciousness of guilt.").

misconduct, the problems associated with exposing the jury to uncharged misconduct evidence come into play.

The logic of this route to admissibility requires that the individual actually have committed the uncharged misconduct. Sometimes, that fact will be conceded or evidence of it will be overwhelming. Where that is true, the reasoning is particularly compelling. Although there is still a meaningful risk that the jury will misuse the uncharged misconduct evidence (by, for example, convicting defendant for the uncharged crime), the probative value of the evidence for its legitimate purpose is sufficiently great to warrant admission.

In actual practice, however, it is considerably more likely that the charged person will deny involvement in the uncharged crime.[144] This means that for the evidence to be relevant, the jury must first determine that defendant in fact did commit the uncharged crime. In such a case, admissibility is at least somewhat more difficult to justify because the risk of unfair prejudice, as well as of distracting the jury with peripheral matters, is considerably greater. Nevertheless, courts tend to admit the evidence fairly routinely on the theory that, if the jury finds that the defendant committed the uncharged act, the probative value of that evidence on the issue of defendant's involvement in the charged crime is sufficiently great. By the same token, it is assumed that if the jury finds that defendant did not commit the uncharged act, the jury will ignore evidence of that act.[145]

The case reporters are filled with decisions approving the admission of uncharged misconduct evidence that suggests a motive to cover up another crime, such as by silencing witnesses, seeking to

144. This was the fact in *Spaulding*, where defendant claimed he was not involved in the murder of his alleged accomplice. The evidence of his guilt of the killing of the accomplice, however, was overwhelming. *See Spaulding*, 141 N.E. at 202-03.

145. This general reasoning is consistent with the U.S. Supreme Court's decision in *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988), in which the Court held that when there is a dispute as to the person's commission of the uncharged misconduct, the standard of Federal Rule of Evidence 104(b) applies. According to that standard, the trial court should admit the questioned evidence if the court finds that there is evidence sufficient to support the jury's determination that the key fact (here, the person's commission of the uncharged misconduct) is true.

prevent the discovery of evidence suggesting guilt of the charged crime, or otherwise engaging in criminal conduct evidencing a consciousness of guilt.[146] Though many cases do not use the label "motive" to describe the theory of admissibility, it is clear that the cases are applying the type of motive theory under consideration here. In addition, of course, the rule permitting the use of uncharged misconduct evidence to prove a fact at issue is not limited to the specific list provided in the common forms of the rule.[147]

Some cases involve uncharged misconduct occurring both before and after the charged event. In *Gibbs v. State*,[148] defendant was charged with the murder of a woman. The prosecution offered evidence of two other killings: of the woman's husband shortly before the charged crime; and of the couple's daughter shortly after the charged crime. The prosecution's theory was that the killing of the husband provided the motive for the charged killing (to conceal his identity as the killer of the wife), and that defendant killed the daughter for much the same reason—to prevent her from revealing his guilt.[149] Although the appellate court ultimately rested its decision approving of admission of the evidence on a somewhat different theory, to be discussed immediately below, it is clear that the prosecution's motive theory is valid.

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146. *See, e.g.*, Dunn v. State, 2 Ark. 229, 245 (1840) (in prosecution for murder of detective, proof that detective was investigating an attempted assassination committed by defendant admissible to prove motive); People v. Gambino, 145 N.E.2d 42, 44 (Ill. 1957) (while awaiting trial for charged offense, defendant escaped and attempted escape from confinement); *Shaw*, 648 P.2d at 289 (in prosecution for theft, evidence that defendant had threatened one of prosecution's key witnesses admissible to prove consciousness of guilt); People v. Harris, 33 N.E. 65, 72-73 (N.Y. 1893) (in prosecution of man for murder of his wife, evidence that defendant had, among other things, kept the marriage a secret, produced an abortion on his wife, and had affairs with other women was admissible to prove motive for murder); Blackwell v. State, 15 S.W. 597, 599 (Tex. Ct. App. 1890) (in prosecution for murder, evidence that defendant had committed theft and arson was admissible to prove defendant killed the victim to aid in his escape).

147. *See Shaw*, 648 P.2d at 289 ("The statutory list of purposes for which other crime evidence may be admitted is not inclusive.").

148. 300 S.W.2d 890 (Tenn. 1957).

149. *See id.* at 892.

In some cases involving the admission of uncharged misconduct to cover up other criminal conduct, courts admit the evidence on a related theory. Instead of stating that the evidence is admissible to show motive, these courts hold that the charged and uncharged crimes are part of the same act, even though only one of the crimes is the subject of the prosecution. So, for example, in the *Gibbs* case, the court held that the "real reason" for admitting the evidence of the other killings was "that they were inseparable components of a completed crime."[150] The court recognized that the crimes were not actually the same;[151] each was a separate crime, though all were related. And the court criticized the use of the term "res gestae" to describe this theory,[152] as did Wigmore, who also preferred language such as "same transaction."[153]

Rather than employ the fiction that the crimes were all part of the same transaction, it would be better to analyze these cases under the theory of motive or uncharged misconduct to show consciousness of guilt, and from that fact, identity. Those labels more clearly describe the reasoning being employed.

6. Evidence of prior assaults on victim suggesting motive to commit charged crime

In prosecutions for assault, murder, and similar crimes, some courts have admitted evidence of prior violent behavior by the charged person against the same victim on a motive-to-identity

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150. *Id.*

151. The court wrote that defendant killed the woman "to cover up a crime that had already been committed" (the murder of the husband), and that the defendant killed the daughter "to cover up this second crime." *Id.* at 892-93. Thus, the court recognized that the crimes were, in fact, distinct.

152. *See id.* at 892 (rejecting the term as "useless and confusing").

153. 1 WIGMORE, *supra* note 6, § 218. Wigmore argued:

> The term "res gestae" should be once and for all abandoned as useless and confusing. Let it be said that such acts receivable as "necessary parts of the proof of an entire deed", or "inseparable parts of the deed", or "concomitant parts of the criminal act", or anything else that carries its own reasoning and definition with it; but let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase.

Id.

theory. As one text explains: "If the defendant has previously assaulted the same person, then these courts allow the prior assault to be used as evidence that the defendant disliked the person, providing a motive for a subsequent assault. Such evidence could be admissible to prove that defendant committed the crime . . . ."[154]

The facts of *State v. Green*[155] illustrate the theory. Defendant was charged with murdering his wife, from whom he was separated. The murder weapon appeared to be an axe. Defendant denied committing the crime, claiming that the murder was committed by an intruder. To prove defendant's involvement, the prosecution offered evidence that a year before the murder, defendant had thrown a small hatchet at his wife,[156] and that in the weeks prior to the murder, there had been marital discord, with defendant at one point threatening to send his wife "'back to Africa in a pine box.'"[157] Defendant was convicted of first-degree murder. On appeal, the court approved admission of the evidence:

> Obviously, the identity of the assailant was a critical issue in the case . . . . [U]nder these circumstances evidence of the defendant's prior assaults against his wife was of great probative value on the issue of identity . . . . [W]e conclude that evidence of a discordant marital relationship, including the defendant's prior acts of violence against his wife and threats to kill her, is admissible . . . where the evidence is offered not for the purpose of proving distinct offenses, but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the witnesses as to the act charged.[158]

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154. ROGER C. PARK ET AL., EVIDENCE LAW § 5.18 (1998). Often the same evidence will be relevant to the criminal intent or motive of the actor. *See id.*

155. 652 P.2d 697 (Kan. 1982).

156. *See id.* at 700 (defendant was convicted of battery arising from the earlier incident).

157. *Id.* at 699 (quoting trial testimony).

158. *Id.* at 701; *see also* Melton v. State, 43 Ark. 367, 371-72 (1884) (holding that in prosecution of Ku Klux Klan member for murder, evidence of previous assault on victim was admissible to "show a series of connected wrongs, growing out of and illustrating one another and culminating in homicide," and

To generalize, then, the reasoning of the courts in these cases is as follows:

> *EVIDENCE*: Prior to the crime charged, *D* had committed violent acts against *V*.
>
> →*INFERENCE*: *D* harbored ill-will toward *V*.
>
> →*INFERENCE*: *D* had a motive to commit the charged violent crime against *V*.
>
> →*CONCLUSION*: *D* committed the charged crime.

The reasoning is valid and does not violate the character evidence prohibition. At the same time, as with other motive evidence, it does not avoid all propensity inferences; moving from one inference to another requires one to conclude that a person with a motive is more likely than one without a motive to act in a particular way.[159]

7. Miscellaneous uses of motive evidence to prove identity

Courts have approved the admission of uncharged misconduct evidence that shows motive, and from that fact, the identity of the actor, in numerous other situations. A few examples will illustrate. In *United States v. Pierce*,[160] defendant Tackett was charged, inter alia, with arson arising from the burning of a church. The government alleged that Tackett committed the act at the request of Pierce, a co-conspirator, and theorized that Tackett was financially dependent on Pierce and had set fire to the church in part to stay in Pierce's good graces.[161] To prove the close relationship between Tackett and Pierce, the government offered evidence that for years, Tackett had stolen property and delivered it to Pierce in exchange for money.

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that "evidence of the previous offense is competent where it discloses a motive for the act which is the subject of investigation").

159. *See supra* note 55 and accompanying text.

160. 62 F.3d 818 (6th Cir. 1995).

161. The evidence indicated that Pierce was Imperial Wizard of the local chapter of the Ku Klux Klan and that he wanted to burn the church because its pastor had been a vocal critic of the Klan. *See id.* at 822.

Approving admission of the evidence, the court stated:

> At trial, the government developed a theory that presented Tackett as financially dependent upon Pierce. Pierce allegedly wanted the Church burned down. The only way for the government to prove Tackett's motive and Pierce's intent was to establish their relationship . . . .
>
> Rule 404(b) does not prevent the government from establishing how members of a conspiracy are related, solely because doing so would include evidence of prior criminal activities.[162]

A somewhat similar theory was apparently used by a Colorado court in *People v. Nicholas*.[163] Defendant appealed his conviction of first-degree murder and conspiracy to commit aggravated robbery. The prosecution's theory was that defendant and an accomplice planned a robbery, and that the actual robbery and subsequent shooting were committed by the accomplice while the defendant waited across the street. At trial, the prosecution was permitted to offer evidence of defendant's alleged gang affiliation. The purpose of the evidence was to prove that the accomplice performed the crimes to show that he should be allowed to join defendant's gang. Thus, defendant's gang affiliation was admissible to prove the motive of his alleged accomplice, and from that, defendant's involvement in the crimes.[164] Though the evidence in *Nicholas* tended to show the motive of a person other than the defendant, that motive, under the circumstances, implicated defendant in the crimes.

8. A brief perspective: the motive-to-identity theory

In each of the fact patterns discussed in this section, the motive-to-identity theory appears to be a legitimate application of the principle that uncharged misconduct evidence may be used to prove a relevant fact if it does not require a character-based propensity inference. The second leap in the inferential chain—from the existence of a

162. *Id.* at 829; *see also* United States v. White, 788 F.2d 390, 393 (6th Cir. 1986) (allowing evidence of prior criminal activities to "set up the scene" and establish relationship between co-conspirators).

163. 950 P.2d 634 (Colo. Ct. App. 1998).

164. *See id.* at 636-37.

motive to the commission of the charged act—always involves a type of propensity inference, but because the validity of that inference does not depend on an assumption about the person's character, the law does not forbid it. Although a legitimate, noncharacter theory does not guarantee admissibility where the court may still exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice, the cases applying the theory pass the initial test for admissibility.

In *Cunningham*,[165] the court approved the trial court's admission of evidence of the nurse's uncharged misconduct to establish her identity as the person who stole the Demerol from the locked cabinet. Later, I will turn to whether the *Cunningham* court stated a legitimate theory for the noncharacter use of the nurse's other misconduct.[166] First, it is useful to complete the story of motive by examining the other two ultimate purposes for which motive evidence may be relevant.

B. The Use of Motive to Prove Actus Reus

In the typical criminal prosecution, there is ample evidence that the underlying criminal act occurred. In a prosecution for murder or theft, for example, the act's occurrence usually will not be in controversy. But sometimes there is a legitimate dispute about the occurrence of the act. Perhaps the alleged murder victim's body was never found, leaving doubt as to whether any killing took place. Or perhaps the condition of the body did not attest to the cause of death, whether natural, self-inflicted, or by the act of another. Moreover, there are some types of cases in which the lack of physical evidence or disinterested witnesses makes the commission of the criminal act a matter of dispute. This is obviously the case with charges of incest or other types of sexual crimes, though it can be true of other crimes as well.

