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"OTHER ACTS" EVIDENCE

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Ohio Evidence Rule 404(B), which is identical to Federal Rule 404(b), governs the admissibility of evidence of "other acts." It reads: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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."

The admission of "other acts" as evidence in criminal cases is commonplace. Unfortunately, the erroneous admission of "other acts" is also commonplace. One commentator has written that "uncharged misconduct is perhaps the most misunderstood area of evidence law." E. Imwinkelried, *Uncharged Misconduct Evidence* viii (1984). In his survey of the cases on this issue, Dean Wigmore found "bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction. . . ." 2 J. Wigmore, *Evidence* § 302, at 246 (Chadbourn rev. 1979). This state of confusion is also found in the Ohio cases. Prior to the adoption of the Ohio rule, evidence of "other acts" was governed by RC 2945.59, the so-called "Similar Acts" statute. In a 1975 article, two authors—one a prosecutor and the other a defense counsel—commented on that statute: "The statute has been a source of major confusion to attorneys and judges alike—even the title itself being subject to some inherent misunderstanding." Herbert & Mount, *Ohio's "Similar Acts Statute": Its Uses and Abuses*, 9 *Akron L. Rev.* 301 (1975).

Although the adoption of the Federal Rules offered an opportunity to clarify the law in this area, the drafters did not take advantage of that opportunity. Rule 404(b) did not clarify the law; instead, it codified the existing confusion. The fact that Federal Rule 404(b) is the most litigated of all the Federal Rules of Evidence indicates as much. See 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 404-47 (1982) ("more decisions than occasioned by any other single rule").

Professors Wright and Graham accurately describe the effect of the rule in their treatise. They wrote: "Rule 404(b) is a good illustration of Wigmore's Rule of Codification: the 'always conceded principle should frequently be found solemnly enacted, while the important controversies. . . are ignored and left without solution.'" 22 C. Wright & K. Graham, *Federal Practice and Procedure* 427 (1978).

This article examines Rule 404(B). Since, however, Rule 404(B) cannot be understood without an appreciation of Rule 404(A), which governs the admissibility of character evidence, the latter rule is discussed first.

CHARACTER EVIDENCE

Rule 404(A) governs character evidence, which is also known as propensity or disposition evidence. The first part of the rule provides: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . ." This provision concerns only the circumstantial use of character. It involves an inference that someone with a particular character trait will act in conformity with that trait on a particular occasion. For example, it could be inferred that a person with a larcenous character acts in conformity with that character and steals. Consequently, when charged with a theft offense, that person's character is circumstantially probative.

The circumstantial use of character, then, is not prohibited because it has no probative value. As Justice Jackson wrote: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. U.S.*, 335 U.S. 469, 475-76 (1948). For example, a three-time rapist is a good suspect in a rape case; nevertheless, such evidence is inadmissible at trial. It is excluded

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because the accused should be convicted for what he did, not for what he is. The Ohio Supreme Court has identified the following dangers associated with character evidence:

(1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he had escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes. *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720, 723 (1975).

Despite these dangers, both the common law and Rule 404(A) recognize several exceptions to the general prohibition against the admissibility of character evidence. Rule 404(A) contains three exceptions: (1) the character of the accused, (2) the character of the victim, and (3) the character of witnesses.

Exception: Character of Accused

Rule 404(A)(1) provides: "Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by the statute enacted by the General Assembly are applicable." This provision, which generally codifies the common law rule, has caused few problems. Nevertheless, two issues are worth noting.

First, the exception permits only evidence of a "pertinent character trait." In an assault case, nonviolent character is the pertinent trait. In a theft case, honest character is the pertinent trait. The rule appeared to preclude the admissibility of *general character* traits, such as law-abiding character. Several cases, however, have held otherwise. *U.S. v. Angelini*, 678 F.2d 380, 382 (1st Cir. 1982) (character evidence that a defendant is a law-abiding person is admissible as a pertinent character trait); *U.S. v. Hewitt*, 634 F.2d 277, 280 (5th Cir. 1981) (character evidence that defendant was a law-abiding citizen is admissible). These cases do not necessarily favor the defense. The prosecution's response, either on cross-examination or through rebuttal witnesses, to the defendant's character evidence is restricted to the character trait offered by the defense. If the defense offers evidence of honest character, the prosecution may not respond with evidence of violent character. If, however, the defense offers evidence of law-abiding character, the prosecution may respond with evidence of general criminal character. Such evidence is relevant because it responds to the defendant's evidence.

