University of Colorado Law Review

Volume 79 | Issue 2 Article 6

Spring 2008

Reverse 404(B) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties

Jessica Broderick

REVERSE 404(B) EVIDENCE: EXPLORING STANDARDS WHEN DEFENDANTS WANT TO INTRODUCE OTHER BAD ACTS OF THIRD PARTIES

JESSICA BRODERICK*

Reverse 404(b) evidence is the name courts have given to a less common use of Federal Rule of Evidence 404(b), wherein a defendant attempts to introduce the "other bad acts" of a third party, usually to prove that this third party committed the crime of which the defendant is accused or that the third party coerced the defendant into committing the crime. This Comment first reviews the standard use of FRE 404(b): when prosecutors seek to introduce other bad acts of the defendant. Then it explores how federal courts have addressed reverse 404(b) evidence. Currently there is no consensus among the circuits on what standard to use for admitting the evidence. Some consider the same strict requirements as are used to admit standard 404(b) evidence, while others seem to disregard the requirements of the rule altogether in order to give the defendant the best opportunity to present a complete defense. Additionally, the Comment shows how two state courts, those of Colorado and Kansas, have dealt with reverse 404(b) evidence in opposite ways. Finally, the Comment proposes two solutions for addressing reverse 404(b) evidence. These solutions balance the interests of all parties and, if adopted by the circuits and followed in the states, would promote consistency.

INTRODUCTION

A bedrock tenet of our criminal justice system is a defendant's right to defend the charges brought against him. As the

* Candidate for Juris Doctor, University of Colorado School of Law, 2008; B.A., University of Northern Colorado, 2004. Special thanks to Professor Christopher Mueller for his comments and suggestions, the University of Colorado Law Review staff for their editorial contributions, and Matt Broderick for his ongoing support and encouragement.

U.S. Supreme Court has held, "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[1] Along with this foundational principle is the idea that a defendant carries little or no burden in a criminal trial; it is the government that must prove every element of the offense beyond a reasonable doubt.[2] In fact, a defense strategy may be merely to raise some reasonable doubt as to the existence of one or more elements of the charged offense.[3] If a defendant has the constitutional right to an opportunity to present a complete defense, then it follows that she has the constitutional right to an opportunity to offer evidence that some third party committed the crime, in order to raise a reasonable doubt in the jury's mind that the defendant is guilty.[4]

These principles of criminal law correlate with the principle behind Federal Rule of Evidence ("FRE") 404(b). FRE 404(b) establishes another foundational tenet of federal law: a defendant must be tried only for the charged offense, not for past crimes, wrongs, acts, or for who he is as a person.[5] The rule allows admission of a defendant's other bad acts[6] only for certain limited purposes, including proving the defendant's intent, motive, identity, and plan,[7] and courts must protect the defendant against unfair prejudice using the procedure outlined by the U.S. Supreme Court in *Huddleston v. United States*.[8] FRE 404(b) does not mention the "accused" or the

1. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)) (citations omitted).

2. *In re* Winship, 397 U.S. 358, 364 (1970).

3. United States v. Stevens, 935 F.2d 1380, 1406 (3d Cir. 1991) ("To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt."); *see also* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 204–05 (1982) (calling this strategy a "failure of proof defense" where the defendant presents evidence to negate an element of the offense).

4. *See* Richmond v. Embry, 122 F.3d 866, 872 (10th Cir. 1997) (defendant is deprived of a fundamentally fair trial if evidence is suppressed that "if admitted would create reasonable doubt that did not exist without the evidence").

5. MCCORMICK ON EVIDENCE § 190 (Edward W. Cleary ed., 3d ed. 1984).

6. This Comment will use the term "other bad acts" or just "other acts" to refer to the sort of evidence admitted under FRE 404(b) and similar state rules.

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

8. 485 U.S. 681, 691–92 (1988).

"prosecution" until the second half of the rule;[9] therefore, it seems to apply to evidence of anyone's other bad acts.

So what happens when a defendant wants to offer evidence of a third party's other bad acts in order to prove that the third party committed the crime or coerced the defendant into committing it? Reliance on the aforementioned foundational tenets suggests that the defendant has the constitutional right to introduce this evidence whenever it would raise some reasonable doubt as to guilt. But admission of other bad acts is governed by FRE 404(b), which limits such evidence to protect its use against defendants.[10] Should courts disregard FRE 404(b) when a defendant seeks to offer "other bad acts" into evidence, in order to provide the defendant with a meaningful opportunity to present a complete defense? Should courts hold defendants to the same standard for admission to which prosecutors are subject when offering evidence against defendants? Or is there a workable standard in between these opposite poles?

This Comment first shows how courts apply FRE 404(b) in its most common setting: when prosecutors seek to offer evidence of a defendant's other bad acts. A discussion of how the federal circuit courts have dealt with the rule when defendants sought to offer evidence of third parties' other bad acts follows. Currently there is no consensus among the circuits; some hold defendants to the same standard as prosecutors,[11] while others seem to disregard the rule altogether.[12] Additionally, this Comment describes how two state courts with rules substantially similar to FRE 404(b) have approached the problem in opposite ways. Because state courts often follow amendments to the Federal Rules with amendments to their own evidence rules, an amendment to FRE 404(b) clarifying the standard for reverse 404(b) evidence could bring about change in the states.

Finally, this paper proposes two solutions to support the premise that the law regarding evidence of other bad acts should be consistent, at least in the federal court system. For evidence of a third party's other bad acts, the *Huddleston* factors for 404(b) evidence should be followed, along with a re-

9. FED. R. EVID. 404(b). The first half of Rule 404(b) instead uses the words "a person."

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

11. *See, e.g.*, United States v. McCourt, 925 F.2d 1229, 1232–33 (9th Cir. 1991).

12. *See, e.g.*, United States v. Seals, 419 F.3d 600, 606 (7th Cir. 2005).

laxed standard of relevancy and prejudice. This approach conforms to the Federal Rules of Evidence and most fairly balances the interests of the parties. An alternative is to amend 404(b) to clarify its application to a "party" and not a "person." If this approach were adopted, courts could disregard 404(b) when defendants seek to introduce a third party's other acts and apply a straightforward relevancy/prejudice balancing approach, remembering that evidence offered to prove only propensity may still be too prejudicial, even when offered by the defendant.