In any case in which the commission of the criminal act by any party is disputed, evidence that the person charged with the act had a

165. See *supra* notes 11-14 and accompanying text for a description of the facts.

166. *See infra* note 314 and accompanying text.

motive to commit it can, in theory, be admissible to prove that the act occurred. Writing in 1978, Wright and Graham recognized this possibility, though they wrote that the federal courts had not embraced it.[167] With the passage of a few years, however, the same commentators were able to state that the courts' reluctance was no longer evident, and they cited numerous cases in which the courts applied the theory.[168]

In fact, for some time, courts have approved admission of uncharged misconduct evidence to establish the occurrence of an event by means of motive in at least one type of case: prosecutions for sexual crimes including rape and child molestation. Although recent developments in evidence law have rendered such evidence more broadly admissible in many jurisdictions,[169] courts have long approved admission of such evidence in sex crime cases for at least three reasons, all of which tend toward the same conclusion—that proof of the crime's occurrence is exceedingly difficult to muster. First, these crimes generally take place in private, meaning that the only witnesses are likely to be the defendant and the alleged victim, who will, of course, offer diametrically opposed stories. Second, these crimes can often be committed without leaving significant physical traces, making circumstantial proof difficult. Third, even if physical evidence did exist at one time, it often has been destroyed by the time the crime is reported and investigated. At base, then, courts have admitted the uncharged misconduct evidence in these cases because it is needed.[170]

As a result of these often insurmountable obstacles to successful prosecution, courts have permitted prosecutors to offer evidence of other acts between the defendant and the victim. The theory is

167. *See* 22 WRIGHT & GRAHAM, *supra* note 21, at 484.

168. *See* 22 *id.* at n.78 (Supp. 1999).

169. *See, e.g.*, FED. R. EVID. 413-415 (allowing for broad admissibility of evidence of prior sexual assault and child molestation in criminal prosecutions and civil actions for such conduct); CAL. EVID. CODE § 1108 (West Supp. 2000) (applying similarly broad admissibility standards in criminal prosecutions).

170. Recall that need is one of the criteria a court should use in determining the admissibility of uncharged misconduct evidence. *See supra* notes 75-79 and accompanying text.

exemplified by *People v. Leonard*,[171] a Colorado case. Defendant was convicted of aggravated incest. The alleged victim was his stepdaughter, who had been thirteen years old at the time the act allegedly occurred. At trial, the stepdaughter, now an adult, testified about the incident. Defendant denied that the act occurred, claiming that the stepdaughter had fabricated the story.[172]

To prove that the stepdaughter's story was not fabricated—that the incestuous conduct did in fact occur—the stepdaughter was permitted to testify, over defendant's objection, about seven other incidents of improper sexual contact defendant had with her from the time she was three years old.[173] On appeal of his conviction, the court held the evidence properly admissible to prove that the charged act occurred by means of motive. The court recognized that although this was not the usual way in which motive evidence is used, it was in fact relevant for this purpose:

> We recognize that evidence of uncharged conduct indicative of motive is generally admitted for the purpose of establishing identity or intent . . . . However, admission of such evidence . . . has been approved in sexual assault cases on a number of occasions as bearing on defendant's motive even though identity and intent were not at issue . . . . Thus, while sexual gratification may be a motive in any sexual assault [case], . . . the concept of motive involves more.
>
> In our view, the concept of motive in a sexual assault case may also address other relevant factors such as why a particular type of behavior is involved or why a particular victim is selected for the assault. Thus, evidence of motive as reflected in the occurrence of prior uncharged conduct may

171. 872 P.2d 1325 (Colo. Ct. App. 1993).

172. *See id.*

173. The prior incidents differed somewhat from the charged crime, but the court held that they were sufficiently similar in that they involved the same parties, occurred in private, and included express or implied intimidation. All were characteristics of the charged crime. Though the type of activity changed as the victim grew older, the court did not find this to be significant. *See id.* at 1327.

tend to establish the charged offense.[174]

Summarizing, the court held that "evidence of the defendant's prior acts of assault against the victim without consequence was relevant to demonstrate that it was more probable than not that defendant had a motive to commit yet another assault and thus to demonstrate that the victim's testimony was not fabricated."[175]

The theory of admissibility in cases such as *People v. Leonard* appears to take the following form:

> *EVIDENCE*: Defendant had engaged in a number of improper sexual contacts with the alleged victim.
>
> → *INFERENCE*: Defendant had a motive to continue engaging in similar conduct with that person.
>
> → *CONCLUSION*: The alleged crime took place. (Or, the alleged victim did not fabricate her testimony.)

The reasoning has been embraced by many courts, whether under the label of "motive" or one of a number of other designations.[176] Though it has been employed to permit evidence of uncharged sexual misconduct with persons other than the victim,[177] most courts limit

174. *See id.* at 1328.

175. *Id.*; *see also* State v. O'Donnell, 61 P. 892, 893 (Or. 1900) ("When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial."); State v. Start, 132 P. 512, 515 (Or. 1913) (enumerating exceptions stated in *O'Donnell*, including limitation to sexual activity between same parties); Brown v. State, 817 P.2d 429, 435 (Wyo. 1991) (in prosecution for sexual abuse of stepdaughters, evidence of numerous uncharged incidents of sexual misconduct involving same victims was admissible to show course of conduct or pattern between defendants and victims and motive, both of which tended to prove that the charged acts occurred; "[t]he demonstration of the long-term pattern of sexual abuse constituted an attempt by the State to rebut this claim that the case against [defendant] was fabricated").

176. For a discussion of cases, see R.P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R.2D 841, § 27 (1961 & Supp. 1998).

177. *See, e.g.*, United States v. Gano, 560 F.2d 990, 992-93 (10th Cir. 1977)

the evidence to other instances of sexual conduct between defendant and the same victim.[178] Sometimes, courts state a number of purposes for which the evidence is admissible.[179]

The rationales offered by the courts in these cases are not always persuasive. For example, in *People v. Barney*,[180] defendant was charged with incest with his daughter and with committing lewd acts upon his granddaughter, both minors. At trial, the prosecution was permitted to offer evidence of numerous uncharged criminal sexual acts defendant committed on the same children. On appeal, the court held that the evidence admissible to prove that the charged acts occurred, and that it did not violate the character evidence rule.[181] Specifically, the court held the evidence admissible under the "*modus operandi*" theory to prove the charged acts occurred by supporting

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(holding that in prosecution for sexual contact with a female under sixteen, evidence that defendant had sexual intercourse with victim's mother was admissible); Adrian v. People, 770 P.2d 1243, 1244-46 (Colo. 1989) (holding that in prosecution for sexual assault, evidence of prior sexual assaults on another child was admissible).

178. *See, e.g.*, Dockerty v. People, 219 P. 220, 220-21 (Colo. 1923) (in prosecution for assault and taking indecent liberties on minor daughter, evidence of sexual intercourse with older daughter should not have been admitted); State v. Marvin, 197 N.W. 315, 315-16 (Iowa 1924) (in prosecution for lewd, immoral, and lascivious acts with a minor girl, evidence of other similar acts at a different time and with a different girl should not have been presented; trial judge's withdrawal of the evidence and instruction to jury to ignore it did not cure error in admission); *Start*, 132 P. at 515 (stating that rule permitting evidence of other sexual offenses is limited to conduct between same parties); McAllister v. State, 88 N.W. 212, 212-13 (Wis. 1901) (where defendant was charged with assault with intent to rape, trial court erred in allowing evidence of defendant's attempt to rape another person, even though that attempt occurred within about an hour of and in close proximity to the charged crime); *cf.* Dunscombe v. State, 197 P. 1073, 1077 (Okla. Crim. App. 1921) (in prosecution for assault with intent to rape, evidence of defendants' sexual misconduct with other persons is sometimes admissible but should have been excluded in this case because conduct was too dissimilar and too remote in time).

179. *See, e.g.*, *Gano*, 560 F.2d at 993 (evidence was admissible to prove "motive, preparation, plan and knowledge (or state of mind)"; court found no error in admission of the evidence even though defendant based defense on insanity rather than on claim that charged act did not occur); *Adrian*, 770 P.2d at 1246 (evidence admissible to prove "*modus operandi* and motive," presumably relevant to prove charged acts occurred).

180. 143 Cal. App. 3d 490, 192 Cal. Rptr. 172 (1983).

181. *See id.* at 494, 192 Cal. Rptr. at 175.

the credibility of the victim-witnesses.[182] While recognizing that *modus operandi* reasoning is usually applied to establish the identity of the perpetrator, the court held that the theory "may also support the credibility of a witness in a sex crime case . . . by corroborating the details peculiar to the offenses."[183]

The facts of *Barney* might support application of the *modus operandi* reasoning, particularly if identity of the perpetrator were at issue.[184] However, its use to support the credibility of the witnesses, and thus also show that the charged acts occurred, is at least somewhat suspect. The court's reasoning appears to be as follows:

> *EVIDENCE*: Defendant committed a number of improper sexual contacts that shared many common characteristics with the charged conduct.
>
> →*INFERENCE*: The testimony of the alleged victims concerning the charged conduct was corroborated.
>
> →*INFERENCE*: The alleged victims' testimony is credible.
>
> →*CONCLUSION*: The charged conduct took place.

The court's theory, then, is that corroboration of the alleged victims' testimony by other similar incidents makes that testimony credible. Arguably, this theory does not avoid the forbidden character inference. Corroboration would be a valid theory when identity is in issue (in which case the similarity of the charged and uncharged conduct would support the *modus operandi* reasoning). But when the only issue is whether the charged conduct took place, the reasoning appears to violate the character rule. Reasoning from the common characteristics to the commission of the crime requires an inference

182. *See id.* at 495, 192 Cal. Rptr. at 176.
183. *Id.*
184. *See id.* at 496, 192 Cal. Rptr. at 176 (pointing to numerous factual similarities among the charged and uncharged occurrences, some of which were quite distinctive).

that defendant would continue to commit such crimes, inferences driven not by the similarity of the acts, but by defendant's propensity toward this kind of criminal behavior.[185] In any event, the case is part of a tangled history in recent California authority concerning the admissibility of uncharged misconduct in sex crime cases, and its validity is uncertain.[186]

Many other cases involving incest and similar behavior admit uncharged misconduct evidence to prove that the charged act took place without specifying the precise reasoning supporting admission. In *State v. Akers*,[187] for example, the court simply held:

> While proof of other distinct crimes is not ordinarily admissible, it is proper in a prosecution for incest to admit evidence of [other sexual acts defendant committed on the alleged victim], "since such evidence is of such a character as tends to make it probable that the parties did commit the specific offense charged. They constitute the foundation for an antecedent probability."[188]

As indicated, the court did not specify the precise noncharacter reasoning that makes the uncharged misconduct admissible in such cases to prove that the crime took place,[189] other than to imply that

185. *See* BERNARD S. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 33.6, at 1212-13 (2d ed. 1982) (criticizing broad rule rejecting admissibility of uncharged misconduct evidence when used only to corroborate victim's testimony). Jefferson would allow admission of such evidence to support victim witness testimony when the evidence can be offered under some other theory, such as intent. He argues that "logic and reason" would require that such evidence be treated as propensity evidence regardless of its admissibility on some other ground.

186. *See* People v. Ewoldt, 867 P.2d 757 (Cal. 1994) (overruling a number of cases stating theories on which the *Barney* court relied).

187. 328 S.W.2d 31 (Mo. 1959).

188. *Id.* at 33-34 (quoting State v. Pruitt, 100 S.W. 431, 432 (Mo. 1907)).

189. *See also* Veloz v. State, 666 S.W.2d 581, 582-83 (Tex. Ct. App. 1984) (stating that the general rule forbidding the use of uncharged misconduct to prove that the defendant committed the crime "does not apply to sex offenses committed against minors by their parents or others standing in the position of a parent," and that in such cases, the evidence "is admitted in order to enable the jury to properly evaluate the inherently questionable testimony of a minor against an adult responsible for his welfare").

the need for the evidence overrides concerns that otherwise would lead to exclusion.