Second, the term "accused" appears in the exception. This would seem to limit the exception to a criminal defendant. Thus, the exception would not apply in civil cases. There are a few cases, however, that have held otherwise. *Carson v. Polley*, 689 F.2d 562, 575 (5th Cir. 1982) (in a civil case, when the nature of the central issue is close to one of a criminal nature, character traits are admissible and Rule 404(a) applies); *Crompton v. Confederation Life Ins.*,

672 F.2d 1248, 1253 (5th Cir. 1982).

Methods of Proving Character

The exceptions in Rule 404(A) specify *only* when character evidence may be admitted. That rule does not specify the methods of proving character. Rule 405(A) governs the methods of proof. It reads: "Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Thus, a character witness may testify about his personal opinion of the defendant's character in addition to the defendant's reputation in the community. This rule represents a change in the common law, which permitted the use of reputation, but not opinion, evidence to prove character.

What is not so obvious is that this change may also permit expert opinion testimony concerning a defendant's character. The Advisory Committee's Note to Federal Rule 405 refers to the "opinion of the psychiatrist based upon examination and testing." The courts, however, are divided over the admissibility of this type of evidence. In *U.S. v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 426 (1983), the court held that it was not an abuse of discretion to exclude character testimony by a psychiatrist that the defendant possessed a personality configuration inconsistent with the outrageous and senseless murders of his family for which he was charged. In contrast, the court in *U.S. v. Staggs*, 553 F.2d 1073, 1075-76 (7th Cir. 1977), held that a psychologist's testimony concerning the nonaggressive character of the defendant should have been admitted.

In addition to introducing its own character witnesses to rebut defense character evidence, the prosecution may cross-examine defense character witnesses. The theory for permitting this type of cross-examination is that the prosecution has the right to test the basis for the character witness' testimony. For example, a defense character witness who is unaware of a defendant's prior arrests and convictions would not appear to be very informed about the defendant's reputation. If that person is informed but ignores such information, the jury may question the standards used in arriving at the conclusion that the accused has a good reputation. In *Michelson* Justice Jackson gave the following example:

A classic example in the books is a character witness in a trial for murder. She testified she grew up with the defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "three or four," and gave the names of two but could not recall the names of the others. She still insisted, however, that he was of "good character." The jury seems to have valued her information more highly than her judgment [and convicted]. *Michelson v. U.S.*, 335 U.S. 469, 479 n.16 (1948).

Although this form of cross-examination is permitted, it is fraught with the danger of prejudice. Conse-

quently, the courts have placed limitations on its use. For example, in *U.S. v. Glass*, 709 F.2d 669, 673 (11th Cir. 1983), the court held that the prosecution may inquire into specific instances of the defendant's conduct on cross-examination only if (1) there is a good faith factual basis for the question and (2) the incidents inquired about are relevant to the character traits involved at trial. See also *U.S. v. Reed*, 700 F.2d 638, 644-45 (11th Cir. 1983) (embezzlement defendant, who presents character witnesses on the issue of his truth and veracity, may not be cross-examined about possession of marijuana).

One commentator has proposed the following procedure: "As a precondition to cross-examination about other wrongs, the prosecutor should reveal, outside the hearing of the jury, what his basis is for believing in the rumors or incidents he proposes to ask about. The court should then determine whether there is a substantial basis for the cross-examination." C. McCormick, *Evidence* 569-70 (3d ed. 1984). A number of courts require or recommend this procedure. See *U.S. v. Reese*, 568 F.2d 1246, 1249 (6th Cir. 1977); *U.S. v. Duke*, 492 F.2d 693, 694 (5th Cir. 1974); *U.S. v. Lewis*, 482 F.2d 632, 639 (D.C. Cir. 1973);

Exception: Character of Victim

The second exception to the general prohibition against the use of character evidence is found in Rule 404(A)(2). It reads: "Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable." As with the first exception, only opinion and reputation evidence is permitted. Rule 405(a).

Generally, two types of cases come within this exception. In homicide and assault cases, the accused may introduce evidence of the victim's violent character to support a claim of self-defense. This evidence is offered to show that the victim was the first aggressor. In homicide cases, a special rule applies. The prosecution need not wait for the defense to offer *character evidence* on the first aggressor issue; any evidence on this issue, such as the defendant's testimony that the victim was the first aggressor, triggers the prosecution's right to respond with evidence of the victim's nonviolent character.