I. CURRENT LAW ON REVERSE 404(B) EVIDENCE

A. FRE 404(b) in General

Although FRE 404(b) applies in both civil and criminal cases,[13] it is most commonly invoked by prosecutors in criminal cases wishing to offer evidence of the defendant's other crimes, wrongs, or acts.[14] The rule specifies:

> 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.[15]

The first sentence of the rule, when applied to defendants, embodies the belief not "that the evidence is irrelevant" but rather "that juries will tend to give it excessive weight, and . . . that no one should be convicted of a crime based on his or her previous misdeeds."[16] The second part of the rule provides for the admission of other acts if they are not offered to prove propensity; in other words, if they are not offered for the purpose of suggesting an inference that the person acted on the occasion

13. *Huddleston*, 485 U.S. at 685.
14. FED. R. EVID. 404(b) advisory committee's note.
15. FED. R. EVID. 404(b).
16. United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

in question consistently with his character.[17] The list of proper purposes in the rule is not exhaustive.[18]

1. *Huddleston v. United States*

The seminal U.S. Supreme Court opinion addressing 404(b) evidence is *Huddleston v. United States*.[19] In this case, defendant Huddleston had been convicted in federal court of possessing stolen property in interstate commerce after a trial that hinged upon whether Huddleston knew the video cassette tapes he was accused of possessing were stolen property.[20] To prove Huddleston's knowledge, the prosecutor had introduced other-act evidence under 404(b) that on past occasions Huddleston had offered to sell a large quantity of televisions and appliances at a low price to various people.[21] While it was established that at least some of the appliances were stolen, there was no direct evidence that the televisions were stolen besides the large quantity, low price, and the fact that Huddleston was working with the same man, Leroy Wesby, to sell the televisions and appliances.[22] The issue on appeal both in the Sixth Circuit and in the Supreme Court was whether "the district court must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the evidence to the jury."[23] The Supreme Court held that the district court was not required to make such a finding.[24]

Huddleston is important for two reasons. The first is its main holding: the district court is not required to make a preliminary finding that the government has proved the other act before it submits the evidence to the jury because 404(b) works in conjunction with FRE 104(b).[25] FRE 104(b) requires the

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

18. United States v. Young, 248 F.3d 260, 271–72 (4th Cir. 2001) (treating 404(b) as "an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition" (quoting United States v. Van Metre, 150 F.3d 339, 349 (4th Cir. 1998)).

19. 485 U.S. 681 (1988).

20. *Id.* at 682–84.

21. *Id.* at 683.

22. *Id.* at 683–84.

23. *Id.* at 682, 684.

24. *Id.* at 682.

25. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evi-

court, "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact," to admit evidence subject to "the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[26] In other words, 104(b) allows the jury to make the final determination regarding whether the defendant committed the prior bad act, with the court simply deciding whether the jury reasonably could find the conditional fact.[27] In making this decision, the court "must consider all evidence presented to the jury."[28] For evidence of other acts, relevancy depends in part on a reasonable finding by the jury "that the act occurred and that the defendant was the actor."[29] If FRE 104(b) were not applicable to admission of other-act evidence, the court could admit the evidence only after making its own determination under 104(a), by a preponderance of the evidence, that the defendant committed the other act.[30] Because *Huddleston* applies only to the Federal Rules of Evidence, and therefore only to the federal court system, some states require the court to make the determination instead of the jury.[31]

While the Court's primary focus in *Huddleston* was establishing who determines preliminary questions of fact—judge or jury—it also discussed four safeguards for ensuring that evidence of other acts, which for a defendant is always prejudicial,[32] does not *unfairly* prejudice the person against whom it is brought.[33] These four safeguards are the requirement of a proper purpose under FRE 404(b); the requirement of relevancy under FRE 402, with conditional facts determined by the jury per FRE 104(b); the trial court's balancing of probative value and danger of unfair prejudice under FRE 403; and the mandate under FRE 105 that, upon request, the court instruct the jury that the evidence of other acts be considered for its

---

dence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b).

26. FED. R. EVID. 104(b).

27. *Huddleston*, 485 U.S. at 690.

28. *Id.* at 690–91.

29. *Id.* at 689. The Court in *Huddleston* held that the jury reasonably could have found that the televisions Huddleston previously had tried to sell were stolen and that, therefore, admitting the evidence was proper. *Id.* at 691.

30. *See* Bourjaily v. United States, 483 U.S. 171, 175 (1987).

31. *See infra* text accompanying notes 77–78.

32. United States v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968).

33. *Id.*

proper purpose only.[34] The four safeguards, though not the primary focus of the case, have become guidelines used by courts for admitting 404(b) evidence against a defendant.[35]

2. Circuit Court Tests for 404(b) Evidence

While the *Huddleston* safeguards are the general requirements for admitting 404(b) evidence against a defendant, circuit courts vary in their exact articulation of the test for admission. Several circuits have expressly used the four safeguards described in *Huddleston* as a four-part test for admitting other-act evidence.[36] Similar four-part tests have also been promulgated under *Huddleston*, such as one used by the Seventh Circuit that divides the relevancy requirement into two parts: a requirement of general relevancy, including a finding that the other acts and the charged offense are sufficiently similar and close in time,[37] and a requirement that the jury could reasonably find that the defendant committed the other acts.[38] This Seventh Circuit test does not require a jury instruction, although courts often still mention it.[39] Still other circuits focus on a simpler two-part relevancy test that considers whether the evidence is offered to prove something other than propensity and whether the danger of prejudice does not substantially outweigh probative value.[40] The common thread in all of these *Huddleston*-inspired tests is a focus on proper purpose, relevancy, and danger of prejudice, as codified in FRE 404 (proper purpose), 401 and 402 (relevancy), and 403 (prejudice).

Courts also may add specific sub-requirements in order to meet the general requirements, such as conditions to establish relevancy of evidence offered to prove a particular 404(b) purpose. For instance, the Tenth Circuit requires that the other bad acts be sufficiently similar and close in time to the charged act in order to meet the requirement of relevance before admit-

34. *Huddleston*, 485 U.S. at 691–92.

35. *See infra* section I.A.2.

36. *See* United States v. Mares, 441 F.3d 1152, 1156 (10th Cir. 2006); United States v. Bakke, 942 F.2d 977, 981 (6th Cir. 1991); United States v. Murphy, 935 F.2d 899, 901 (7th Cir. 1991).

37. *See infra* text accompanying note 42.

38. *See* United States v. Jones, 455 F.3d 800, 806–07 (7th Cir. 2006); United States v. Penson, 896 F.2d 1087, 1091–92 (7th Cir. 1990).

39. *See Jones*, 455 F.3d at 809.

40. *See* United States v. Walters, 351 F.3d 159, 165 (5th Cir. 2003); United States v. Smith, 292 F.3d 90, 98–99 (1st Cir. 2002).

ting them to prove motive, intent, or knowledge.[41] Similarly, the Seventh Circuit has held that the other acts must bear "a singular strong resemblance to the pattern of the offense charged" and that the acts be "sufficiently idiosyncratic to permit an inference of pattern for purposes of proof" in order to prove identity or modus operandi.[42] Prosecutors must ensure these specific requirements are present when introducing other bad acts of the defendant. In combination with the general tests courts use to establish proper purpose, relevancy, and 403 balancing, the requirements amount to a rather strict standard for admitting the defendant's other bad acts. But most courts do not apply this strict standard when a defendant attempts to introduce other bad acts of a third party under 404(b).[43]

B. Applied by Defendants to Third Parties: Confusion in the Circuits

1. How Reverse 404(b) Evidence Works

Defendants apply the other-acts rule of FRE 404(b) to third parties (an application known as "reverse 404(b) evidence") in two ways. First, the defendant may want to prove that some other person committed the crime with which the defendant is charged. Therefore, the defendant offers evidence that some other person committed crimes similar to the one with which the defendant is charged, raising at least a possibility that this other person actually committed the crime with which the defendant has been charged. Second, the defendant may want to prove that a third party coerced her into committing the crime. To prove this defense, the defendant offers evidence that the third party coerced others on different occasions, raising an inference that the person coerced the defendant as well. Essentially, the defendant wants to offer evidence of a third party's other bad acts in support of his defense.