The language employed by some courts reveals more clearly what arguably stands behind admission of the evidence in these cases: a specific type of motive-based theory. In *Barney*, for example, the court held that the evidence "tended to prove defendant had a strong and continuing sexual desire for [the victim] likely to have been realized on the occasion of the charged offense."[190] In *Happner v. State*,[191] another incest prosecution, the court used similarly motive-laden language:

> "In matters of incest or rape under the age of consent, it is often of importance to show . . . how one in a position demanding care and guidance of a related person, has failed in such duty and has adopted an unnatural attitude relative thereto, and by fondling or otherwise, evidences a desire for sexual gratification toward such child or relative."[192]

This motivationally driven language was at one time common in American sex crime cases, and went under various labels including "deviate sexual instinct" or "depraved sexual instinct," and "lustful disposition."[193] Though a complete discussion of the origins, scope, and viability of that theory is beyond the scope of this Article, it is

190. *Barney*, 143 Cal. App. 3d at 496, 192 Cal. Rptr. at 176-77.

191. 325 S.W.2d 390 (Tex. Crim. App. 1959).

192. *Id.* at 391-92 (quoting Johns v. State, 236 S.W.2d 820, 823 (Tex. Crim. App. 1951)); *see also* Laredo v. State, 232 S.W.2d 852, 853 (Tex. Crim. App. 1950) (holding evidence admissible "as showing this kind of act as probable by reason of [defendant's] unnatural passion for this girl").

193. *See* MCCORMICK, *supra* note 39, § 190, at 803-04 (describing cases admitting uncharged misconduct evidence "[t]o show a passion or propensity for unusual and abnormal sexual relations," and noting that some cases have admitted such evidence even when it involves persons other than the alleged victim). Some courts that previously had embraced this theory have now abandoned it. *See, e.g.*, Lannan v. State, 600 N.E.2d 1334, 1337-41 (Ind. 1992) (overruling "depraved sexual instinct exception" to rule barring evidence of prior bad acts; court noted that one of the two main rationales for the rule was the perceived need to support the credibility of an alleged victim of this type of crime).

sufficient for present purposes to note that it purports to rest, at least in part, on a theory of motive.[194]

Uncharged misconduct evidence has also been admitted in other types of cases to prove that the alleged act occurred. In *State v. Harshman*,[195] the court employed reasoning similar to that used in some of the sex crimes cases. Defendant was convicted of drug charges after he allegedly provided one hitchhiker with nine pills containing methamphetamine. The hitchhiker testified for the prosecution that defendant gave him the pills as a "sample" of drugs he had with him. Defendant claimed the story was fabricated—that he never provided any drugs, and that the witnesses contrived the testimony because they had a financial stake in the outcome of the case. To prove defendant's guilt, the prosecution was permitted to present evidence that a few days after the charged event, defendant sold one of the same persons 800 pills containing methamphetamine. Although the appellate court held that the trial court committed reversible error by failing to grant defendant a continuance after the prosecution revealed its intention to offer the evidence only on the morning of the trial,[196] the court held that on retrial, the evidence

194. For a more complete analysis of the "depraved sexual instinct" theory, see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 581-83 (1997); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 557-60 (1994); Sarah B. Colley, *New Mexico Rejects the "Lewd and Lascivious" Exception to Rule 404(b):* State v. Lucero, 24 N.M. L. REV. 427, 430-31 (1994); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 135-40 (1993); David J. Kaloyanides, Comment, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297 (1992); L. Renée Lieux, Note, *The Michigan Pig Farm Perception: The Michigan Supreme Court Continues to Ignore the Opportunity to Create a Lustful Disposition Exception to Michigan Rule of Evidence 404(b)*, 76 U. DET. MERCY L. REV. 127, 151-52 (1998); Ellen H. Meilaender, Note, *Revisiting Indiana's Rule of Evidence 404(b) and the Lannan Decision in Light of Federal Rules of Evidence 413-415*, 75 IND. L.J. 1103, 1107-13 (2000); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995).

195. 658 P.2d 1173 (Or. Ct. App. 1983).

196. *See id.* at 1176-77.

would be admissible to prove motive because "[w]ithout evidence of the later sale, the state is left with the unexplained gift of nine pills by a hitchhiker to a paid drug informant."[197] Thus, the reasoning appears similar to that used in some of the sex crimes cases: the evidence is admissible to support the credibility of the prosecution witnesses, whose testimony concerning the charged crime would not appear plausible without the evidence.[198]

In *State v. Rader*,[199] defendant was charged with arson in the alleged burning of two haystacks. The prosecution's theory was that defendant did so in retaliation for the victim's reporting another crime (that defendant had cut off the tail of one of the victim's cows) to the police. At trial, the victim was permitted to testify concerning this uncharged act. Although on appeal the court held that admission of the testimony was reversible error,[200] the court also stated that it would have been permissible for the state to elicit testimony "that a charge of that character had been made . . . , and that charge followed by an arrest . . . ."[201] Presumably, the evidence would have been admissible to show a motive to retaliate, and from that motive, the likelihood that defendant did indeed commit the crime of arson.[202]

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197. *Id.* at 1177.

198. *See id.* at 1177 & n.4. Because the jury was exposed to other evidence of defendant's drug-related activity, the prosecution argued that the evidence would not have significant prejudicial impact. *See id.* Though this appears to be true, it might also be true that because other evidence made the prosecution witnesses' story appear plausible, evidence of defendant's later sale of a large amount of illegal drugs was not necessary. Thus, the court reasonably could have concluded that the probative value of the evidence was too slight to justify admission.

199. 124 P. 195 (Or. 1912).

200. *See id.* at 196. It seems clear that under modern rules, the evidence of the underlying act would have been admissible unless its probative value was substantially outweighed by the danger of unfair prejudice. Because the existence of a motive could be evidenced by the victim's charge concerning the cow, rather than testimony that the act had in fact occurred, the legitimate probative value of affirmative testimony of the act itself would be slight. Nevertheless, the jury is likely to infer defendant's commission of the uncharged act from the testimony of the victim's charge and defendant's arrest.

201. *Id.*

202. The court did not make clear whether the actual issue in the case was whether any burning occurred or whether defendant was the perpetrator of a burning that concededly occurred. The evidence would have been relevant to

Sometimes, the bare facts of an alleged crime do not speak for themselves, and in fact might be misunderstood by a fact finder unfamiliar with the broader factual context in which the events took place. It is, of course, well established that in such cases, evidence of other events is sometimes admissible simply to complete the story—to fill out the factual record by placing the events in context.[203] In such cases, courts have sometimes approved the use of uncharged misconduct evidence to provide the necessary factual background to make the parties' behavior comprehensible. Sometimes, the uncharged misconduct evidence does so by demonstrating a motive to act in a particular way, which in turn shows the nature of the events at issue. In *United States v. Williams*,[204] for example, defendants were charged with kidnapping and conspiracy to kidnap one Harris. To prove that the actions of the defendants constituted a kidnapping, the prosecution offered evidence that defendants were in possession of drugs when they were apprehended, that they killed the alleged kidnapping victim, and that the victim was a rival drug dealer.[205] The court admitted the evidence, and defendants' convictions were affirmed on appeal.[206]

The appellate court held that the evidence was admissible on two grounds. First, the killing of Harris completed the story of the crime itself—that it was an "integral part" of the kidnapping. Second, the fact that the defendants were in possession of drugs and that they were involved in drug trafficking provided a motive to get rid of a rival drug dealer.[207] The ultimate import of both of these rationales

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either ultimate purpose.

203. This is an important reason behind the general principle that a party is entitled to prove its case through any otherwise admissible evidence. *See* Old Chief v. United States, 519 U.S. 172, 182, 186-91 (1997) (endorsing the idea of "full evidentiary context," and the right to tell a story with "descriptive richness," and creating a narrow exception for situations in which the fact finder would not be assisted in any way by hearing precise testimony on an issue because the opponent's offered stipulation gives the offering party everything the questioned evidence would have provided).

204. 95 F.3d 723 (8th Cir. 1996).

205. *See id.* at 731. This evidence required an inference that defendants were also drug dealers.

206. *See id.*

207. *See id.*

is to demonstrate that the facts show a kidnapping rather than innocent behavior. Without the evidence, it would have been considerably more difficult for the jury to comprehend and evaluate the defendants' behavior.[208]

As the above discussion shows, courts should not admit all uncharged misconduct evidence purportedly offered to prove that an event occurred. *United States v. Vance*[209] illustrates the need for close scrutiny of the precise claims and defenses in order to determine the admissibility of uncharged misconduct evidence on a motive theory.[210] In *Vance*, defendant, a prominent Kentucky politician, was charged with conspiracy to transport a weapon in interstate commerce with knowledge that it was to be used to commit murder; he was also charged with the underlying act itself. The murder victim was a Florida prosecutor, and the killer was Kelly, whose husband the victim had successfully prosecuted for drug crimes. Kelly was assisted by Taylor. Both Kelly and Taylor testified for the prosecution in Vance's trial. The government charged that on the day of the murder, Vance and the others set up an auto accident in Kentucky to place the killer in that state and thus provide an alibi. Vance denied involvement in the crime.

At trial, the government offered into evidence a number of prior criminal acts committed by Vance, Kelly, and Kelly's husband. The purpose of the evidence was to prove Vance's motive to assist Kelly.[211] The government claimed that this was necessary in order to demonstrate to the jury why a prominent person would become involved in such a crime. The trial court admitted much of this evidence,[212] explaining, in part:

208. The *Williams* case arguably could be classified as one in which the evidence shows *intent* through the mechanism of motive. That is, the evidence shows the state of mind of the defendants in holding the victim.

209. 871 F.2d 572 (6th Cir. 1989).

210. *See id.* at 573-74.

211. *See id.* at 574.

212. *See id.* at 575. The court permitted the prosecution to offer evidence of the following uncharged crimes: detonation of a bomb on the property of a judge, theft of a machine gun from a police impoundment lot, illegal manufacture of gun silencer parts, and production of false identification papers. Vance was involved in each of these acts, along with one or both of the Kellys.

> Much of the government's prior act evidence attempts to show *why* the defendant would risk this high social and political prominence by becoming involved in a murder. Any murder! The alleged criminal relationship between the unindicted co-conspirators and Vance is probative on the issue of *motivation* in the transfer of the pistol.[213]

The Court of Appeals held that the trial court had not abused its discretion in admitting this evidence.[214] The court explained that the crimes were admissible to prove motive on essentially the same grounds stated by the trial court: "to show why this well-known citizen of considerable public standing and prominence, and a former law enforcement officer, could have been motivated to assist Bonnie Kelly in the commission of Berry's murder."[215]

The court's reasoning that the evidence is admissible to show a motive that would be difficult to understand in the absence of the evidence is flawed for a number of reasons, perhaps best explained by Wright and Graham:

> The trial court admitted the evidence to show what motivated the defendant to transfer the gun, hence it was admissible under Rule 404(b) only if it proved the defendant did so without requiring the jury to draw an inference to the defendant's character. The rationale for admitting the evidence was that because the defendant was politically

213. *Id.* (quoting trial court's memorandum opinion and order).

214. *See id.* at 576.

215. *Id.* The factual record of the case is unclear in one respect. There appears to have been no contest that defendant transported the weapon, but it is not clear whether defendant claimed he did not give the weapon to Kelly or that he gave the weapon to Kelly without knowing Kelly's intention to use it in a murder. If Vance's claim was the former, the evidence would have been offered to prove that he committed the criminal act of transferring the weapon. If he admitted transferring the weapon but claimed he did not know how it would be used, the ultimate purpose of the evidence would have been to prove Vance's criminal intent. Wright and Graham assume the evidence was offered to prove the criminal act. *See* 22 WRIGHT & GRAHAM, *supra* note 21, § 5240. Perhaps the distinction is not terribly important, however. Even if Vance admitted committing the act, the prosecution still would have had to prove that he did so knowing how the weapon was to be used. Ultimately, this is likely to have been the primary issue in the case.

well-connected, . . . the jury was unlikely to believe that he would have provided a gun to be used to kill a prosecutor in another state. This comes perilously close to saying that because the jury is likely to think that the defendant is of good character and unlikely to commit the crime, the prosecution is entitled to show the defendant's bad character by showing all the evil he had participated in over the preceding decade.

The difficulty with the court's rationale is that it does not appear that the defendant put his character in issue, since by doing so he would have opened the door to the use of these other crimes on cross-examination of his character witnesses. If this is correct, it is not clear how the jurors would have been aware that the defendant was a "man of social and political prominence" inasmuch as this would appear to be irrelevant in the absence of a character defense. Hence, one is left with the suspicion that either the defendant's background came in as part of the prosecution's own case or because of a prosecutorial failure to object when the defense introduced evidence of the defendant's political connections.