The principal problem with this rule is that it is frequently misapplied. For example, in *State v. Smith*, 10 Ohio App.3d 99, 101, 460 N.E.2d 693, 697 (1983), the court held that the victim's admission to the defendant that he had killed a person, her personal knowledge of the victim's violent attacks on others, and her knowledge through hearsay that the deceased had committed an unprovoked act of violence upon another were relevant to the defendant's belief that she was in imminent danger of death. The court cited Rule 404(A)(2) to support its decision.

Although the evidence is relevant to self-defense, admissibility is not governed by Rule 404. Rule 404(A)(2) governs only the circumstantial use of character evidence and in this context involves only one element of a self-defense claim: the issue of who was the first aggressor. The theory of admissibility is that a victim with a violent character acts in conformity with that character and this evidence is probative on the first aggressor issue. A second (and distinct) issue in a self-defense claim is whether the defendant acted with an honest and reasonable belief that his life was in danger when he used deadly force. This issue does not involve the circumstantial use of character. Any evidence which influenced the defendant's mental state, such as his belief that the victim had a violent character, is admissible. It was this issue which was involved in *Smith*. See also *Government of Virgin Islands v. Carino*, 631 F.2d 226, 229 (3d Cir. 1980); C. McCormick, *Evidence* 572 n.3 (3d ed. 1984) ("Used for this purpose, the evidence does not transgress the policy against employing character evidence to show conduct.").

The second type of case in which a victim's character may be relevant is a rape or gross sexual imposition prosecution. As Rule 404(A)(2) provides, admissibility of character evidence in these cases is controlled by the rape shield statute. RC 2907.02(D); RC 2907.05(D). Shield laws are often attacked on constitutional grounds. See Letwin, "*Unchaste Character, Ideology, and the California Rape Evidence Laws*," 54 S. Cal. L. Rev. 35 (1980); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980); Berger, *Man's Trial, Woman's Tribulations: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 39-69 (1977).

For the most part, such attacks have failed. See *Doe v. U.S.*, 666 F.2d 43 (4th Cir. 1981); Annot., 1 ALR4th 283 (1980). Nevertheless, the circumstances of a particular case may support such an argument. Indeed, the federal shield law explicitly recognizes this possibility. See Fed. R. Evid. 412(b)(1) (admissibility may be "constitutionally required"). *State v. Jalo*, 27 Or. App. 845, 850-51, 557 P.2d 1359, 1362 (1976), is illustrative. In *Jalo* the defendant denied that he had sexual intercourse with the complainant. The court held it was error to exclude evidence that the complainant had had sexual relations with the defendant's son and others, which facts had become known to the defendant and he had told the complainant that he would notify her parents. Application of the shield law in this case precluded the defendant from establishing the complainant's motive to falsely accuse him.

Exception: Character of Witnesses

The third exception to the general prohibition against character evidence involves the character of a witness. Rule 404(A)(3) contains a cross-reference to the impeachment rules relating to character for truthfulness or untruthfulness. See Rule 609 (impeachment by prior convictions); Rule 608(A) (impeachment by reputation or opinion); Rule 608(B) (impeachment by prior acts not resulting in a conviction).

RULE 404(B)

As mentioned at the beginning of this article, Rule 404(B) governs the admissibility of "other acts" evidence. A close analysis of the rule is critical. The rule contains two sentences. The first sentence provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." This sentence is redundant. Rule 404(A) already prohibits the circumstantial use of character. The second sentence provides that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In one sense, this sentence is unnecessary. Rule 404(A) prohibits *only* the circumstantial use of character. If evidence is offered for some other purpose, Rule 404(A) simply does not apply. The federal drafters, of course, were aware of this. They included Rule 404(b) as a rule of clarification, intending it to highlight the limited scope of Rule 404(a).

Before discussing the analysis required by Rule 404 (B), several preliminary issues deserve attention.

Civil cases

"Other acts" evidence is typically used in criminal cases, and thus it is not surprising that the Ohio Similar Acts statute, RC 2945.59, was placed in the criminal code. Rule 404(B), however, applies in civil as well as criminal cases. See *Doe v. New York City Dep't of Social Services*, 649 F.2d 134, 147 (2d Cir. 1981) (civil rights action), *cert. denied*, 104 S.Ct. 195 (1983); *Annot.*, 64 ALR Fed 648 (1983) (applicability of Fed. R. Evid. 404(b) in civil cases).