United States v. Stevens[44] and *United States v. McClure*[45] illustrate these two uses of reverse 404(b) evidence. In *Stevens*,

41. United States v. Zamora, 222 F.3d 756, 762 (10th Cir. 2000).

42. United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989) (quoting United States v. Shackleford, 738 F.2d 776, 783 (7th Cir. 1984)).

43. *See infra* notes 60–68 and accompanying text.

44. 935 F.2d 1380 (3d Cir. 1991).

45. 546 F.2d 670 (5th Cir. 1977).

a man robbed and sexually assaulted two Air Force police officers at gunpoint.[46] The two victims later identified their attacker as Stevens from a wanted poster and at a lineup.[47] At trial, Stevens sought to introduce evidence that, three days after the police offers were assaulted, a man named Tyrone Mitchell was assaulted a few hundred yards away from the location of the previous assault.[48] Although the crimes were so similar police originally thought the same person had committed both, Mitchell did not identify Stevens as his attacker.[49] Stevens' defense theory was that the same person had most likely committed both crimes, and Mitchell's testimony proved the person was an unknown third party, not Stevens.[50]

In *United States v. McClure*, defendant McClure was charged with two counts of selling a controlled substance, arising from two incidents in which he sold heroin to an undercover agent from the Drug Enforcement Administration.[51] McClure's duress or coercion defense was that the DEA informant who arranged the sales had threatened and intimidated him into selling the drugs.[52] To support his claim, McClure wanted to offer testimony from three people who claimed the informant had coerced them into selling heroin, including one witness who claimed the informant had shown him his gun and threatened to kill him if he did not produce the drugs in twenty-four hours.[53] McClure was arguing that if the DEA informant had coerced others into selling heroin, then it was likely McClure had been coerced as well.

46. 935 F.2d at 1384–85.
47. *Id.* at 1385.
48. *Id.* at 1401.
49. *Id.*
50. *Id.* One aspect of this defense theory relied on the fact that the assailant in each incident and Mitchell were black, while the two police officers were white. *Id.* Stevens wanted to argue that "because Stevens was exonerated by Mitchell, a black man whose identification (or lack thereof) is arguably more reliable than that of the two white victims, Stevens was not [the person who assaulted the two police officers]." *Id.*
51. 546 F.2d 670 (5th Cir. 1977)
52. *Id.* at 672.
53. *Id.*

2. How the Federal Courts Handle Reverse 404(b) Evidence

Although the federal circuit courts handle offers of reverse 404(b) evidence in different ways, there are two general standards for admitting evidence of other bad acts by third parties. The first standard requires the court to consider only what it must consider for any proffered evidence: the relevance of the evidence and the balance of probative value with FRE 403 considerations.[54] The other standard requires courts to treat reverse 404(b) evidence as it would regular 404(b) evidence, finding the *Huddleston* requirements of a proper purpose, relevance, and probative value not substantially outweighed by FRE 403 considerations.[55] In essence, the first does not apply FRE 404(b)—and its requirement of a proper purpose—to third parties; the second does. What makes these decisions confusing is that courts often purport to follow 404(b), sometimes even stating that the rule applies to third parties, but then go on to analyze only relevance and the FRE 403 balancing test, without considering proper purpose.[56]

Several circuits have expressly held that 404(b) does not apply to the other bad acts of someone other than the defendant; however, these cases are not reverse 404(b) cases. Instead, the prosecution offers the other acts of someone close to the defendant in order to indirectly implicate the defendant.[57]

---

54. *See* United States v. Seals, 419 F.3d 600, 606 (7th Cir. 2005).

55. *See* United States v. McCourt, 925 F.2d 1229, 1232–33 (9th Cir. 1991).

56. *See* United States v. Reed, 259 F.3d 631, 634 (7th Cir. 2001). The court explained,

> This type of evidence is referred to as a variant of Rule 404(b), known as "reverse 404(b)" evidence. In deciding whether to admit such evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403.

Id. (internal citations and quotations omitted).

57. *See* United States v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir. 1987) (testimony that defendant, an attorney, counseled his gang clients about their stolen vans suggests "at most . . . that [defendant] had knowledge of prior crimes of other persons. Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant"); United States v. Morano, 697 F.2d 923, 925–26 (11th Cir. 1983) (evidence of arsonist's past crimes admitted to show a "common plan" between the arsonist and the defendant, who were seen talking in a store a day or two before a fire destroyed the store; 404(b) does not apply because it involves a crime "committed by someone other than the defendant," but exceptions in rule can be used to balance relevancy and prejudice).

The Eleventh Circuit explained why 404(b) should not apply to these third parties in *United States v. Krezdorn*:

> [W]here the only purpose served by extrinsic offense evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded. When, however, the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable. It would seem, therefore, that when extrinsic offense evidence is sought to be introduced against a criminal defendant, in order to trigger the application of Rule 404(b) there must be an allegation that the extrinsic offense was committed by the defendant.[58]

The Eleventh Circuit found the principles of 404(b) inapplicable because other bad acts committed by someone other than the defendant do not prove the defendant's propensity, but in this scenario the other acts do prove some element of the defendant's crime.[59] Because this subset of decisions involves other acts that have a proper purpose of proving the defendant's guilt, they do not relate to reverse 404(b) evidence, which tries to negate a defendant's guilt, possibly by proving propensity of a third party to commit an act.

While no decisions expressly hold that 404(b) does not apply to third parties when defendants offer reverse 404(b) evidence, several circuits impliedly have held this. One of the

---

58. United States v. Krezdorn, 639 F.2d 1327, 1333 (11th Cir. 1981). The court in *Krezdorn* declined to decide that 404(b) did not apply to third parties, *see id.* at 1333, but the Eleventh Circuit did so more explicitly two years later in *Morano*, 697 F.2d at 926.