The most troubling aspect of the case is that in neither the trial court nor in the appellate court does there appear to have been any attempt to explain how the evidence of these other crimes would have motivated the defendant to furnish the murder weapon. That the defendant was a friend of the killers could probably have been shown without proving that they committed crimes together. It does not appear that the killers used their knowledge of the defendant's crimes to blackmail him into furnishing the weapon. The fact that they had apparently kept secret his part in the prior crimes might explain why defendant felt safe to participate in this crime but it does not explain why he wanted to become involved at all, except out of a general antisocial character. Perhaps there are other noncharacter inferences that would allow the evidence to be admitted without violating the

> letter and spirit of Rule 404(b), but these are not mentioned in the opinion.[216]

Wright and Graham are correct in asserting that defendant did not appear to have opened the door to character evidence, and thus, the reasoning of the court is suspect. Nevertheless, there might be a more supportable chain of reasoning not dependent on defendant having introduced evidence of his good character:

> *EVIDENCE*: Defendant committed a number of crimes with Bonnie Kelly, one of the confessed killers, and with her husband Mike Kelly, whom the murder victim recently had prosecuted successfully.
>
> →*INFERENCE*: Defendant knew and felt an allegiance toward the Kellys.
>
> →*INFERENCE*: Defendant had a motive to act in a way consistent with the wishes and interests of the Kellys.
>
> →*CONCLUSION*: Defendant transferred the weapon to the victim's killers and did so with knowledge of how they planned to use it.

This reasoning does not involve defendant's character, though it does, of course, rely on the same kind of motive-based propensity inference as in virtually all cases discussed in this section. That is, for the evidence to be useful, one must infer that *any* person who has a motive to act in favor of a particular party would have a tendency to act in accordance with that motive. Because this inference does not depend on a judgment of the person's character, however, it is not forbidden by the character rule. Thus, the evidence in *Vance* might have been admissible, though not on the reasoning set forth by the court.

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216. 22 WRIGHT & GRAHAM, *supra* note 21, at 432-33.

C. The Use of Motive to Prove that a Person Acted with a Required Mental State

Apparently, the most common use of motive evidence, as proved by means of uncharged misconduct, is to demonstrate that a person acted with a mental state required by the substantive law.[217] An early twentieth century evidence handbook states:

> It may be said then, that motive is the inducement to intent, ... The rule is that when intent is relevant and material, any similar act or transaction committed by the accused which tends to show the motive of the criminal act charged may be shown, even though it may establish the commission of another offense not charged.[218]

It is not possible to catalog all of the situations in which courts have sanctioned admission of uncharged misconduct evidence to prove motive as a link in the chain leading to the requisite mental state. However, some common patterns can be identified.

1. Evidence of other acts tending to show a financial motive to commit a charged act

We have already seen that financial gain can motivate a person to engage in misconduct.[219] Thus, where defendant concededly participated in the relevant event but claims no unlawful intent, evidence of other misconduct tending to show a motive to commit the unlawful act might be admissible. Such evidence has long been admitted in arson cases, where the prosecution offers uncharged misconduct evidence to prove that defendant set the fire intentionally for the purpose of collecting the proceeds of a fire insurance policy.

In *State v. Harris*,[220] for example, defendant was convicted of burning a barn and its contents with the intent of defrauding an insurance company. On appeal, defendant claimed the trial court erred

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217. *See* 22 *id.* at 481.

218. LESLIE J. TOMPKINS, TRIAL EVIDENCE: THE CHAMBERLAYNE HANDBOOK § 688, at 657 (1936) (footnote omitted). Despite the categorical character of the quoted statement, the author noted that not all similar transactions are admissible. *See id.*

219. *See supra* notes 101-03 and accompanying text.

220. 175 P. 153 (Kan. 1918).

in allowing the prosecution to prove that about a month before the charged fire, defendant set fire to a stack of alfalfa on which he had obtained insurance. The court found no error:

> The purpose of the testimony was not to prove another offense, but to show the intent of the defendant in the commission of the offense charged and as an ingredient in that offense. There was testimony tending to show that defendant had obtained insurance on buildings [and property] .... Some testimony was offered tending to show that defendant claimed the loss on the alfalfa in excess of its value, and that other property insured was overvalued. The intent to defraud the insurer was an essential element of the crime charged, and any fact or circumstance tending to show the ingredient of intent is admissible, although it may also tend to prove the commission by the defendant of an offense other than the one [charged].[221]

Numerous courts have applied this reasoning in similar cases.[222] Admission, however, has not been approved universally.[223] In some

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221. *Id.* at 154-55.

222. *See, e.g.*, Hinkle v. State, 91 N.E. 1090, 1091 (Ind. 1910) (evidence that shortly before the fire in question the defendant applied for additional insurance covering her hotel furniture, and that four fires, apparently of incendiary origin, occurred during her four or five month tenancy, was admissible to prove the accused committed arson in the burning of the hotel); State v. Ettenberg, 176 N.W. 171, 172 (Minn. 1920) (in prosecution for arson in burning an insured store, evidence of a similar fire three months earlier was admissible); State v. McClard, 160 P. 130, 131 (Or. 1916) (similar; uncharged fire occurred after charged fire; "when the motive or intent of a party constitutes a material part of the offense charged, and particularly where the intent must necessarily be fraudulent in order to constitute the crime, evidence of similar acts may be received to show the intent in the particular case"); Stanley v. State, 171 S.W.2d 406 (Tenn. 1943) (similar; property destroyed by fire was insured for greater than its value).

223. *See, e.g.*, State v. Raymond, 21 A. 328, 330 (N.J. 1891) (in prosecution for burning a building with intent to defraud insurers, evidence that between five and eleven years earlier, several other buildings in which defendant had an interest were burned was inadmissible on the question of whether the fire at issue was set accidentally; for admission to be justified, "[t]here must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition"); People v. Smith, 56

arson cases, courts have admitted evidence of other fires purportedly to prove intent, but where intent was not a contested issue.[224] The reasoning of these cases might therefore be flawed because the evidence actually might have been relevant to another ultimate fact, such as identity.

Although arson/insurance fraud prosecutions constitute an obvious class of cases in which the motive-to-state of mind theory might apply, it could apply whenever financial gain might motivate a person to act in a certain way. Any type of case sounding in fraud would potentially qualify. Thus, in *United States v. Lambinus*,[225] defendant was convicted of unauthorized use, acquisition, and possession of food stamps. On appeal, defendant claimed the trial court erred in admitting evidence that he sold the food stamps. The court held that admission was not error: "[E]vidence of what he had done with the stamps, coupled with the inference that he had obtained a profit upon their sale, shows his intent, knowledge, and motive for accepting the food stamps."[226]

In *United States v. O'Brien*,[227] defendant was charged with bank and wire fraud in connection with the sale of a business. Specifically, the government alleged that defendant orchestrated the sale of the business in such a way that the buyer issued a check without learning that certain liens against the assets of the business had not been paid off. At trial, the court allowed the government to present evidence of a fire that had destroyed insured property, and that defendant had used the insurance proceeds for personal purposes rather than to replace the truck, even though a bank held a lien on the truck. On appeal, the court found no error in admission of this evidence because it tended to show a motive to divert business funds to personal

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N.E. 1001, 1003-04 (N.Y. 1900) (similar; prosecutor's comments suggesting other fires in buildings with which defendant was connected were improper).

224. *See, e.g.*, Regina v. Regan, 4 Cox C.C. 335, 335 (1850) (in prosecution for maliciously setting fire to building with intent to injure one Adams, where prosecution claimed defendant acted on a motive to obtain reward for reporting fire, evidence of other fires defendant had reported and for which he had received rewards was admissible to prove intent; close reading of facts suggests, however, that real issue was identity of perpetrator, not intent).

225. 747 F.2d 592, 592-97 (10th Cir. 1984).

226. *Id.* at 597.

227. 119 F.3d 523 (7th Cir. 1997).

use.[228] Though the court did not explain its reasoning completely, it appears to have held that the evidence was admissible to show that defendant had acted on a motive to obtain financial advantage, and that when she misled the buyer about the liens on the business, she did so with the same kind of fraudulent intent.[229]

The facts of *Gastineau v. Fleet Mortgage Corp.*[230] offer an interesting variation on the use of uncharged misconduct to prove intent in a fraud context. Gastineau sued Fleet, for which he had worked as a loan originator, for sexual discrimination. Plaintiff alleged that he complained several times that he was being harassed by a loan processor who, among other things, demanded sex in exchange for processing loan applications taken by the plaintiff. At trial, plaintiff produced a memorandum allegedly written by Trimble, the manager to whom he complained. In the memo, the manager admitted that the harassment was taking place but stated that because it was easier to hire loan originators than loan processors, she would fire plaintiff instead of the processor. Trimble claimed that the memorandum was a forgery. The defense was essentially that plaintiff's claim was part of a pattern of behavior in which he would fabricate charges against former employers. To prove that plaintiff fabricated the claim, the court allowed defendant to offer evidence that plaintiff had sued three former employers, in each case claiming violation of a term of employment.[231] In addition, defendant offered an allegedly forged document which plaintiff had attempted to use in

228. *See id.* at 529.

229. *See id.*; *see also* United States v. Sandow, 78 F.3d 388, 391-92 (8th Cir. 1996) (in prosecution of insurance broker for, inter alia, fraud in connection with insurance and annuity pledge schemes, evidence of civil judgments against defendant and that defendant wrote checks in satisfaction of judgments was admissible to show defendant's motive; evidence demonstrated defendant's need for money at the time he induced the victim unknowingly to pledge annuities to him; the evidence, in turn, tended to show defendant's criminal intent); United States v. Shriver, 842 F.2d 968, 974 (7th Cir. 1988) (evidence that business owner failed to comply with terms of a franchise agreement was admissible to show that the business was failing, evidencing a motive to make a false statement to the bank).

230. 137 F.3d 490 (7th Cir. 1998).

231. *See id.* at 494-95.

his action against one of the former employers. The trial court admitted the evidence to prove, inter alia, plaintiff's motive.

On appeal, the decision was affirmed. The court held that the allegedly forged document used in another claim was admissible both because it showed a common scheme or plan to use false documents in anticipation of litigation, and because it "shows Gastineau's motive in creating false documents as revenge against former employers and the hope of monetary gain."[232] Evidence of the three prior lawsuits was admissible to show, among other things, "Gastineau's vindictive state of mind regarding his employers."[233] The theory is that the evidence showed plaintiff's motive in filing the claim, and from that, the invalidity of the claim. It demonstrated a state of mind inconsistent with a valid claim.

2. Evidence of other acts tending to show enmity toward victim of charged offense

Evidence that a person harbored ill will toward a particular person or group of people can demonstrate a motive to act against the person or persons, and from that fact, the intent with which the charged act was committed. Anything can potentially serve as the source of the animosity. In *United States v. Woodlee*,[234] the source was racial prejudice. Defendants were charged with violently interfering with enjoyment of a public facility based on race, a crime requiring proof, inter alia, that the attack on the victim was motivated by the victim's race, color, religion, or national origin.[235] Apparently, identity was not in dispute, though defendants' intent was. Testimony showed that on the evening in question, the white defendants threatened and intimidated the African American victims in a bar, and later chased the victims' car and shot at them, causing injury. To prove that James Woodlee, one of the defendants, was motivated by racial hatred, the prosecution offered evidence that about a week before the incident, Woodlee told another person that he was planning to accompany some friends on an outing, but that he had

232. *Id.* at 495.
233. *Id.*
234. 136 F.3d 1399 (10th Cir. 1998).
235. *See* 18 U.S.C. § 245(b)(2)(F) (1994).

refused to go when he learned that a woman of "mixed race" would also attend.[236] On appeal, the court held that the trial court properly admitted this evidence to prove Woodlee's motive and intent. The court was correct, and the reasoning is simple: The evidence strongly suggested that his actions were motivated by the type of animosity required by the statute. Although other evidence presented at trial also tended to show Woodlee's racial animosity toward the victims,[237] the trial court acted within its discretion in admitting the evidence of Woodlee's earlier comments.[238]

Sometimes, the animosity is more personal. In *People v. Gardner*,[239] defendant was charged with assault and retaliation against a witness. The victim was struck and injured by a cardboard display as she worked. An issue at trial was whether the display was deliberately thrown or accidentally knocked over. The victim had been a government witness in two trials of defendant's husband for fraud and deceit. To prove that defendant intentionally struck the victim with the display, the prosecution offered evidence that before the trials in those cases, defendant approached the victim and asked the victim to testify that she could not identify defendant's husband as the person who had committed the crimes.[240] Apparently, the victim did not heed this request; she testified against defendant's husband, and he was convicted in both trials. The trial court admitted the evidence concerning the earlier conversation for the limited purpose of establishing defendant's motive and intent, and the appellate court affirmed. Once again, the decision is correct. Evidence that defendant wanted the victim to testify favorably in her husband's criminal trial, together with the victim's unwillingness to do so,

236. *See Woodlee*, 136 F.3d at 1410.