"Other acts" evidence offered by the accused

Rule 404(b) is typically used by the prosecution. For instance, if the defendant employs a distinctive modus operandi in a series of robberies but is charged with only the last robbery, the prosecution may offer evidence that the defendant committed the prior robberies using this distinctive modus operandi. Proof that the same modus operandi was used in the charged offense raises the inference that the defendant also committed that crime. Thus, the "other act" evidence is relevant to establish identity.

The probative value of modus operandi to show identity, however, is the same when it is offered by the defense. In this context, the defense is attempting to show that another person, using a distinctive modus operandi, committed the earlier robberies and, since the same m.o. was used in the charged offense, that person also committed it. See *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978); *State v. Bock*, 229 Minn. 449, 39 N.W.2d 887 (1949). Indeed, the argument for admissibility is stronger when "other acts" evidence is offered by the defendant because the risk of unfair prejudice to the defendant is not present. See *U.S. v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984) (standard of admissibility when other acts are offered by the defense is not as restrictive as in cases in which the evidence is offered by the prosecution).

Subsequent acts

Although "other acts" evidence is sometimes referred to as "prior crimes" evidence, the relevant act may have occurred after the charged offense. In other words, subsequent acts may also be admissible. See *U.S. v. Riley*, 657 F.2d 1377, 1388 (8th Cir. 1981), *cert. denied*, 103 S.Ct. 742 (1983); *State v. Wilson*, 8 Ohio App.3d 216, 219, 456 N.E.2d 1287, 1291 (1982) (evidence of subsequent unlawful importuning admitted in rape case). For example, if a robbery defendant threatens a witness the day before trial, evidence of the threat may be admissible to show consciousness of guilt, even though it occurred after the charged offense.

Noncriminal conduct

By its own terms, Rule 404(B) is not limited to other crimes. It includes other acts and wrongs that are not criminal. *U.S. v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) ("Rule 404(b) authorizes the admission of prior 'acts' as well as 'crimes' and 'wrongs.'"). This is another reason why the term "prior crimes" evidence is misleading. As an example, consider a murder case in which the prosecution's theory is that the defendant killed the victim because he wanted to marry the victim's wife. Proof of an affair between the defendant and the victim's wife—the "other act"—may be admissible to establish motive.

Similar acts

The "other act" need not be similar to the charged offense. This is why the term "Similar Acts" Statute is misleading. Sometimes the other act is similar. The robbery example mentioned above is illustrative; it is the existence of the similarity in the distinctive modus operandi in the prior offenses and the case at bar which makes the "other act" relevant to prove identity. In other cases, however, there is no similarity between the "other act" and the charged offense. Here, the murder example mentioned above is illustrative. The "other act" is the affair with the victim's wife; the charged offense is murder.

Statute of Limitations

Several cases have involved the admissibility of evidence of prior crimes for which the statute of limitations has expired. The courts have held that this fact does not preclude admission of the evidence. *U.S. v. DeFiore*, 720 F.2d 757, 764 (2d Cir. 1983); *U.S. v. Means*, 695 F.2d 811, 816 (5th Cir. 1983); *U.S. v. Blosser*, 440 F.2d 697, 699 (10th Cir. 1971). These courts have found that the reasons for enacting a statute of limitations are inapplicable in this context:

The statute of limitations is a defense to prosecution, not a rule of evidence. Therefore, once prosecution is timely instituted, the statute of limitations has no bearing on the admissibility of evidence. It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside the period. *U.S. v. Ashdown*, 509 F.2d 793, 798 (5th Cir.), *cert. denied*, 423 U.S. 529 (1975).

Acquittals

The federal courts are divided on the issue of whether a prior acquittal precludes the admission of "other acts" evidence. *Compare* U.S. v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979) (evidence of another crime is not necessarily inadmissible by the fact of acquittal), *with* Albert v. Montgomery, 732 F.2d 865, 869-70 (11th Cir. 1984). U.S. v. Mespouledé, 597 F.2d 329, 334-35 (2d Cir. 1979) (evidence of prior similar acts is not admissible when the defendant has been acquitted of those acts by a jury); U.S. v. Keller, 624 F.2d 1154, 1157 (3d Cir. 1980) (collateral estoppel precludes admission of evidence of other crimes following an acquittal). *See generally* Annot., 25 ALR4th 934 (1983).