59. A good example of this is the *Krezdorn* case itself. The Eleventh Circuit was reviewing the admission of two kinds of evidence at the trial of defendant Krezdorn, who was charged with forging border-crossing cards for illegal aliens: (1) thirty-two other documents allegedly forged by Krezdorn, for which he was not charged; and (2) evidence of payments to an unrelated third party made by the illegal aliens whose cards Krezdorn was charged with forging. *Krezdorn*, 639 F.2d at 1329. The court held that the admission of the thirty-two forged documents was an abuse of discretion under 404(b) because there was no proper purpose and, even if there was, the evidence was too prejudicial. *Id.* at 1332. On the other hand, the admission of the evidence of payments proved the existence of a common plan between Krezdorn and the unrelated third party, and the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *Id.* at 1333.

most cited cases in this vein is *Stevens*, where the Third Circuit relied on several state cases—two from New Jersey in particular[60]—to hold that reverse 404(b) evidence may be admitted as long as it tends to negate the defendant's guilt and passes the FRE 403 balancing test.[61] While the court in *Stevens* includes 404(b) in the name it gives the kind of evidence it describes, the formulation of the standard leaves out any requirement of identifying proper purpose.[62] Assumedly, therefore, evidence of a third party's other bad acts could be introduced to prove propensity alone. This assumption is supported by the court's decision to "reject the government's attempt to impose hard and fast preconditions on the admission of 'reverse 404(b)' evidence."[63]

Other circuits have established similar standards for reverse 404(b) evidence,[64] some expressly following *Stevens*.[65] But recently the Third Circuit narrowed its holding in *Stevens*, concluding that the prohibition in 404(b) of other acts to prove propensity applies even if defendants offer the evidence.[66] Therefore, while some circuit courts have held that the standard for reverse 404(b) evidence consists only of relevance and 403 balancing, there is confusion about (1) whether FRE 404(b) applies to third parties, despite the relaxed standard for admitting reverse 404(b) evidence that seems to leave proper purpose out, and (2) whether a defendant could offer reverse 404(b) evidence only to prove propensity. At least one judge, in a concurring opinion disagreeing with the majority's analysis,[67] would

60. State v. Garfole, 388 A.2d 587 (N.J. 1978); State v. Williams, 518 A.2d 234 (N.J. Super. Ct. App. Div. 1986).

61. United States v. Stevens, 935 F.2d 1380, 1404–05 (3d Cir. 1991).

62. Arguably, identity constituted a proper purpose in *Stevens*. *See infra* text accompanying note 114.

63. *Id.* at 1405.

64. *See* United States v. Aboumoussallem, 726 F.2d 906, 911–12 (2d Cir. 1984) (when a defendant offers evidence of a third party's other acts, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense"); United States v. McClure, 546 F.2d 670, 672–73 (5th Cir. 1977) (while "strict standards for admissibility protect the defendant from prejudice" in the normal case, a defendant has a right when offering evidence to "present a vigorous defense," although the judge can exclude the evidence under FRE 403)..

65. *See, e.g.*, United States v. Montelongo, 420 F.3d 1169, 1174 (10th Cir. 2005).

66. United States v. Williams, 458 F.3d 312, 314 (3rd Cir. 2006).

67. See *infra* note 134 and accompanying text.

allow defendants to use reverse 404(b) evidence to prove only propensity.[68]

The second standard some circuits apply to reverse 404(b) evidence employs the same analysis used when other-act evidence is offered by the prosecutor. As the Sixth Circuit explained in *United States v. Lucas*, evidence of other bad acts is "not considered proof of *any* person's likelihood to commit bad acts in the future" and, therefore, the standard test should apply to third parties who are not charged with a crime.[69] Additionally, these courts note that FRE 404(b) indicates that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a *person* in order to show action in conformity therewith"; this part of the rule does not specify "the *accused*"[70] as it does later in the rule.[71] Thus, appellate courts are divided about the standard trial courts should use to admit reverse 404(b) evidence; specifically, the circuits are split on whether finding a proper purpose under the rule is necessary before admitting the evidence.

C. Sampling of State Courts

1. Colorado

Colorado's treatment of reverse 404(b) evidence[72] is similar to the treatment by the Third Circuit exemplified in the *Stevens* case. In other words, the evidence's relevance is balanced with concerns for undue delay and confusion of the issues. While Colorado sets a relatively low standard for admission of reverse 404(b) evidence, for evidence of a *defendant's* other acts offered by the prosecution (the typical use of 404(b) evidence), Colorado is governed by a stricter standard than the one established by *Huddleston* that is followed in federal courts.

Before Colorado adopted the Colorado Rules of Evidence ("CRE"), patterned after the Federal Rules of Evidence, in

68. *See* United States v. Lucas, 357 F.3d 599, 611 (6th Cir. 2004) (Rosen, J., concurring).

69. 357 F.3d at 605–06.

70. FED. R. EVID. 404(b) (emphasis added).

71. *See Lucas*, 357 F.3d at 605; Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999); United States v. McCourt, 925 F.2d 1229, 1231–32 (9th Cir. 1991).

72. Colorado courts never use the term "reverse 404(b) evidence," instead using descriptions such as "evidence of similar transactions" that is "offered by the defendant." *See* People v. Bueno, 626 P.2d 1167, 1170 (Colo. App. 1981).

1980, it followed a common-law approach to admitting evidence of a defendant's other acts.[73] Instead of replacing the state common-law approach with the federal approach to 404(b) evidence after adoption of the rule,[74] Colorado merged the two, retaining three principles from the common law that differ from federal law. The first is the general theory behind the approach. In Colorado, admission of a defendant's other acts is governed by an "exclusionary principle that, subject to narrow exceptions . . . renders such evidence generally inadmissible in a criminal prosecution."[75] As *Huddleston* makes clear, the federal rule, FRE 404(b), is a rule of admissibility: "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."[76] Additionally, Colorado treats preliminary questions of admissibility differently. Unlike the federal system, where FRE 104(b) applies for other-act evidence,[77] Colorado places the responsibility for resolving preliminary questions on the court under CRE 104(a).[78] Finally, Colorado retains some of the common-law procedural requirements for other-act evidence, including instructing the jury regarding the limited purpose of the evidence both at the time it is offered and in the final written instructions, as well as referring to the event in evidence as an "act" or "transaction" instead of a "crime" or "offense."[79] Because of these three common-law principles, Colorado's standard for admitting evidence of a defendant's other acts is stricter than the federal standard.

Colorado's standard of admissibility for reverse 404(b) evidence does not track its standard for 404(b) evidence against

---

73. This approach is laid out in *People v. Honey*, 596 P.2d 751 (Colo. 1989), decided by the Colorado Supreme Court one year before the adoption of the Colorado Rules of Evidence.

74. The language of CRE 404(b) is identical to that of FRE 404(b). *See* COLO. R. EVID. 404(b); FED. R. EVID. 404(b).

75. People v. Garner, 806 P.2d 366, 372 (Colo. 1991).

76. Huddleston v. United States, 485 U.S. 681, 688–89 (1988).

77. The court determines only whether the jury "could reasonably find the conditional fact . . . by a preponderance of the evidence." *Huddleston*, 485 U.S. at 690; *see supra* notes 25–30 and accompanying text.

78. *Garner*, 806 P.2d at 372 (noting that although the language of CRE 104 is identical to the federal version, "Colorado's longstanding restrictive policy concerning the admissibility of other-crime evidence militates against adoption of that part of the *Huddleston* analysis").