237. Woodlee uttered a number of highly charged racial slurs in the bar that evening. *See id.* at 1403.

238. *See id.* at 1410-11; *see also* United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983) (in prosecution for murder of two African American men, evidence of defendant's assault on an interracial couple four years earlier was admissible to prove the murders were racially motivated).

239. 919 P.2d 850 (Colo. Ct. App. 1995).

240. *See id.* at 855. Defendant testified that a conversation about the upcoming trial took place, but denied that she asked the victim to say that she did not recognize defendant's husband as the perpetrator. *See id.*

logically gives rise to a feeling of ill will toward the victim, and therefore makes it somewhat more likely that defendant intentionally injured the victim on the charged occasion.[241]

In *People v. Coit*,[242] the source of animosity was the prior relationship of the defendant and the victim,[243] and the fact that the two were embroiled in litigation concerning an investment. The trial court admitted this evidence to prove intent by showing a motive to commit the murder. The appellate court affirmed, though it never made clear that intent was in fact an issue in the case. Similarly, in *United States v. Wynn*,[244] defendant's conviction of causing another person to use an interstate facility to solicit murder was affirmed after a trial in which the victim, defendant's ex-wife, was permitted to testify that defendant had made threats against her life and had attempted to kill her. The appellate court held that the evidence was admissible to show defendant's intent.[245] Presumably, the evidence showed enmity toward the victim, which led to a motive to commit the charged crime, and from the motive, intent. As in *Coit*, the court did not make clear the basis of the defense. If it was lack of intent, the evidence was analyzed properly. If it was misidentification or that no one had solicited the victim's murder, the court should have examined the evidence on that basis instead.[246]

In recent years, a number of cases have approved evidence of gang affiliation to establish a motive, and from that fact, criminal

241. Note that in this case, the government could have demonstrated a motive simply by showing that the victim had testified against defendant's husband. Without hearing that defendant had specifically asked the victim not to implicate her husband, however, the jury would be denied evidence suggesting how strongly defendant was motivated to retaliate against the victim. In other words, the evidence presented had higher probative value than would evidence that the victim previously had testified against defendant's husband.

242. 961 P.2d 524 (Colo. Ct. App. 1997).

243. Defendant and the victim were previously married. The evidence also concerned defendant's making of false claims that she was pregnant, engaging in bigamy, and commission of other fraudulent acts. *See id.* at 529.

244. 987 F.2d 354 (6th Cir. 1993).

245. *See id.* at 356.

246. *Coit* and *Wynn* are discussed further *infra* at notes 264-67 and accompanying text.

intent, in prosecutions for various crimes. In *People v. Mendoza*,[247] for example, defendant was charged with the murder of a member of the "Crips" gang. The killing took place following an argument. Though not made completely clear in the court's opinion, it can be assumed that the defendant claimed he acted in self-defense. At trial, the prosecution sought to demonstrate defendant's membership in the rival "Bloods" gang by offering certain physical evidence associated with that group.[248] Defendant argued on appeal that the trial court should not have admitted the evidence. The court found no error, holding that "[p]roof of intent to kill was a necessary part of the prosecution's case, and the evidence of the defendant's gang affiliation, which tended to prove the existence of such a motive for killing the victim, was relevant . . . ."[249] The court continued:

> [T]he fact of the defendant's gang affiliation could have shown a motive to commit the crime. The evidence was not offered to prove that the defendant was more likely to kill because he was a gang member; rather, it was offered to show that, because of his membership in a particular gang, defendant was more likely to murder this particular victim after deliberation. The evidence of gang affiliation, therefore, was necessary for the prosecution's case of first-degree murder.[250]

Thus, in *Mendoza*, ill will between a group with which defendant was affiliated and a rival group provided a motive to act with deliberation. This, in turn, tended to establish defendant's potential guilt of first-degree murder.[251]

Similar theories have been used in other cases involving gang activity. In *People v. Marquantte*,[252] for example, defendant was convicted of murdering one victim and for assault and attempted

247. 876 P.2d 98 (Colo. Ct. App. 1994).

248. *See id.* at 102. The evidence consisted of the testimony of a police officer, photographs, and a notebook containing rap music, lyrics, and a drawing of a gun. The prosecutor also remarked during closing argument that there was an "explosive relationship" between the "Bloods" and the "Crips." *See id.*

249. *Id.*

250. *Id.* at 103.

251. The jury convicted defendant of second-degree murder. *See id.* at 100.

252. 923 P.2d 180 (Colo. Ct. App. 1996).

murder of a second person. Defendant was a gang member, and the victims were members of a rival gang. Defendant admitted shooting the victims but claimed he acted in self-defense. At trial, the court permitted the prosecution to present evidence of defendant's prior violent acts, specifically, his violent initiation of a young gang member and his violent action against that same person immediately after the events at issue. The court held the evidence admissible to support the prosecution's theory that defendant committed the charged crimes to protect the younger gang member and to set an example for him.[253] Thus, the acts tended to prove defendant's motive to act intentionally in killing the victim.[254]

In some cases, the courts have admitted uncharged misconduct evidence on a theory of motive based on animosity to prove intent, when intent is either uncontested or not the basis of the defense. In *People v. Curtis*,[255] for example, defendant was charged with assault with a deadly weapon.[256] His defense was an alibi. On appeal of his conviction, defendant claimed the trial court should not have permitted the victim to testify that defendant had previously assaulted him.[257] The court held that the evidence was properly admitted because it was "probative of malice and ill toward the victim."[258] Had defendant admitted committing the act but claimed it was an accident or that it was committed in self-defense,[259] the court's reasoning would be logical. However, defendant sought to establish an alibi. By implication, therefore, he did not contest intent;[260] he merely

253. *See id.* at 184.

254. *See id.*; *see also* United States v. Sills, 120 F.3d 917 (8th Cir. 1997) (evidence of defendant's gang-related activities was admissible to show defendant's knowledge of and intent to possess the firearm found in a car inscribed with gang markings; evidence tended to show a motive and opportunity to have a firearm).

255. 657 P.2d 990 (Colo. Ct. App. 1982).

256. *See id.* at 991.

257. *See id.* at 992.

258. *Id.*

259. *See, e.g.*, Douglas v. People, 969 P.2d 1201, 1206 (Colo. 1998) (evidence that defendant had previously threatened his girlfriend, the alleged victim in the charged case, was admissible to prove intent for felony menacing).

260. It is true that even if the defense is based on the absence of one element of the crime rather than another, the prosecution is required to prove all ele-

claimed that he was not the person who committed the crime, if indeed there was a crime. Under these circumstances, the court should have examined whether the evidence was relevant to identity. Though admission under that theory might have been justifiable,[261] the proper course would have been to analyze its admissibility on that basis instead of the inapplicable theory of motive-to-intent.[262] Some courts have been careful to point out that when intent is uncontested, the evidence generally should not be admitted under that theory.[263]

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ments of the crime beyond a reasonable doubt, *see In re* Winship, 397 U.S. 358 (1970), and may prove each element with any otherwise admissible evidence. *See* Old Chief v. United States, 519 U.S. 172 (1997). However, factors in determining admissibility of uncharged misconduct evidence include the need for the evidence and the potential for unfair prejudice, and when an issue is uncontested, the need is often minimized and the prejudice factor weighs more heavily. *See, e.g.*, State v. Conley, 873 S.W.2d 233, 237 (Mo. 1994) (trial court erred in permitting the prosecution to offer evidence of other crimes to establish intent because intent was not a legitimate issue in prosecution for sodomy, sexual assault, and attempted sodomy; the evidence was thus unnecessary, and its probative value was "far outweighed" by its prejudicial effect).

261. *See supra* notes 158-66 and accompanying text (discussing admissibility of uncharged misconduct showing a motive based on animosity and, from that fact, the identity of the actor).

262. *See also* Shuffield v. State, 179 S.W. 650 (Ark. 1915). Defendant was charged with arson for burning a barn owned by the town constable. On the night of the fire, in an effort to quell a disturbance, the constable had searched many people including defendant and an alleged accomplice. The prosecution also offered evidence that after the incident with the constable, defendant and an accomplice had set fire to a fence and some corntops owned by a man who assisted the sheriff. On appeal, the court held that the evidence of the other fires set by defendant was relevant to both the "motive or intent of the defendant" and whether the charged fire was of incendiary origin. *Id.* at 651. Because defendant did not base his defense on lack of intent, but denied involvement in the charged crime, the evidence should not have been admitted to prove his state of mind, though it might have been admissible to prove identity. The court held the evidence should have been excluded, but for another reason—that it was offered in the form of inadmissible hearsay. *See id.* at 652.

263. *See, e.g.*, *Conley*, 873 S.W.2d at 237 (in prosecution for sodomy, sexual assault, and attempted sodomy, trial court should not have admitted evidence of uncharged sexual acts to prove intent (through common scheme or plan) because intent was not a legitimate issue). The court held that

> [w]hen there is direct evidence that the defendant committed the illicit act, the proof of the act ordinarily gives rise to an inference of the necessary mens rea. No other evidence is required to establish that ele-

In other cases, courts have left unclear the nature of the defense. In *Coit*, discussed previously,[264] defendant was convicted of first-degree murder and conspiracy following a trial at which the jury heard details of defendant's prior relationship with the victim, bigamy, and fraudulent behavior,[265] as well as of an acrimonious civil lawsuit between the two. The appellate court affirmed, holding that the evidence was admissible to prove the prosecution's theory that "defendant murdered the victim to prevent exposure of this evidence in the civil trial and thus established a motive for the killing."[266] However, the court never made clear whether the defense was based on lack of criminal intent or on misidentification of the killer. If defendant did not contest the killing but claimed she lacked the state of mind for murder, the evidence certainly would have been relevant, and likely admissible despite a risk of unfair prejudice from the jury's possible tendency to use the evidence to establish guilt by character. But it seems more likely that defendant claimed she did not commit the killing, thus making the evidence admissible, if at all, to prove identity, not intent.[267]

3. Evidence of other acts tending to show motive and intent in employment discrimination cases

When a former employee brings an action alleging unlawful employment discrimination, an element of the prima facie case is the employer's intent to discriminate.[268] Because the employer's

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ment of the case unless the state has some reason to believe that the defendant will make intent or mistake or accident an issue in the case because its probative value is far outweighed by its prejudicial effect. *Id.* at 237.

264. *See supra* notes 241-42 and accompanying text.

265. *See Coit*, 961 P.2d at 524. The evidence included testimony about defendant's allegedly bigamous marriage, false claims of pregnancy, and other false and fraudulent activities. *See supra* notes 243-45 and accompanying text.

266. *Coit*, 961 P.2d at 529.

267. *See Wynn*, 987 F.2d at 354 (in prosecution for solicitation of murder, evidence of prior threats and assaults against victim admitted to prove intent even though the court did not make clear that intent was at issue); *see also supra* notes 243-45 and accompanying text.

268. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (in employment discrimination case, plaintiff must prove intentional discrimination in workplace).

motivation generally cannot be proven directly, it is usually necessary to resort to circumstantial evidence to prove that element of the prima facie case. One form such evidence might take is other instances of misconduct by the employer indicating discriminatory motivation. The admissibility theory in these cases is similar to that of other cases in which uncharged misconduct is offered to show enmity toward a person or group.

In *Garvey v. Dickinson College*,[269] a former professor brought suit alleging sexual harassment and gender discrimination while she was employed as a professor at the college.[270] Prior to trial, defendants moved to preclude admission of evidence of the supervisor's alleged harassment of others. The court denied the motion, noting the lack of direct evidence:

> In an employment discrimination case, evidence that, e.g., the defendant has made disparaging remarks about the class of persons to which plaintiff belongs, may be introduced to show that the defendant harbors prejudice toward that group. Such evidence is often the only proof of defendant's state of mind, and if it were excluded, plaintiff would have no means of proving that the defendant acted with discriminatory intent.[271]

Thus, evidence of the supervisor's harassment of others was relevant because it "tends to show his attitude toward women and his treatment of them at the college."[272] Other courts have reached similar conclusions.[273]

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269. 763 F. Supp. 799 (M.D. Pa. 1991).

270. *See id.* at 800.

271. *Id.* at 801.