The rationale for precluding the use of an "other act" which has resulted in an acquittal is often based on constitutional considerations. The U.S. Supreme Court has ruled that the Double Jeopardy Clause encompasses the doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436 (1970). Although *Ashe* did not involve "other acts" evidence, some courts have extended *Ashe* to cover such evidence:

[I]t is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime. It is our view that the admission into a trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair. *State v. Wakefield*, 278 N.W.2d 307, 308-9 (Minn. 1979).

The counter argument is that the accused is not being retried for the prior offense when only evidentiary use is made of that offense, and that double jeopardy arises only when there is relitigation of the same facts from the same transaction:

Offering evidence of a prior crime, for which defendant has been acquitted, to a jury embarked on a distinct inquiry . . . does not involve asking the second jury to convict defendant for the prior crime. It does not involve the second jury contradicting the first jury, since the first jury did not find that the defendant did not commit the crime, only that the People had not proved that he had beyond a reasonable doubt. *People v. Oliphant*, 399 Mich. 472, 498 n.14, 250 N.W.2d 443, 454 (1976).

See generally E. Imwinkelried, Uncharged Misconduct Evidence §§ 10.03-09 (1984).

ADMISSIBILITY

Admissibility of "other acts" evidence requires an analysis under Rules 401 and 403. Rule 404(B) simply says that evidence of "other acts" *may* be admissible. As Judge Weinstein has written: "Rule 404(b) does not authorize automatic admission." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 404-47 (1982). The federal drafters also recognized that admission was not automatic: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of

other proof and other factors appropriate for making decisions of this kind under Rule 403." Advisory Committee's Note, Fed. R. Evid. 404(b).

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 403(A) provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Although "other acts" evidence may be confusing and misleading, it is the risk of unfair prejudice that is the principal concern—in particular, the risk that the jury will misuse the evidence for the prohibited purpose of establishing propensity or character.

Relevance other than propensity

The first step in determining the admissibility of "other acts" evidence is identifying its relevancy or probative value. The evidence must prove something other than the defendant's propensity. While the prosecution will rarely admit that the evidence is being offered to show propensity, there are a few reported cases in which admissibility is argued on this basis. *E.g.*, *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930) (possession of weapons offered to show defendant was a "person criminally inclined"). In most cases, the prosecution will offer some other reason for admission. For example, in *People v. Tassell*, 201 Cal. Rptr. 567, 679 P.2d 1 (1984), the defendant claimed that the victim consented to an act of oral copulation. In its case-in-chief, the prosecution introduced two prior sex offenses committed in much the same way. According to the prosecution, the evidence was offered to show a "common plan or design." The "common plan or design" argument might have been relevant if the defendant's identity or even perhaps intent to have intercourse were at issue. The defendant, however, claimed consent, thus conceding identity and intent. Accordingly, the California Supreme Court commented that the "common plan or design" rationale was "merely a euphemism for 'disposition'" and held the evidence inadmissible. *Id.* at 574, 679 P.2d 8.

Another common example involves the use of modus operandi to prove identity. Two bank robberies with a firearm do not establish a distinctive modus operandi. As McCormick points out: "Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies or rapes. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." C. McCormick, *Evidence* 559-60 (3d ed. 1984). One court explained it this way: "It is apparent that the indicated inference does not arise . . . from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant." *People v.*

Haston, 69 Cal.2d 233, 245, 70 Cal. Rptr. 419, 427, 444 P.2d 91, 99 (1968).

To avoid these traps the prosecution should bear the burden of clearly stating the relevance of "other acts" evidence. As one court has commented, "the prosecutor's first duty is to identify, with specificity, the purpose for which the evidence is admissible" and the trial court should require "a showing by the prosecutor as to how such evidence is relevant" *People v. Golochowicz*, 413 Mich. 298, 314-15, 319 N.W.2d 518, 523-24 (1982). Any other approach will result in what one commentator has described as the "smorgasbord" approach to analysis of other crimes evidence "in which the court simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand." 22 C. Wright & K. Graham, *Federal Practice and Procedure* 479 (1978).

Relevancy—"other purposes"

Rule 404(B) lists a number of purposes for which "other acts" evidence may be admitted: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Two points are worth noting about this list. First, the list is not exhaustive. See *State v. Wilson*, 8 Ohio App.3d 216, 219, 456 N.E.2d 1287, 1290 (1982) ("a party may sometimes introduce 'other acts' evidence, although the purpose for its admission is not enumerated in Evid R 404(B)").