79. *Id.* at 374.

the defendant. Instead, Colorado is fairly lenient toward defendants seeking to offer evidence of a third party's other acts. The leading case on the issue, *People v. Bueno*,[80] presents a standard not of exclusion but of inclusion: "[A] defendant is entitled to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt."[81] Evidence of other acts is admitted if it is relevant to the defendant's guilt or innocence and passes the CRE 403[82] balancing test.[83] Prejudice, the *Bueno* court asserts, is not a factor if the defendant is offering the evidence.[84] Finally, in these cases the procedural requirements of the common law are inapplicable.[85]

The preceding standard sounds very similar to the *Stevens* standard established by the Third Circuit. Like the Third Circuit, which held in *Stevens* that elements such as the existence of a "signature" crime could go toward probative value but do not erect absolute preconditions on admission,[86] Colorado requires the court to determine admissibility on a case-by-case-basis: "If all of the similar facts and circumstances, taken together, *may* support a finding that the same person was *probably* involved in both transactions, then evidence that the defendant did not commit the second transaction is relevant and admissible."[87] So although Colorado sets a strict standard for admissibility of other acts offered by the prosecution, it sets a lenient standard for admissibility of other acts offered by the defendant.

2. Kansas

Unlike the federal circuit courts, Kansas takes a hard-line approach to other-acts evidence introduced by the defendant. Regarding its equivalent of FRE 404(b),[88] the Kansas Supreme

80. 626 P.2d 1167 (Colo. App. 1981). The Colorado Supreme Court expressly adopted *Bueno*'s reverse 404(b) standard in *People v. Flowers*, 644 P.2d 916, 918 (Colo. 1982).

81. *Bueno*, 626 P.2d at 1169.

82. The language of CRE 403 is identical to that of FRE 403. *See* COLO. R. EVID. 403; FED. R. EVID. 403.

83. *Bueno*, 626 P.2d at 1170–71.

84. *Id.* at 1171.

85. *Id.* at 1169.

86. United States v. Stevens, 935 F.2d 1380, 1405 (3d Cir. 1991).

87. *Bueno*, 625 P.2d at 1170 (emphasis added).

88. KAN. STAT. ANN. § 60-455 (2005):

Court has held that the rule of evidence applies only to other acts of defendants.[89] But while some federal circuit courts find FRE 404(b) applicable only to defendants, these federal courts then admit evidence of third parties' other acts subject to relevancy and 403 balancing. Kansas, on the other hand, allows defendants to offer other acts of third parties only in two specific situations.[90] This restriction may be unconstitutional.[91]

The Kansas Supreme Court held in *State v. Bryant* that Kansas statute 60-455, which codifies the rule of evidence substantially similar to FRE 404(b), does not apply to any witness except the defendant; in other words, the defendant cannot prove that the witness committed the crime by offering other acts of the witness.[92] As the authors of an article for the Kansas Bar Association Journal explain, "[W]hile K.S.A. 60-455 may be used as a sword by the state to introduce prior crimes of the defendant to show his identity as the culprit, the defendant cannot use K.S.A. 60-455 as a shield to show someone else committed the crime."[93] The authors go on to argue that a defendant has a right to call witnesses to testify in his defense,[94] and "a per se rule excluding all testimony of a particular type or regarding a particular subject matter, regardless of its potential reliability," violates this right.[95]

Defendants may be able to introduce a third party's other bad acts independent of K.S.A. 60-455 in two circumstances.[96] The first is if the state's case against the defendant is built on direct evidence; then the defendant may introduce a third

---

> Subject to K.S.A. 60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident.

89. State v. Harris, 915 P.2d 758, 768 (Kan. 1996).

90. *See* Dennis Prater & Tammy M. Somogye, *Some Other Dude Did It (But Will You Be Allowed to Prove It?)*, 67 J. KAN. B. ASS'N 28 (1998).

91. *See id.*; *see also infra* notes 92–100 and accompanying text.

92. State v. Bryant, 613 P.2d 1348 (Kan. 1980).

93. Prater, *supra* note 90, at 29–30.

94. *Id.* at 31 (citing Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

95. *Id.* (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987) (a state's "interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case")).

96. *Id.* at 33.

party's other bad acts only if there is also direct evidence connecting that third party to the crime.[97] The second is if the state's case against the defendant is built on circumstantial evidence; in that scenario, the defendant may introduce evidence, including other bad acts, reasonably suggesting someone else committed the crime.[98] The *Bryant* rule and its potential exceptions create a regime for admitting reverse 404(b) evidence that is much different from the one in federal courts or in Colorado—nowhere in those courts can one find anything similar to Kansas's bifurcation of standards for admission based on direct versus circumstantial evidence. The Kansas regime limits its "other bad act" evidence rule to parties to the litigation, despite the use of "person" in the rule, just as several federal circuits do. But instead of permitting the court to consider the relevance and balance the prejudice of third-party other acts, Kansas requires trial courts to analyze the kind of evidence the state has offered. Connecting the defendant's right to present a complete defense to the state's evidence, Kansas presumes that "when the state's case is based on direct evidence, by definition, the evidence is so reliable that the defendant's countering evidence must be unreliable."[99] This standard is much more strict than that found in any federal case addressing reverse 404(b) evidence, and it may also violate due process under the U.S. Constitution by creating a per se rule of exclusion.[100]

II. WHAT THE LAW SHOULD BE

Concerns about the defendant's use of a third party's other acts are very real, for both the defense and prosecution. On the one hand, it seems that defendants should be able to introduce any relevant evidence if it may raise a reasonable doubt of the defendant's guilt in the jury members' minds. On the other hand, prosecutors should have the burden of proving beyond a reasonable doubt that the defendant on trial is guilty, not the burden of proving beyond a reasonable doubt that everyone else in the world who possibly could have committed the crime

97. *Id.* (citing State v. Calvert, 505 P.2d 1110 (Kan. 1973)).
98. *Id.* at 34–35 (citing State v. Hamons, 805 P.2d 6 (Kan. 1991)).
99. *Id.* at 35.
100. *Id.*

is not guilty.[101] Additionally, while there is little or no risk of prejudice to defendants from admitting the evidence,[102] there is still some risk of adverse consequences to known third parties when their other bad acts are introduced in a public forum, with the third parties absent and without any representation.[103] Finally, the relevance of third parties' other acts may be outweighed by 403 concerns, especially the possibility of misleading the jury by allowing jury members to easily blame a third person despite other relevant evidence to the contrary.[104] Therefore, while any rule about reverse 404(b) evidence should favor a defendant's right to present a complete defense and raise a reasonable doubt as to his or her guilt, it should also recognize not only the possible hardship for prosecutors but also that other-acts evidence is always prejudicial, even to absent third parties. A comprehensive rule governing reverse 404(b) evidence should also address whether a defendant may use this evidence to prove only propensity.

A. Under the Federal Rules' Current Language

When setting a standard for reverse 404(b) evidence, the federal courts that either expressly hold that FRE 404(b) does not apply to third parties or implicitly hold this by not considering the rule in their standard violate the plain language of the rule. As Chief Justice John Marshall wrote in 1820, "[t]he case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."[105] The plain meaning of FRE 404(b) is that the word *person*, used in the first part of 404(b), means any person, not just a party or the defendant. The Ninth Circuit explained the plain meaning of the rule in this way:

101. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 115 (3d ed. 2007).