272. *Id.* The court held, however, that evidence of other instances of harassment by the supervisor would be limited to those involving persons in the drama department, the department in which plaintiff worked. *See id.* at 802. The court also reserved for trial a determination of whether the probative value of any instances of conduct would be substantially outweighed by the danger of unfair prejudice. *See id.*

273. *See, e.g.*, Lam v. Univ. of Haw., 164 F.3d 1186, 1188-89 (9th Cir. 1998) (in employment discrimination action against state university law school, trial court erred in excluding evidence of other biased behavior by same professor).

In employment-related cases, plaintiff is not always successful in seeking admission of evidence of past behavior indicative of motive and thus intent. In *Coletti v. Cudd Pressure Control*,[274] a wrongful termination case, plaintiff wished to offer testimony of two former employees regarding the circumstances of their discharges, which occurred after plaintiff's firing. Plaintiff argued that the evidence would show a pattern of retaliatory conduct against employees who made workers' compensation claims. The trial court excluded the evidence, and the appellate court affirmed. The court recognized that testimony of other employees about their treatment is relevant to the issue of discriminatory intent if it establishes a pattern of retaliatory behavior or discredits the employer's assertion of legitimate motives.[275] However, in the current case, the court refused to overturn the trial judge's determination that the prejudicial effect of such evidence was substantially outweighed by the danger of unfair prejudice.[276]

4. Evidence of other acts tending to show need for or motive to obtain money

In some cases, uncharged misconduct helps to explain why certain conduct that might appear innocent could in fact be criminal or actionable. In *United States v. Boyd*,[277] for example, defendant was charged, inter alia, with possession of marijuana with intent to distribute and conspiracy to do the same. At trial, the government offered evidence that defendant personally used marijuana and cocaine.[278] The purpose of the evidence was to show a financial

274. 165 F.3d 767 (10th Cir. 1999).

275. *See id.* at 776-77.

276. *See id.* The court noted that the two employees whose testimony plaintiff offered were terminated after plaintiff, and stated that "[t]estimony about later events is even less relevant and of less probative value than evidence of prior bad acts generally, because the logical relationship between the circumstances of the character testimony and the employer's decision to terminate is attenuated." *Id.* at 777. This rationale is questionable. There is no reason to assume that generally speaking, later uncharged misconduct is less probative of an issue other than character than is prior misconduct.

277. 53 F.3d 631 (4th Cir. 1995).

278. *See id.* at 636.

motive to participate in the drug conspiracies: to obtain money to purchase drugs for his own use.[279] On appeal of his conviction, the court affirmed. Though the court did not make its reasoning explicit, at least three legitimate lines of reasoning would support the result. First, the evidence would be relevant to the actus reus of the crime. The reasoning would be as follows:

EVIDENCE: Defendant used marijuana and cocaine.

→*INFERENCE*: Defendant had a need for and thus a motive to obtain money to finance his drug use.

→*CONCLUSION*: Defendant became involved in the conspiracy as a source of funds for his drug use.[280]

Under this reasoning, the evidence ultimately does not go to intent, but to defendant's commission of the act itself. If, for example, defendant admitted being present in the place where drugs were found but denied possession or any other involvement with the drugs, the evidence would be relevant to that essential element of the crime.

A second chain of reasoning leads to the identity of defendant as a member of the conspiracy, also an essential element of the crime. If, for example, defendant claims that he was misidentified—that the police arrested the wrong person—the evidence would be relevant as follows:

EVIDENCE: Defendant used marijuana and cocaine.

→*INFERENCE*: Defendant had a need for and thus a motive to obtain money to finance his drug use.

279. *See id.* at 637.

280. This and the other theories to be discussed could also be used to show a motive simply to have access to a supply of marijuana for personal use. *See* United States v. Templeman, 965 F.2d 617, 619 (8th Cir. 1992) (evidence of defendant's cocaine use relevant to prove motive to distribute cocaine to finance his drug use and assure a ready supply of the drug).

→*CONCLUSION*: Defendant was correctly identified as a participant in the crimes.

A third chain of reasoning leads, ultimately, to intent:

EVIDENCE: Defendant used marijuana and cocaine.

→*INFERENCE*: Defendant had a need for and thus a motive to obtain money to finance his drug use.

→*CONCLUSION*: Defendant's possession of the marijuana on the charged occasions was for the purpose of distribution as a source of funds for his drug use.

Here, the evidence explains why defendant's conduct constituted the commission of the crimes of distribution and conspiracy to distribute. It is thus relevant to defendant's criminal intent, an essential element of the charged crimes.

The *Boyd* court did not make clear whether the ultimate purpose of the evidence was to prove the act, identity, intent, or some combination of these elements, but the evidence is relevant for all three purposes. The propriety of the court's admission of the evidence would depend on many factors including whether the issue on which the evidence was offered was contested, but the evidence passes relevance scrutiny on all stated counts.

5. Evidence of other acts to complete the factual story and prove that criminal motivation and intent accompanied behavior at issue

As the foregoing discussion shows, in many cases the reasons for a person's behavior are not evident from the conduct itself, which can be interpreted consistently with either innocence or guilt. In such cases, uncharged misconduct evidence sometimes helps to make the evidence more comprehensible. In *United States v. Sriyuth*,[281] for example, defendant was convicted of kidnapping and

281. 98 F.3d 739 (3d Cir. 1996).

using a firearm in relation to a kidnapping. The alleged victim was the subject of a marriage arranged according to Laotian custom.[282] Defendant claimed that the woman consented, and pointed to her failure to avail herself of a number of opportunities to escape or notify the authorities.[283] To prove defendant's motive and the victim's lack of consent, the trial court allowed the prosecution to present evidence that defendant raped the victim in the course of the events at issue.[284] On appeal of his conviction, defendant argued that admission of this evidence constituted error, but the court affirmed, holding the evidence admissible to prove defendant's motive and the victim's lack of consent.[285] To examine the motive reasoning, the rape tends to show that defendant was motivated by a desire for rape or sexual gratification rather than to carry out the arranged marriage.[286]

The court in *United States v. Murray*[287] employed a somewhat similar theory. Defendant was charged with being a felon in possession of a firearm.[288] Police found the firearm in defendant's car when they stopped him after suspecting the presence of drugs.[289] At the time of his arrest, defendant claimed he did not know who owned the gun.[290] To prove defendant possessed the gun, the prosecution offered evidence that police also found crack cocaine in the car.[291] The court held the evidence admissible to provide a complete

282. *See id.* at 742.
283. *See id.* at 747 n.13.
284. *See id.* at 741-47.
285. *See id.* at 747. The court also held that the rape was not another crime at all, but a necessary part of the defendant's exercise of dominion over the victim. *See id.* (citing United States v. Bradshaw, 690 F.2d 704, 708-09 (9th Cir. 1982)). Evidence of sexual activity with a child victim was admissible to show defendant's dominion over the victim, and thus explain the victim's actions in going with defendant.
286. The court noted that because motive is relevant, it was not necessary to determine whether the kidnapping statute required proof of a particular motive or purpose. *See id.* at 747 n.12.
287. 89 F.3d 459 (7th Cir. 1996).
288. *See id.* at 460.
289. *See id.* at 461.
290. *See id.*
291. *See id.* at 462.

picture of the events.[292] The court explained:

> When the evidence of the crack cocaine . . . was introduced, the jury could better understand that Murray may indeed have made a drug purchase while the officers watched, and they could better understand why Murray might want to be armed. The evidence, in short, gave the jury a more complete story concerning the charged crime.[293]

When jurors viewed the evidence in context, then, they would better appreciate the possibility that defendant would possess a weapon because they would understand the motive to do so.[294]

Though application of the theory under consideration here is highly fact-specific, traces of it can be found in other cases as well. The common element of the cases is the idea that the uncharged misconduct evidence helps to supply the reason—otherwise difficult to discern—why the prosecution's theory of criminal intent is valid.[295]

One of the more notorious cases that appears to have employed reasoning of the type under consideration here is *United States v. Haldeman*,[296] a prosecution of three high-ranking officials in the Nixon administration arising from the cover-up of the Watergate affair. At trial, the prosecution offered evidence that defendants had authorized the illegal break-in of the office of a psychiatrist who had been treating Daniel Ellsberg, a leading policy critic.[297] The prosecution's theory was that the break-in demonstrated a motive to

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292. *See id.* at 463.

293. *Id.*

294. The court also suggested that the firearm evidence was so "'intricately related to the facts of the case'" that it was not actually an extrinsic bad act subject to the requirements of Rule 404(b). *Id.* at 462-63 (hinging admissibility of the evidence on a determination that "its absence would create a 'chronological or conceptual void' in the story of the crime" (quoting United States v. Hattaway, 740 F.2d 1419, 1424-25 (7th Cir. 1984)).

295. *See, e.g.*, United States v. Rodriguez, 53 F.3d 545, 546 (2d Cir. 1995) (in prosecution for, inter alia, possession and use of a firearm equipped with a silencer in relation to drug trafficking where defendant claimed his presence in the place where the contraband was found was innocent, evidence that defendant was a supplier of narcotics to organized crime showed a motive to be in the apartment where the guns and drugs were stored).

296. 559 F.2d 31 (D.C. Cir. 1976).

297. *See id.* at 88.

engage in the charged cover-up. Specifically, the government alleged that defendants engaged in a cover-up of the Watergate affair in part to prevent revelation of the psychiatrist's office break-in, a revelation that would be extremely damaging to the administration.[298] Though defendants argued that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, the appellate court held that the trial court did not err in admitting the evidence, as it tended to show a clear connection between the office break-in and the Watergate cover-up.[299] As the court wrote, in part:

> It could be concluded from the Hunt Memorandum . . . and the payment of money thereafter that concealing responsibility for the Ellsberg break-in was part of the motivation for the payment of money to those involved in Watergate. The desire on the part of appellants to conceal the Ellsberg break-in was clearly indicative of a motive to conceal the identities of higher-ups involved in the Watergate break-in . . . because some of those who participated in the former operation were also in the latter and any reasonable person would suspect that if the names of the participants in either venture were discovered, such fact might lead investigators to the identities of those persons participating in the planning, execution, or concealment of the other crime.[300]

Though the court never made the matter clear, it appears to have viewed the evidence of the break-in of the psychiatrist's office to help explain what was going through the minds of the Watergate conspirators. In that sense, the evidence helped to clarify the very complex series of events that collectively came to be known as "Watergate."

In some cases, it is difficult to justify the court's decision to admit the uncharged misconduct evidence on the type of theory described here. In *United States v. Jones*,[301] for example, defendant was charged in connection with a heroin and cocaine distribution

298. *See id.*
299. *See id.* at 88-90.
300. *Id.* at 89 (footnote omitted).
301. 145 F.3d 959 (8th Cir. 1998).

conspiracy. Defendant, a street-level dealer, was the only member of the conspiracy to go to trial; all others, including the ring-leaders, pleaded guilty. At trial, the prosecution was permitted to elicit testimony indicating that defendant had sold drugs after the charged conspiracy had ended. On appeal, the court found no error, holding that in drug prosecutions, evidence of similar drug activity is admissible to establish intent or motive to commit the charged crime.[302] The court noted that the later activity was "similar in kind and close in time to the drug activity Jones engaged in while a member of the conspiracy charged in the indictment."[303]

How does the uncharged misconduct evidence in *Jones* tend to establish "intent or motive"? Absent a theory that defendant had a motive to obtain money or drugs, or that he had a particular reason to be involved with the drug conspiracy, it is difficult to imagine how the evidence was relevant to defendant's guilt of the crime except by means of the forbidden character inference; a person who would deal drugs shortly after the conspiracy ended is more likely to have been involved in the conspiracy. Therefore, *Jones* arguably crosses the line between permissible noncharacter misconduct evidence and forbidden character evidence.

Additionally, courts should carefully scrutinize uncharged misconduct evidence that is allegedly "intricately related" to the charged offense, or offered to "complete the story," provide factual context, or explain the otherwise unexplainable. Often, the real impact of the evidence is to invite the jury to apply the forbidden character inference, convicting the defendant for the uncharged conduct, or perhaps simply because the defendant appears to be a criminal type who should be separated from free society. The mere proximity in time of the uncharged to the charged events is not a reason to admit the former. Also, in many ambiguous situations, a factfinder can be educated without exposing it to damaging evidence that invites unfair prejudice.

302. *See id.* at 961-64.
303. *Id.* at 964.