Second and more importantly, the list may be more harmful than helpful. Many of the "purposes" listed, such as motive, opportunity, and preparation, are not essential elements of crimes. Accordingly, it is not enough for the prosecution to state that the "other acts" evidence is being offered to prove motive; the prosecution must state that motive is relevant to some essential element, such as identity. This point is critical because, as will be discussed in a subsequent section, identity may not be a disputed issue in the case, and thus the need for the evidence may be minimal while the risk of unfair prejudice may be substantial.

One helpful commentary states that "other acts" evidence is generally admissible on three different ultimate issues: *identity, mens rea, and corpus delicti*. 22 C. Wright & K. Graham, *Federal Practice and Procedure* 460 (1978).

"Other acts" evidence is often used to show that the accused was the actor, i.e. to establish *identity*. Several of the listed "purposes" of Rule 404(B) fall into this category. For example: (1) In a murder case, evidence of the defendant's affair with the victim's wife (the "other act") may be admitted to establish *motive* and motive is probative of identity. (2) In a murder case in which the victim was killed by the explosion of a bomb, evidence that the defendant had used a bomb in a prior offense may be admissible to establish the defendant's technical know-how with explosives, and this capacity (*opportunity*) is probative of identity. (3) In a bank robbery case, evidence that the defendant had previously stolen the car that was later identified as the robbery getaway car may

be admissible to establish *preparation* and is probative of identity.

"Other acts" evidence is often used to show that the accused possessed the requisite mental state for the charged offense, i.e. to establish the *mens rea*. Two of the listed "purposes"—intent and knowledge—are typical *mens rea* elements. Moreover, absence of mistake or accident relates to *mens rea*. It is simply a claim that the defendant did not possess the necessary *mens rea*. For example, when the defendant claims he made a mistake about the nature of a controlled substance, he is asserting that he did not have the requisite *mens rea*, i.e. knowledge that the substance was heroin. Accordingly, his prior heroin transactions may be admissible to show that he is familiar with heroin and thus a mistake is unlikely.

Although not as common as the *identity* and *mens rea* examples, "other acts" evidence may be used to show that a crime has been committed, i.e. to establish the *corpus delicti*. The famous "Brides in the Bath Case," *Rex v. Smith*, 11 Crim. App. 229, 84 L.J.K.B. 2153 (1915), illustrates this use of "other acts" evidence. In that case, the defendant was accused of murdering his wife, who was found drowned in a bath tub. The prosecution introduced evidence showing that two other women who had been married to the defendant also drowned while taking baths. The evidence was relevant to show that the death in the charged offense was homicidal and not accidental. See also *U.S. v. Woods*, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

In addition to identity, *mens rea*, and *corpus delicti*, there is another category of cases in which "other acts" evidence is often found. This category is sometimes labeled "interrelated acts" or "res gestae." In *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975), the Supreme Court recognized that there are:

Situations in which the "other acts" form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible . . . the "other acts" testimony must concern events which are inextricably related to the alleged criminal act . . . *Id.* at 73, 330 N.E.2d at 725.

There is some dispute, at least in the federal cases, over whether "interrelated acts" are "other acts" within the meaning of Federal Rule 404(b). For example, in *U.S. v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983), the Eleventh Circuit took the position that evidence of criminal activity other than the charged offense is not considered extrinsic evidence within the proscription of Rule 404(b): (1) if it is an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) if it was inextricably intertwined with the evidence regarding the charged offense, or (3) if it is necessary to complete the story of the crime charged. In contrast, the Second Circuit in *U.S. v. Levy*, 731 F.2d 997, 1003 (2d Cir. 1984), held that Rules 404(b) and 403 govern the admissibility of evidence of uncharged crimes

that are inextricably interwoven with the charged offense.

Under either view, the critical issue remains the same: “[O]nly as much of related crimes as is necessary to make comprehensible the evidence relating to the charged crime should be admitted.” 2 J. Weinstein & M. Berger, *Weinstein’s Evidence* 404-61 to 62 (1982).