102. United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984).

103. MUELLER & KIRKPATRICK, *supra* note 101.

104. United States v. Lucas, 357 F.3d 599, 606 n.2 (6th Cir. 2004) (citing in the footnote the advisory committee's note to FRE 403, which explains that "'[u]nfair prejudice' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

105. United States v. Wiltberger, 18 U.S. 76, 96 (1820).

> As a whole, the rules on character evidence use explicit language in defining to whom they refer. Rule 404(a) establishes the general rule excluding circumstantial use of character. It provides that evidence of "*a person's*" character is not admissible for the purpose of proving action in conformity therewith except for pertinent character traits of an "*accused,*" Fed.R.Evid. 404(a)(1), a "*victim,*" Fed.R.Evid. 404(a)(2), or a "*witness,*" Fed.R.Evid. 404(a)(3), 607, 608, 609. It therefore appears that Congress knew how to delineate subsets of "persons" when it wanted to, and that it intended "a person" and "an accused" to have different meanings when the Rules speak of one rather than the other. Because Rule 404(b) plainly proscribes other crimes evidence of "a person," it cannot reasonably be construed as extending only to "an accused."[106]

Additionally, 404(b) itself distinguishes between a *person* and the *accused*, using *person* in the first half of the rule for the prohibition against character evidence to prove propensity alone and *accused* in the second half of the rule for the notice a prosecutor in a criminal trial must give when offering other-act evidence.[107] This is further confirmation that Congress intended *person* to have a different meaning in 404(b) than *accused*. The plain meaning is that, except for the part of the rule requiring prosecutors to give notice, 404(b) applies to any person, including third parties whose other bad acts defendants would like to offer into evidence.

Because 404(b) applies to third parties, their other bad acts cannot be used to prove propensity only. Doing so would violate the clear prohibition in the rule against using other acts "to prove the character of a person in order to show action in conformity therewith."[108] Allowing admission of a third party's other acts to prove propensity also would be an exception to the general principle that character evidence is an inappropriate kind of circumstantial evidence.[109]

---

106. United States v. McCourt, 925 F.2d 1229, 1231–32 (9th Cir. 1991) (footnotes omitted).

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

108. *Id.*

109. *See* 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1, at 1150–51 (Peter Tillers rev. ed., 1983) (reasons not to admit character evidence to prove propensity include that the evidence lacks probative value and that it "violates a social commitment to the thesis that each person remains mentally free and autonomous at every point in his life").

Instead, when a defendant wants to offer evidence of a third party's other bad acts, the evidence must be admissible for some purpose other than proving action in conformity with the third party's character. As the Seventh Circuit has articulated for the usual use of 404(b) evidence against a defendant, the evidence must be "directed toward establishing a matter in issue other than the defendant's propensity."[110] One purpose likely to be used frequently, according to the existing cases, would be identity, which is a purpose listed in the rule.[111] For instance, in *Stevens*, the defendant wanted to prove that an unknown third party had committed the crime instead of him.[112] The other-acts evidence may have raised a reasonable doubt as to a crucial element of the prosecution's case: the identity of the perpetrator. For the coercion/duress cases, the purpose for admitting the evidence would be intent or motive, because the defendant would be trying to prove that she was coerced into committing the crime, not that she desired to do so. Intent and motive are also included in the rule as proper purposes.[113]

Since these two sorts of cases are the most common reverse 404(b) scenarios, it should not be difficult for a defendant to argue proper purpose if he or she has a valid defense theory using third-party other bad acts. In fact, the cases applying the liberal reverse 404(b) standard often imply a valid 404(b) purpose, even if they do not specifically mention that a purpose is required under 404(b). For instance, in *Stevens*, the court, when balancing relevance against 403 considerations, found that the other-acts evidence was relevant because it tended to show that the victim of a similar crime had not identified the defendant as his assailant.[114] Because identity is a proper purpose under 404(b), the *Stevens* court could have expressly required a proper purpose without changing the outcome of the case.

Applying 404(b) to third parties does not means courts cannot recognize the difference between prosecutors offering the evidence against defendants and defendants offering it

110. United States v. Toro, 359 F.3d 879, 884 (7th Cir. 2004).

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

112. United States v. Stevens, 935 F.2d 1380, 1401 (3d Cir. 1991).

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

114. *Stevens*, 935 F.2d at 1405; *see also* United States v. McClure, 546 F.2d 670, 672–73 (5th Cir. 1977) ("[E]vidence of a systematic campaign of threats and intimidation against other persons is admissible to show *lack of criminal intent* by a defendant who claims to have been illegally coerced.") (emphasis added).

against third parties. Because defendants have the right to present a complete defense, and because the danger of prejudice when defendants offer the evidence against third parties is low, courts should find a proper purpose under 404(b) and then use a relaxed standard when considering relevance and 403 balancing.

The courts that apply the liberal reverse 404(b) test already use a relaxed standard, so their formulation of relevance and balancing is instructive. The New Jersey Supreme Court, for example, held in *State v. Garfole* that "a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State when such evidence is used incriminatorily."[115] In *Stevens*, the Third Circuit relied on *Garfole* to find that:

> [T]he defendant, in order to introduce other crimes evidence, need not show that there has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or that the other crime was sufficiently similar to be called a "signature" crime. These criteria, although relevant to measuring the probative value of the defendant's proffer, should not be erected as absolute barriers to its admission. Rather, a defendant must demonstrate that the "reverse 404(b)" evidence has a tendency to negate his guilt . . . .[116]

A relaxed standard of relevance would loosen or get rid of the requirements some jurisdictions have that the other bad act be sufficiently similar and close in time to the act at issue. What is important to the courts in *Garfole* and *Stevens* is not a strict test that looks at specific requirements of similarity; what matters is simple relevance.[117] A relaxed standard of 403 balancing recognizes what has already been suggested: when defendants offer evidence of a third party's other bad acts, danger of prejudice to those defendants is nonexistent. The Second Circuit, in fact, suggested in the *Aboumoussallem* case that reverse 404(b) evidence should always pass the 403 balancing

115. State v. Garfole, 388 A.2d 587, 591 (N.J. 1978).

116. *Stevens*, 935 F.2d at 1404–05.

117. *See id.* at 1405 ("[A] defendant must demonstrate that the 'reverse 404(b)' evidence has a tendency to negate his guilt . . . .").

test because the risks of prejudice are absent.[118] *Aboumoussallem* perhaps goes too far by failing to acknowledge the possibilities of confusing or misleading the jury, wasting time, and unfair prejudice to the absent third party.[119] But these possibilities most likely would exist only in cases where the defense had no real purpose for offering the evidence besides propensity.