IV. THE MOTIVE THEORY IN *CUNNINGHAM*

We return now to the story that began this analysis: the nurse accused of stealing Demerol from the hospital medicine cabinet.[304] The issue in the case was the perpetrator's identity.[305] Recall that the court permitted the prosecution to present evidence that four years earlier, she had been addicted to Demerol, had stolen it from a prior employer, had been suspended from practice, and had falsified the results of drug tests given as a condition of restoration of her license.[306] On appeal, the court held that the evidence was admissible on a "motive" theory, explaining that "[m]ost people don't *want* Demerol; being a Demerol addict gave Cunningham a motive to tamper with the Demerol-filled syringes . . . ."[307]

The court's motive theory in *Cunningham* appears to have rested on the following chain of inferences:

> *EVIDENCE*: Four years earlier, Cunningham had been addicted to Demerol, had stolen it from a prior employer, had been suspended from practice, and had falsified required drug tests.[308]
>
> → *INFERENCE 1:* Cunningham either continued to be addicted to Demerol, or again became addicted, at the time of the currently charged crime.
>
> → *INFERENCE 2:* Cunningham had a motive to steal the Demerol from the locked medicine cabinet.
>
> → *CONCLUSION*: Cunningham stole the Demerol from the locked cabinet.[309]

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304. *See* United States v. Cunningham, 103 F.3d 553, 554 (7th Cir. 1996).

305. *See id.* at 555. There was no dispute that the drug had been stolen or that the actor possessed the requisite intent. *See id.*

306. *See id.* at 556.

307. *Id.* at 557.

308. *See id.* at 556.

309. Note that this conclusion might actually be stated as a matter of probability; that Cunningham is more likely to have stolen the Demerol than the other nurses who had access to the locked cabinet.

None of the motive-to-identity theories discussed earlier[310] exactly fits the facts of *Cunningham*. The cases that come closest are those in which the person has a motive to obtain money, usually in order to obtain drugs.[311] In those cases, to assess whether the chain of reasoning from the drug use to the theft successfully avoids the use of a character inference, it is necessary to examine how one leaps from one inference to another. To do so, one must uncover the generalization, or what Morgan called the "unarticulated premise,"[312] that a reasonable person might apply when thinking about the evidence. For example, suppose that *D*, who has no apparent means of support, is charged with bank robbery. *D* denies involvement. To prove *D*'s participation, the prosecution wishes to present evidence that *D* is addicted to heroin. The motive reasoning, complete with generalizations, would be as follows:

> *EVIDENCE*: *D*, who has no apparent means of support, is addicted to heroin.
>
> →*INFERENCE*: *D* had a motive to commit robbery to obtain money to buy heroin.
>
> *GENERALIZATION*: A person who is addicted to a drug and who has no legitimate source of funds, is more likely to have a motive to steal money with which to purchase the drug than a person randomly chosen from the population.
>
> →*CONCLUSION*: *D* acted on the motive by robbing the bank.
>
> *GENERALIZATION*: A person who has a motive to steal is more likely to rob a bank than is one without such a motive.

310. *See supra* notes 85-164 and accompanying text.
311. *See supra* notes 101-16 and accompanying text.
312. 1 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 162 (Charles E. Clark ed., 1954).

This reasoning is quite straightforward and does not depend on the application of a character-based propensity inference. The inference is not personal to *D*. In our society, virtually anyone with a need for money would have a motive to obtain it. Because the existence of the motive does not depend on a particular trait of character peculiar to *D*, and not the general population, the first leap—from the facts of poverty and a drug addiction to the existence of the motive—is easy to make. Put differently, the evidence has high probative value on this first inference.

The second leap—from the existence of a motive to taking action upon it—is, of course, considerably more difficult. Indeed, one might argue that in a non-police-state, social order is maintained only by the constraint which most people feel about such things as bank robbery. Even among those who possess a motive to steal, few would actually do so. Thus, the evidence has little probative value on the ultimate conclusion that *D* committed bank robbery. Nevertheless, because the evidence has *some* value, it is relevant, and the inferential chain is unbroken.

We have demonstrated that the motive reasoning is logically sound, and that the leap from *D*'s circumstances to the existence of a motive is not character-based. But we have not established whether the second inferential step requires the application of character-based reasoning. To assess that question, it is necessary to ask whether a drug addict who robs a bank to obtain money for drugs does so because of an aspect of her character. Assume for the moment that *D*'s addiction was not to heroin, but to a prescription pain killer such as codeine, and that the addiction arose during *D*'s recovery from painful back surgery, when her doctor prescribed codeine to relieve the pain. Would we think that *D*'s bank robbery to obtain money for codeine was character-motivated? Perhaps not. If we are not willing to blame *D*'s addiction on a character flaw, we also might be willing to see the bank robbery as an act of desperation that any person in such a situation, who was of good or bad character, might commit. On this reasoning, the inference to bank robbery from the codeine addiction would not be character-based. Close examination of the heroin addict reveals the same underlying logic; once a person has become addicted to a substance, we are more likely to view that person

as suffering from disease rather than having bad character. And people who act a certain way because of their disease are not bad people.[313]

Cunningham is similar. It is possible to move from the fact of Demerol addiction to the existence of a motive to obtain the drug without employing a character inference. The generalization would simply be that any person who is addicted to a drug would have a motive to obtain it. This is a universal motive, not dependent on a judgment about Cunningham personally. The second leap—from the existence of a motive to obtain Demerol to stealing it from the locked cabinet—also does not require a character-based propensity inference. If we accept that addiction creates impulses that make improper action more likely for people with addiction, and that addiction is a disease rather than a choice made by a person with a bad character, then the inference that a person with an addiction is more likely to steal the drug is not based on character and thus not forbidden by the rules.

Therefore, if the nurse in *Cunningham* was addicted to Demerol at the time of the charged theft, the motive theory would be valid. Indeed, it might be even stronger than in our hypothetical case. There, we have a person stealing from a third party to be able to purchase the drug. This might invite a fact finder to infer that *D* is the kind of person who victimizes even those people who do not have what she ultimately desires. In contrast, *Cunningham* involves the simple theft of Demerol. The motive-to-identity theory is relatively clean.

There is one potentially crucial difference between *Cunningham* and our hypothetical that calls into question the validity of the court's reasoning. In our hypothetical, *D*'s drug addiction is a given fact. The existence of that addiction allows us to infer a noncharacter based motive to steal, and from that, the possibility of the charged theft. In *Cunningham*, on the other hand, only the past addiction was conceded; Cunningham did not concede that she was currently addicted. Thus, the past addiction is used, first, to show that

313. For example, we would not blame a Tourette's syndrome sufferer for her inappropriate verbal outbursts.

Cunningham continued to be addicted or regained her dependency, and then to show a motive to steal the Demerol.[314] Does the use of the past addiction to show the present addiction require a character inference? If we were considering murder or tax evasion, it certainly would. Few would argue that one may offer evidence that a person has murdered in the past to prove that she murdered the current victim. "Once a murderer, always a murderer" is precisely the type of reasoning forbidden by the character rule. But is drug addiction the same? Arguably not. As I have already argued, if drug addiction is a disease, then the tendency to continue the addiction, or succumb to it again, is not a matter of choice and thus, not based on character. True, the evidence of Cunningham's past addiction will only be related to the charged theft if she was addicted at the later time; but this is a preliminary question of fact that, for better or worse, the United States Supreme Court has left to the jury in virtually all situations.[315]

In sum, the court in *Cunningham* has stated a valid, noncharacter theory for admission of Cunningham's prior Demerol addiction[316]

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314. That is not to say that there was no evidence of current addiction. Cunningham voluntarily submitted to blood and urine tests for the presence of Demerol. The blood tested negative but the urine tested positive. *See* United States v. Cunningham, 103 F.3d 553, 555 (7th Cir. 1996).

315. *See* Huddleston v. United States, 485 U.S. 681, 690-91 (1988) (holding that Federal Rule Evidence 104(b) applies, which requires the court to let the jury decide the preliminary fact question when there is evidence sufficient to support a finding of the fulfillment of the condition).

316. One question not addressed here is the relevance of the other evidence used against Cunningham, specifically the prior theft of Demerol, her suspension from practice, and her falsification of drug test results. The court reasoned:

> [T]he suspension . . . did not merely duplicate the evidence of Cunningham's addiction insinuate a propensity to steal; it also provided essential background to the evidence of her having falsified the results of tests required as a condition of regaining her license. *That* evidence furnished the basis for an inference that she had falsified the test results in order to enable her to continue to feed her addiction without detection and without losing access to a "free" supply of the addictive substance, and so, like the addiction itself, established motive to tamper with the Demerol syringes.

Cunningham, 103 F.3d at 557. This logic is rather convoluted, and even if it is valid, it seems much more likely that the fact finder would use the evidence of Cunningham's past theft of Demerol to prove her propensity to steal than

if one accepts the proposition that falling into drug addiction, and stealing drugs to feed the addiction, is not a matter of personal character.

That, however, is exactly the problem with the court's conclusion. The reasoning requires a fact finder who accepts the addiction-as-disease paradigm, and clearly, not all fact finders will. Many people firmly believe that addiction is a character flaw, that those who fall into addiction choose to do so, and that those who become addicted can quit if they really want to.[317] That these assumptions might be wrong[318] does not answer the question. The question is

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merely to demonstrate a possibly continuing motive to obtain the drug. If that is true, the trial court arguably should have excluded the prior theft, as it had the conviction based upon it. If the prior theft had been excluded, Cunningham's license suspension also should not have been revealed, as it arose from the theft itself. Finally, evidence of Cunningham's falsification of drug test results might have been admissible to show her motive to conceal her addiction and her tendency to act on that motive, and might have been admissible on that basis. Even if not, the evidence almost certainly would have been admissible to impeach her credibility if she testified. *See* FED. R. EVID. 608(b).

317. One is reminded of the congressional testimony of tobacco company executives that tobacco use is a matter of choice rather than addiction, and that this is evidenced by the fact that many people quit smoking. For example, the President and Chief Executive Officer of Philip Morris U.S.A. testified:

> Dr. Kessler and some Members of the Subcommittee contended that nicotine is an addictive drug and that, therefore, smokers are drug addicts. I object to the premise and to the conclusion.
>
> . . . .
>
> Cigarettes contain nicotine because it occurs naturally in tobacco. Nicotine contributes to the taste of cigarettes and the pleasure of smoking. The presence of nicotine, however, does not make cigarettes a drug or smoking an addiction.
>
> People can and do quit smoking. According to the 1988 Surgeon General's Report, there are over 40 million former smokers in the United States, and 90% of smokers quit on their own, without any outside help.

Nicotine and Cigarettes, Subcomm. on Health and the Env't, Hearing Before the House Energy and Commerce Comm., 103d Cong. (1994) (statement of William I. Campbell, President and Chief Executive Officer, Philip Morris, U.S.A.), *available at* 1994 WL 229351.

318. I say "might be wrong" because the nature of addiction is still a matter of dispute, even in the scientific community. *See* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse in America*,

whether the risk of trial by character is too great to accept. That brings us to the question of how to resolve the problem of motive in cases such as *Cunningham*. The final section of the Article will consider that question.

V. AN APPROACH TO THE MOTIVE-CHARACTER PROBLEM

In some situations, the distinction between motive and character is clear. In those cases, the evidence rules provide a clear solution: Exclude the evidence if it falls into the category of character, even if it also satisfies a definition of motive, and consider admission if the evidence consists only of motive, without the need of a character inference.[319] A large number of the fact patterns considered in this Article raise little difficulty in this respect. Evidence that a person has killed before is simply not admissible, absent some other connection, to prove that the person killed the present victim. "Once a murderer, always a murderer" is forbidden logic. On the other end of the spectrum, evidence that a person had previously manifested hatred toward a specific other person is very likely admissible in a prosecution for murdering that person. Hatred gives rise to a motive, and a person with a motive—whatever her character—is more likely to act violently toward the object of that hatred than is a person randomly chosen.

As *Cunningham* demonstrates, some cases cannot be resolved so easily. This can be the result of two types of situations. In one, there is genuine debate in the relevant scientific field about the nature of the behavior or mental state alleged to have existed. There is much uncertainty, for example, about the scientific validity of certain syndromes such as battered child syndrome.[320] In other situations, the

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74 NOTRE DAME L. REV. 439, 463-64 (1999).

319. *See supra* notes 243-50 and accompanying text. Even if the evidence is not barred by the character rule, the court may still exclude it if, for example, its probative value is greatly outweighed by the danger of unfair prejudice. *See supra* note 10 and accompanying text.