Relevancy—the defendant’s involvement in the “other act”

In order to establish the relevancy of “other acts” evidence, the prosecution must also show that the defendant committed the other act. In the distinctive *modus operandi* example used earlier in this article, evidence of the prior robberies is not relevant, no matter how similar they are to the charged offense, unless it can be shown that the defendant was involved in the prior robberies. The defendant’s involvement need not have resulted in a conviction nor does the prosecution have to establish his involvement by proof beyond a reasonable doubt.

The Ohio cases require *substantial proof* that the defendant committed the other act. *State v. Dick*, 27 Ohio St.2d 162, 167-68, 271 N.E.2d 797, 800-01 (1971); *State v. Carter*, 26 Ohio St.2d 79, 82-83, 269 N.E.2d 115, 117 (1971). Most federal courts require *clear and convincing* evidence. *U.S. v. Gustafson*, 728 F.2d 1078, 1082-83 (8th Cir. 1984); *U.S. v. Kane*, 726 F.2d 344, 348 (7th Cir. 1984). *But see U.S. v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). *See generally Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 Notre Dame L. Rev. 556 (1984).

Balancing probative value against unfair prejudice

Once the relevance of “other acts” evidence is established, the trial court must weigh its probative value against the danger of unfair prejudice. Under Ohio Rule 403(A), the evidence must be excluded if the danger of unfair prejudice outweighs probative value. The latest edition of McCormick’s text describes this process in the following way:

In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility. C. McCormick, *Evidence* 565 (3d ed. 1984).

Several courts require that this “balancing” process be reflected in the record. *See U.S. v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1003 (1984) (Rule 404(b) requires the trial court to make an on-the-record articulation of probative value versus prejudice when requested by a party); *U.S. v. Foskey*, 636 F.2d 517, 525 n.7 (D.C. Cir. 1980) (the trial judge must ensure that the record reflects the consideration he made in balancing the probative value of evidence of bad acts against their preju-

dicial impact).

One aspect of this “balancing” process deserves special attention. Because “other acts” evidence commonly involves the risk of unfair prejudice, many courts have ruled that such evidence is admissible only if the issue for which it is offered is in *dispute*. For example, the Second Circuit has stated that “other acts” evidence is “inadmissible to prove intent when that issue is not really in dispute.” *U.S. v. Williams*, 577 F.2d 188, 191 (2d Cir.), *cert. denied*, 439 U.S. 868 (1978). *See also C. McCormick, Evidence* 564 (3d ed. 1984) (there should be “a genuine controversy”).

Several Ohio cases contain comparable language. In *State v. Eubank*, 60 Ohio St.2d 183, 398 N.E.2d 567 (1979), the state argued the admissibility of evidence of “other acts” on the theory that such evidence showed an absence of mistake or accident. The Supreme Court held admission was error because “[m]istake or accident was not a material issue.” *Id.* at 186, 398 N.E.2d at 569. *See also State v. Curry*, 43 Ohio St.2d 66, 73, 330 N.E.2d 720, 726 (1975) (“In the present appeal, identity was not a material issue.”).

Frequently, a stipulation will eliminate an issue from dispute and thus preclude the need for “other acts” evidence. *See U.S. v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *U.S. v. De Vaughn*, 601 F.2d 42 (2d Cir. 1979).

In order to ensure that “other acts” evidence is offered on a disputed issue, the Second Circuit has provided some additional guidelines. If the evidence is offered to prove that the defendant committed the act charged, for example, by proving identity, the “other acts” evidence may be offered during the prosecution’s case-in-chief, unless the defendant’s commission of the act is not a disputed issue. If the evidence is offered to prove the defendant’s intent or knowledge, the offer of similar acts evidence should await the conclusion of the defendant’s case and should be aimed at a specifically identified issue. *U.S. v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980). The court recognized that this approach might deprive the prosecution of necessary evidence in some cases. Accordingly, the court suggested that the prosecution should rest its case, “reserving, out of the presence of the jury, the right to reopen to present such evidence in the event the defendants rest without introducing evidence.” *Id.* at 939 n.1.

In contrast, other courts permit the prosecution greater leeway. For example, in *U.S. v. Miller*, 725 F.2d 462, 466 (8th Cir. 1984), the Eighth Circuit held that where intent is an element of the crime charged, evidence of other acts tending to establish that element is generally admissible. The prosecution need not await the defendant’s denial of intent before offering evidence of similar acts. This view unnecessarily opens the door to the admission of “other acts” evidence. As one court has commented: “The mere theory that a plea of not guilty puts everything material in issue is not enough The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.” *Thompson v. The King*, 1918 App. C. 221, 232.