The *Lucas* case is illustrative of a court's finding that evidence of a third party's other bad acts was offered to prove propensity alone. Robin Lucas was convicted of knowingly and intentionally possessing cocaine with the intent to distribute it.[120] Lucas, carrying almost three thousand dollars, was stopped driving a rental car in Tennessee; cocaine, three cell phones, and thirteen credit cards were found in the car.[121] The defense theory at trial was that a man named Morrell Presley, whom the defendant claimed she had been with earlier in the day, had taken the rental car for an extended period of time and left the drugs in the car.[122] The defense sought to introduce an "other bad act" of Presley's—a former conviction for possessing and distributing cocaine.[123]

The Sixth Circuit held that the trial court's refusal to admit this evidence under 404(b) was proper because the evidence would effectively only be used to prove Presley's propensity to possess cocaine: "the defense wants the jury to make the inferential leap that because Presley sold drugs before, he is likely to have done so again."[124] The court also rejected the defense's argument on appeal that the prior conviction also could be used to prove knowledge and intent, two of the exceptions mentioned in 404(b).[125] Presley's knowledge of cocaine and his intent to sell it, the court reasoned, were not at issue in the case, and the simple fact that he possessed cocaine before was not sufficiently probative.[126] The court noted that if the action leading to the prior conviction had been similar in some way to the ac-

118. United States v. Aboumoussallem, 726 F.2d 906, 911–12 (2d Cir. 1984) ("[T]he only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.").

119. *See* FED. R. EVID. 403.

120. United States v. Lucas, 357 F.3d 599, 601 (6th Cir. 2004).

121. *Id.* at 603.

122. *Id.* at 603–04.

123. *Id.* at 604.

124. *Id.* at 605–06.

125. *Id.* at 606.

126. *Id.*

tion leading to Lucas's conviction, such as if Presley had left the cocaine under the seat of a car or packaged the cocaine in the same manner, then the prior conviction may have been sufficiently probative.[127] The *Lucas* court, applying the stricter standard of admitting reverse 404(b) evidence, found the evidence inadmissible because it only proved Presley's propensity to commit crime.[128] The court also concluded that, regardless of whether there was a valid proper purpose, when weighing 403 considerations, the evidence's prejudicial value outweighed its probative value.[129]

As with 404(b) evidence offered *against* defendants, the *Lucas* court's analysis implies that reverse 404(b) evidence offered to prove only propensity runs at least a risk of implicating Rule 403 and its considerations, such as misleading the jury or confusing the issues. Requiring a proper purpose for reverse 404(b) evidence, then, would help alleviate 403 considerations and allow the court to take a relaxed approach to 403 balancing. Applying 404(b) to defendants' proffer of other acts not only follows the plain language of the rule but also enables the court to balance relevance and unfair prejudice effectively, since these are intertwined with a 404(b) proper purpose.[130]

Under the Federal Rules of Evidence as they are today, courts should not ignore Rule 404(b)'s requirement of finding a proper purpose before admitting evidence of any person's other bad acts. Ignoring the requirement disregards the plain language of the rule and fails to take into account the possible prejudice and confusion that could arise from using other-act evidence to prove propensity alone. Following the plain language of the rule allows courts to apply relaxed standards of relevance and 403 balancing that respect the defendant's right to present a defense and the lesser pressures on the defendant attendant with the evidence's admission. A standard for reverse 404(b) evidence that requires a proper purpose but relaxes relevance and 404 balancing is the best way to account

127. *Id.* While Presley's intent and knowledge were not at issue in the case, presumably additional evidence of a more similar "other act" would make it highly probable that Presley had the same intent and plan each time to commit crime, thereby decreasing the probability that Lucas had that same intent and plan. Because Lucas' intent and plan were at issue in the case, the evidence of Presley's other act would be relevant for more than propensity to commit the crime.

128. *Id.*

129. *Id.*; *see supra* note 104.

130. *See supra* text accompanying note 114.

for the competing interests of the defendant, the prosecution, and absent third parties.

B. Alternative: Amend the Federal Rules of Evidence

Amending Rule 404 of the Federal Rules of Evidence also could create conformity among federal courts with regard to reverse 404(b) evidence. Amending the rules would require a proposal to do so from the Advisory Committee to the rules and acceptance by the Supreme Court.[131] This process would clarify for the courts and codify in statute how trial judges should handle reverse 404(b) evidence. The amendment would alter the wording of the first sentence of 404(b), changing the words "a person"[132] to "a party." The sentence would then read: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a party in order to show action in conformity therewith."

The basis for this amendment would be to acknowledge what the courts in the reverse 404(b) cases already recognize and what has been discussed at length in this Comment: many of the dangers of admitting other bad acts are alleviated when it is the defendant seeking admission, and the importance of admission seems greater due to the defendant's right to present a complete defense. As several courts have noted, the policy behind Rule 404(b)'s prohibition against proving propensity seems to be the protection of defendants.[133]

Again, *Lucas* is instructive. The judge who wrote the concurring opinion in *Lucas* agreed with the majority's result but not its analysis in holding the trial judge's exclusion of reverse 404(b) evidence proper.[134] Judge Rosen went into a great deal of depth explaining why the policy behind 404(b) invites an interpretation that the rule does not apply when defendants offer evidence of third parties' other bad acts. First, the rule's principle of exclusion has its roots in the common law, which did not allow other acts to prove the charged act in a criminal

131. 28 U.S.C. §§ 2072(a), 2073 (2000).

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

133. *See supra* text accompanying note 58.

134. *Lucas*, 357 F.3d at 614–15 (Rosen, J., concurring). While Judge Rosen, writing the concurring opinion, would have admitted the evidence under a relaxed standard per *Stevens*, the judge ultimately did not find an abuse of discretion on the part of the trial judge. *Id.*

case.[135] The policy of the rule at common law, then, was to protect the criminal defendant,[136] and Rule 404(b) "continues the policy of the common law."[137] Given that this policy is not implicated when a defendant offers evidence of a third party's other acts, the defendant's proffer should not be brought under the 404(b) rubric but instead should be subject to the test of relevance and possibility of prejudice established in *Stevens*.[138] In other words, Judge Rosen argued that despite the plain language of the rule, policy considerations and the purpose behind the rule necessitate a finding that 404(b) does not apply when the defendant offers a third party's other acts.[139] While this policy approach to reverse 404(b) evidence is persuasive, it would be more useful if supported by the plain language of the rule, such as a rule without the inclusive words "a person," which invite the conclusion that 404(b) does apply to a third party's other bad acts.

Because the policy behind 404(b) is protecting a criminal defendant from unfair prejudice, the rule could be amended to change "a person" to "the accused." However, this change would not only preclude reverse 404(b) evidence from application of the rule but also evidence of other acts in civil cases. The rule under the current language does apply in civil cases,[140] although the vast majority of cases discussing the rule involve use by the prosecutor in a criminal case.[141] While the main policy behind the rule, as discussed in the last paragraph, is protecting criminal defendants, the same dangers of unfair prejudice to a defendant apply to a certain extent to parties in a civil case.[142] For instance, the jury may still give the evidence too much weight or find the defendant (or the plaintiff in

135. *Id.* at 611 (citing JOHN HENRY WIGMORE, CODE OF EVIDENCE 81 (3d ed. 1942)).