320. The courts are divided, for example, about the admissibility of evidence of battered child syndrome, partly because of uncertainty about the scientific basis for its existence. *See* Annotation, *Admissibility of Evidence of Battered Child Syndrome on Issue of Self-Defense*, 22 A.L.R. 787, 793 (5th ed. 1994 & Supp. 2000) (noting that most courts have focused on whether there is sufficient scientific knowledge to support use of the syndrome and on whether it

scientific community has more or less settled on the classification of particular behavior as brought about by medical conditions, but lay society views the matter with considerably more skepticism. Kleptomania is a good example. Among researchers, kleptomania is seen as a genuine medical condition.[321] A poll of the general population, however, would almost undoubtedly reveal much skepticism. The same is true of alcoholism, though perhaps to a lesser degree as more nonscientists come to accept the possibility of genetic predisposition and uncontrolled impulses.

From the standpoint of evidence law, these two problems, one caused by the existence of expert uncertainty, the other by lack of social acceptance of expert views, might require different treatment. Where the proposition is not generally disputed in the relevant scientific community, and where the consensus in that community favors the existence of a medical explanation for a person's behavior or state of mind, the court should find that the evidence is relevant for its noncharacter, motive purpose. At that point, the court should determine admissibility according to the generally applicable formula, which primarily requires a determination, pursuant to the standard of Rule 403, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Here, the relevant prejudice would be caused by the jury's refusal to accept the medical explanation for the person's behavior or state of mind, and its willingness to convict or find liable on the improper character reasoning. If the court believes there is sufficiently great danger that the jury will do so, despite the issuance of a limiting instruction, the court should exclude the evidence. In other words, if the court finds that there does exist a valid, noncharacter chain of reasoning for the

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will assist the fact finder).

321. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 612 (4th ed. 1994). According to the American Psychiatric Association, kleptomania is characterized by a repeated failure to resist the impulse to steal things that a person does not need for personal use or even for their value. *See id.* Researchers have reported successful treatment of kleptomania with Serotonin Specific Reuptake Inhibitors, which have been used for other obsessive-compulsive disorders. *See* E. Lepkifker et al., *The Treatment of Kleptomania With Serotonin Reuptake Inhibitors*, 22 CLINICAL NEUROPHARMACOL 40-43 (Jan.-Feb. 1999), *at* http://biopsychiatry.com/klepto.htm (abstract only).

relevance of the uncharged misconduct evidence, the court should admit the evidence unless it finds that it should be excluded pursuant to Rule 403. Trial courts have a large amount of responsibility in these situations because the Rule 403 balance is highly contextual, and appellate courts review Rule 403 rulings based on an "abuse of discretion" standard.[322] One cannot expect complete consistency among courts in making these decisions, but a sincere effort to rule based on all relevant considerations must be made.

If the court believes that the lay community considers the actor's character to be the result of character, and that there is genuine debate in the scientific community about the validity of the syndrome or condition supposedly represented by the relevant behavior or state of mind, it seems reasonable simply to exclude the evidence. In that situation, the court will have failed to find a necessary threshold fact—that the evidence does not constitute character evidence. Absent that finding, exclusion should follow. There is simply no sufficient reason to risk violating the long-standing principle that a person should be judged by what she did on the charged occasion, and not by the type of person she is.

Applying these standards to *Cunningham*, it is first necessary to ask whether there is scientific consensus about the nature of drug addiction. The National Institute on Drug Abuse reports significant progress over the last quarter century in understanding the nature of drug use and addiction.[323] The clear trend is to treat drug addiction as a disease of the brain,[324] leading to uncontrollable and compulsive behavior.[325] Alan Leshner, director of the National Institute on Drug

322. *See* Old Chief v. United States, 519 U.S. 172, 183 n.7 (1997) ("[O]n appellate review of a Rule 403 decision, a defendant must establish abuse of discretion."); DiCarlo v. Keller Ladders, Inc., 211 F.3d 465, 467 (8th Cir. 2000) (holding that the appellate court gives "great deference" to the trial court's Rule 403 determinations).

323. *See* Donna E. Shalala, *Preface to Drug Abuse and Addiction Research: The Sixth Triennial Report to Congress from the Secretary of Health and Human Services, available at* http://www.nida.nih.gov/STRC/html (last updated Dec. 15, 1999).

324. *See id.*

325. *See* Alex T. Zakharia, *The Mystery of Addiction, Part VII: At the Helm of Research: Doctor Alan I. Leshner, Director, National Institute on Drug Abuse, National Institute of Health*, MIAMI MED., Sept. 1997, at 15. Dr. Lesh-

Abuse states:

> Recent scientific research provides overwhelming evidence that not only do drugs interfere with normal brain functioning, creating powerful feelings of pleasure, but they also have long-term effects on brain metabolism and activity as well. What happens is that at some point, drugs change the way the abuser's brain is functioning. When that point is reached, it's as if a switch is thrown in the brain, thereby resulting in addiction. This modified brain may help explain why many addicts say they are unable to control their desire or cravings for drugs.
>
> One might ask where voluntary drug-taking behavior ends and the compulsive disease of addiction begins.[326]

Some experts believe that choice remains an important factor in alcohol consumption and drug-taking, however. One authority, for example, writes:

> The research showing that addictive behaviors are not diseases is over two decades old .... Addictive behavior, like all voluntary behavior, responds to rewards and punishment, and is not governed by some internal and unalterable disease process. Although biological factors are certainly present, these factors influence choices but do not dictate

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ner states that the National Academy of Sciences' Institute of Medicine, the American Psychiatric Association, and the American Medical Association all define drug addiction as uncontrollable, compulsive drug seeking and use. *See id.*

326. *Id.* at 16. (quoting Dr. Leshner). Dr. Leshner also states:

> Although the onset of addiction begins with the voluntary act of taking drugs, the continued repetition of voluntary drug taking begins to change into involuntary drug taking, ultimately to the point that the behavior is driven by a compulsive craving for the drug. This compulsion results from a combination of factors, including in large part the dramatic changes in brain function produced by prolonged drug use. This is why addiction is considered a brain disease—one with embedded behavioral and social aspects. Once addicted, it is almost impossible for most people to stop the spiraling cycle of addiction on their own without treatment.

Alan I. Leshner, *Science-Based Views of Drug Addiction and Its Treatment*, 282 JAMA 1314, 1314-15 (1999).

them.[327]

Clearly, much research still needs to be done. As one expert writes, "At a time when American science moves a robot on Mars, it is incumbent upon each of us to push for research to unveil the mystery of addiction."[328] In particular, as Dr. Leshner's statement indicates, work still needs to be done to identify when drug-taking ceases to be a matter of choice and becomes an addiction. Even so, most experts appear to accept the view that excessive consumption of alcohol and certain drugs leads to biochemical changes in the brain that limit the element of choice in the behavior.

If there is consensus in the relevant scientific community that drug addiction can be explained at least in significant part as a brain disorder, it is arguably not appropriate for courts to treat evidence of drug addiction as character evidence. Seen that way, evidence of Cunningham's Demerol addiction would not violate the ban on character evidence, and was potentially admissible under the "other crimes, wrongs, or acts" rule as evidence of motive.

Having reached that conclusion, the court's obligation was to weigh the probative value of the evidence for its legitimate purpose of showing a motive against the danger that the jury will misuse the evidence. If the research is correct, the evidence appears to possess fairly high probative value.[329] That is, if drug addiction is truly a disease characterized by uncontrolled, compulsive behavior aimed at obtaining drugs, it sets up a powerful motive inference. At the same time, the court must consider the danger of unfair prejudice. Roger Park has identified two basic types of unfair prejudice: inferential error prejudice and nullification prejudice.[330] Inferential error prejudice occurs "if the trier overvalues the evidence in determining whether the defendant committed the crime charged. Nullification

327. A. Thomas Horvath, *Alcoholism: 12-Step Isn't For Everyone*, NAT'L PSYCHOLOGIST, July-Aug. 2000, at 1B.

328. *Id.* (statement by Dr. Zakharia).

329. Enhancing the probative value of the past addiction evidence in *Cunningham* is the finding that "for many people, addiction becomes a chronic recurring disorder." Leshner, *supra* note 326, at 1314.

330. *See* Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720 (1998).

prejudice occurs if the trier decides to punish the defendant for acts other than those charged."[331]

In *Cunningham*, the primary risk seems to be from inferential error prejudice. This might occur in at least two ways. *First*, jurors might assign too much value to the evidence as proof of the first inference: that Cunningham was addicted to Demerol at the time of the charged theft. If the prosecution offered little other evidence that Cunningham was addicted to Demerol at the time of the charged theft, and jurors had no other basis from which to judge the likelihood of continued addiction or relapse, they might accord too much weight to the evidence of a four-year-old addiction. The fact that Cunningham's urine tested positive for the presence of Demerol in her system might have reduced the potential prejudicial impact of the questioned evidence, however. *Second*, and perhaps more importantly, jurors might overvalue the evidence as proof of the second inferential step: that as a person addicted to Demerol, Cunningham is more likely to have stolen the drug from the medicine cabinet than the other nurses who had access. Even following a judge's cautionary instruction not to use the evidence to infer bad character, jurors might overstate the likelihood that a person in Cunningham's position would steal to feed her habit. Though it is difficult to evaluate the reactions of lay jurors to evidence of prior addiction in a case such as this, it does seem reasonable to fear that jurors will too readily assume that an addict—even a professional nurse—will steal.[332]

The balance of probative value and prejudice is highly context-dependent; neither probative value nor prejudice exist in a vacuum.[333] There is empirical evidence suggesting that judges have

331. *Id.*

332. Nullification prejudice is also possible in *Cunningham*. Societal attitudes toward illicit drug use and drug addiction have become increasingly hostile. Though Cunningham was neither charged with selling drugs nor sold them in the past, it is possible that jurors will choose to punish her for her past addiction rather than for the theft with which she is currently charged.

333. For an analysis of the probative value-prejudicial impact balancing test, see Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59 (1984); Edward J. Imwinkelried, *The Meaning of Probative*

widely different views on what constitutes prejudicial evidence.[334] Nevertheless, trial courts must take their responsibilities seriously, and should place on the record the reasons for their evidentiary rulings. Whether in *Cunningham* the court struck the appropriate balance is a close question. Had I been the judge, I might have erred on the side of exclusion on the basis that there was other evidence that Cunningham might have a *current* Demerol addiction (the positive result of her urine test), making it less necessary to inform the jury of a four-year-old addiction. Regardless of the proper outcome, the analytical path through Rules 404(b) and 403 is set, and appellate oversight is both possible and crucial.[335]

VI. CONCLUSION

The motive-to-identity theory in *Cunningham* illustrates the imprecision of our definition of character and the need to go behind the labels to examine the underlying purposes of the character rule. Our society long ago deemed trial by character impermissible, and we must guard that principle with a system of evidence law that not only purports to exclude character evidence to prove conduct, but seeks to minimize the danger that the jury will misunderstand its instructions and circumvent the rules. When the thin line between character and motive is approached, the court must consider not only the validity of the abstract theory asserted by the proponent of the evidence, but the likelihood that the overriding goals of the trial will be served by admission or exclusion.

The problem raised by motive in *Cunningham* has a counterpart in sexual assault and child molestation cases, where many courts have permitted introduction of past similar misconduct with the same victim.[336] Even as a matter of abstract theory, these cases come

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Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 be Used to Resurrect the Common Law of Evidence?, 41 VAND. L. REV. 879 (1988).

334. *See, e.g.*, Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147.

335. *See* David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1155 (1992) (arguing for more appellate oversight of trial court evidentiary rulings).

336. *See* United States v. Cunningham, 103 F.3d 553, 556 (7th Cir. 1996);

dangerously close to crossing the character line; in practice, there is little doubt that the effect of admitting the evidence is to condone trial by character. Though recent federal evidence reform has largely mooted this concern for sexual assault and child molestation cases,[337] that reform has been the subject of intense criticism,[338] and the issue is still up for grabs in most states.

Rule 404(b), so brief and straightforward in language, raises a mass of complex analytical questions. The Rule and its common-law counterpart have never been understood well or applied consistently. The goal of this Article has been to examine the "motive" theory for admissibility of uncharged misconduct evidence, with an eye toward eventual reconciliation of the rule with the prohibition of character evidence. It is a small step on a long road.

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see also supra text accompanying notes 310-14.

337. *See* FED. R. EVID. 413 (admitting evidence of similar crimes "for its bearing on any matter to which it is relevant" in prosecution for sexual assault); FED. R. EVID. 414 (admitting evidence of similar crimes in prosecutions for child molestation); FED. R. EVID. 415 (admitting evidence of similar acts in civil actions involving sexual assault or child molestation). All three rules were passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 16, 18, 21, 28 (1994)).

338. The literature on these rules is extensive and growing. For a list of some commentaries, both favorable and unfavorable, see Leonard, *In Defense*, *supra* note 35, at 1162-63 & nn.7-8.