Notice

Because of the prejudice associated with "other acts" evidence, several courts have recommended that the prosecution give advanced notice when it intends to introduce evidence of "other acts." U.S. v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980). Florida Rule 404 requires written notice to defense. See also Burks v. State, 594 P.2d 771, 774-75 (Okla. Crim. App. 1979) (ten-day pretrial written notice to defense describing other acts with particularity; notice not required where the other acts resulted in a conviction or is part of the *res gestae*); State v. Gray, 643 P.2d 233, 236 (Mont. 1982) (prosecution must provide written notice, including a statement of purpose for which "other acts" evidence will be offered).

The rationale for notice is clear: "The major tactical advantage accruing to the prosecution is surprise since there is no requirement that the other crime be alleged in the pleadings and often the existence of such evidence cannot be determined through the limited discovery available in criminal cases." 22 C. Wright & K. Graham, *Federal Practice and Procedure* 525 (1978).

Jury Instructions

It may be possible to avoid the prejudicial effect of "other acts" evidence through the use of instructions that inform the jury that such evidence may not be used to show the defendant's character. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §§ 14.14 & .15 (3d ed. 1977); 4 Ohio Jury Instructions 402.61 (1984).

The effectiveness of such an instruction, however, has been questioned. As one commentator has noted: "It may not be . . . realistic to believe that evidence which would be seriously prejudicial can be made substantially less so by asking the jury to use the evidence only for proof of an element of the crime and not as direct proof that the defendant committed the crime." Note *Rule, 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 Nw. U. L. Rev. 635, 643 (1977). Indeed, the instruction may be more harmful than helpful if it unduly emphasizes the evidence. See *United States v. Barnes*, 586 F.2d 1052, 1059 (5th Cir. 1978) ("Counsel may refrain from requesting an instruction in order not to emphasize potentially damaging evidence. . . ."). Perhaps because of these reasons, the trial court is not required to instruct on "other acts" evidence *sua sponte*. The defense counsel must request an instruction. See *United States v. Murzyn*, 631 F.2d 525, 531 (7th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States v. Potter*, 616 F.2d 384, 389 (9th Cir. 1979), *cert. denied*, 449 U.S. 832 (1980). If an instruction is considered desirable, counsel should request that it be given twice—once when the evidence is admitted and later when the case is submitted to the jury.

CONCLUSION

As a recent review of the Federal Rules of Evidence has commented, "The use of other crimes, acts and conduct to prove matters other than general character has always been problematic for courts." ABA Section on Litigation, *Emerging Problems Under the Federal Rules of Evidence* 65 (1983). Unfortunately, the federal drafters did not do more to eliminate some of the problems. Thus, the courts are now left with the responsibility of providing guidance for the admissibility of "other acts" evidence under Rule 404. Such guidance is solely needed; otherwise, the shot-gun approach to this type of evidence may continue.

REFERENCES

- C. McCormick, *Evidence* ch. 17 (3d ed. 1984)
- E. Imwinkelried, *Uncharged Misconduct Evidence* (1984)
- 22 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5231-5250 (1978)
- 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[01] et seq. (1982)
- 1A J. Wigmore, *Evidence* §§ 192-218 (Tillers rev. 1983); 2 J. Wigmore, *Evidence* §§ 300-373 (Chadbourn rev. 1979)
- P. Giannelli, *Ohio Evidence Manual* §§ 404.01 et seq. (1983)

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RECENT BOOKS

Several texts on criminal law, criminal procedure, and evidence have been published recently. These texts should be of interest to criminal litigators. Professor Lewis Katz has written a book entitled *Ohio Arrest, Search and Seizure*, published by Banks Baldwin. In addition to chapters on Fourth Amendment law, it contains chapters on confessions and lineups. Professors LaFave and Israel have published a three-volume work, entitled *Criminal Procedure*. This work covers all aspects of criminal procedure, including chapters on search and seizure, confessions, lineups, grand jury practice, pretrial release, severance and joinder, speedy trial, discovery, and so forth. Another book, Robinson, *Criminal Law Defenses*, treats criminal defenses, including chapters on insanity, mistake, self-defense, and so forth. In addition, the third edition of McCormick, *Evidence* has recently been published. All three books are published by the West Publishing Company. A fourth book, Imwinkelried, *Uncharged Misconduct Evidence*, is published by Callaghan & Company.