136. *Id.*

137. *Id.* (citing United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979) and WEISSENBERGER, FEDERAL EVIDENCE § 404.12 (3d. ed. 1998)).

138. *Id.* at 614.

139. *Id.* at 612.

140. Huddleston v. United States, 485 U.S. 681, 685 (1988).

141. FED. R. EVID 404(b) advisory committee's note (1991 Amendments).

142. In *Lucas*, Judge Rosen at some points in his concurrence characterizes the policy behind 404(b) as protecting criminal defendants, *see supra* text accompanying notes 134–37, specifically when discussing the historical policy behind the rule. But several times elsewhere he characterizes the policy as protecting any party to the litigation, although in particular a criminal defendant. *See Lucas*, 357 F.3d at 611, 612.

a cross-complaint) liable based only on the previous act, not the evidence of the present action adduced at trial. Unlike an absent third party, a party to a civil case is directly affected by the introduction of evidence and its ultimate bearing on the outcome. And the thesis that a person "remains mentally free and autonomous at every point in his life"[143] is accurate for civil parties just as it is for criminal defendants. Therefore, Rule 404(b) should continue to apply to civil parties, although, under an amendment changing the wording to "a party," a civil party could introduce evidence of third party's other acts without implicating the rule.[144]

Amending Rule 404(b) to admit evidence of a third party's other acts without implicating the strictures of the rule would require trial courts to consider relevance and 403 balancing more carefully than they would under a regime that required a 404(b) proper purpose. Requiring a proper purpose helps ensure both that the other bad act is relevant and that it is not unfairly prejudicial, confusing, or misleading.[145] Keeping analysis of a third party's other acts out of Rule 404(b), and consequently not requiring a proper purpose, would mean that parties could offer the other acts for propensity only. With this sort of offer, a trial judge would have to consider the relevance of the evidence,[146] although if some relevance exists, the judge could use the relaxed standard expounded in *Stevens*, not requiring a signature crime or more than one similar crime.[147] The trial judge would also have to be mindful of making sure the proffered evidence would not mislead the jury or confuse the issues.[148] But it seems that considering relevance and appropriate 403 balancing would lead to the same result for admission of reverse 404(b) evidence under an amended rule as it

143. WIGMORE, *supra* note 109.

144. Courts already have considered reverse 404(b) evidence in civil cases. *See, e.g.*, Agushi v. Duerr, 196 F.3d 754, 759–61 (7th Cir. 1999); Rivera v. Rivera, 262 F.Supp.2d 1217, 1225 (D. Kan. 2003).

145. *See supra* text accompanying note 114.

146. *See* WIGMORE, *supra* note 109 (arguing that character evidence that proves propensity only lacks probative value).

147. *See supra* text accompanying note 116.

148. *See* United States v. McVeigh, 153 F.3d 1166, 1191 (10th Cir. 1998) (suggesting that courts be mindful of "alternative perpetrator" evidence because "unsupported speculation that another person may have done the crime . . . intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice").

would under a scheme that required proper purpose but relaxed relevance and 403 balancing.

An amendment may be an especially helpful alternative in order to give guidance to the states for their evidentiary schemes. As shown through the example of two states, Colorado and Kansas, the states can vary widely in their admittance of a third party's other bad acts. While states under the federalist system are permitted to promulgate their own body of evidence law, forty-two states have adopted evidence codes based on the Federal Rules of Evidence, and in the other eight states, "appellate opinions cite [the Federal Rules] and sometimes adopt their underlying principles."[149] An amendment to Rule 404(b) may spur some states to amend their own rules more quickly than would a Supreme Court decision or a collection of circuit court decisions.

CONCLUSION

It has been suggested that evidence law is "less a method of maximizing the chances of finding the truth in a disputed matter than a means of apportioning the risk of error when decisions are made under uncertainty."[150] This idea seems especially pertinent to evidence offered under Federal Rule of Evidence 404(b). The requirement in 404(b) that evidence of other bad acts not be offered to prove propensity alone helps ensure that verdicts do not result from the jury concluding that the defendant committed the charged act merely because he committed the previous act. Requiring 403 balancing before admitting 404(b) evidence also helps allocate the risk of error: better to exclude unfairly prejudicial evidence, even if relevant to a proper purpose, than for the jury to find a defendant guilty as a means of punishing him for the previous act.

Any standard for reverse 404(b) evidence also apportions the risk of error. At present, the federal circuit courts employ several standards for admitting reverse 404(b) evidence,[151] and the state courts apply even more varied standards for admit-

149. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 2–3 (5th ed. 2004).

150. Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 1022 (2006) (discussing the work of Alex Stein).

151. *See supra* Part I.B.2.

ting a third party's other acts.[152] The federal courts applying a strict standard, such as the Sixth Circuit, install more protection against error by requiring the same conditions for admission of reverse 404(b) evidence as for regular 404(b) evidence offered against a defendant.[153] However, introduction of a third party's other acts does not warrant such a high degree of protection. The courts applying a more liberal standard, such as the Second, Fifth and Tenth Circuits, allow more risk of error, reasoning that this does not harm the defendant's case and in fact helps the defendant present a complete defense.[154] But the liberal standard ignores the plain language of the rule and may mislead the jury or confuse the issues. The most appropriate standard, in order to protect constitutional rights and ensure fair outcomes, would give the defendant in a criminal case the greatest amount of latitude to present a complete defense while keeping the risk of error as low as possible and remaining within the confines of the rule.

Therefore, a compromise is in order. Under the current language of Rule 404(b), a third party's other acts are covered by the inclusive language "character of a *person*," despite any policy considerations to the contrary. Applying 404(b) to a third party means three requirements must be met before admission of the third party's other acts: a proper purpose other than propensity, relevance, and passing the 403 balancing test. Additionally, a limiting instruction to the jury should be provided upon request of a party. These requirements keep the risk of error low without precluding the trial court from recognizing the defendant's right to a complete defense by relaxing the standards for relevance and balancing. Alternatively, a compromise could be reached by amending Rule 404(b) so that it would apply only to a party to the litigation. This would give defendants latitude to introduce a third party's other acts without worrying about proper purpose but would require the trial court to look carefully at relevance and balancing to prevent risk of error. Because state evidentiary rules and standards often track the federal rules, an amendment also could have a significant effect on the standards for admitting reverse 404(b) evidence in the states.

152. *See supra* Part I.C.
153. *See supra* text accompanying notes 60–68.
154. *See supra* text accompanying notes 69–71.

While the admission of reverse 404(b) evidence arises rather infrequently compared to the admission of other-acts evidence offered by the prosecutor under 404(b), the constitutional implications involved suggest that courts, committees advising on evidence rules, and legislatures should ensure a fair, workable standard for all parties. Above all, these institutions should work toward establishing a standard that recognizes the defendant's right to a complete defense and the legal system's interest in upholding justice through fair outcomes.