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Indelible Ink in the Milk - Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in State v. Coffey

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Indelible Ink in the Milk*: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in *State v. Coffey*

> *It was tragic. The defendant had, on several occasions, taken up with divorced women so he could have access to their children. He had sexually abused four other children before this little girl. The government either couldn't or didn't introduce any of this prior conduct at the defendant's trial. The jury acquitted. When some of the jurors subsequently found out about the prior incidents, they were furious. "If only we'd known about them, we'd have convicted the guy!"*[1]

The issue of admission of uncharged misconduct evidence is the most litigated evidentiary issue in most federal and state appellate courts.[2] The multitude of litigation in this area no doubt results from the highly prejudicial effect this type of evidence has on judges, juries, and lay-persons[3] in both civil and criminal cases.[4] The North Carolina Supreme Court, like most state and federal courts, traditionally recognized the impact of this type of evidence on a defendant's right to a fair trial by adopting a general exclusionary rule, with a limited number of well-recognized exceptions.[5] The court further protected defendants from unrestrained admission of prior uncharged acts by requiring that evidence of these acts be substantially similar to and not too remote in time from the charged crime.[6] Since Congress adopted Federal Rule of Evidence 404(b) and numerous state legislatures adopted corresponding state versions of that rule,[7] many courts in these jurisdictions have relaxed significantly—if not eliminated—the evidentiary constraints on the admissibility of this highly prejudicial class of evidence.[8]

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* The title originates from a colorful remark in a decision by the United States Court of Appeals for the Third Circuit involving the admission of uncharged misconduct evidence: "A drop of ink cannot be removed from a glass of milk." Virgin Islands v. Toto, 529 F.2d 278, 283 (3rd Cir. 1976).

1. The opening quotation is borrowed from the beginning of a law review article on admission of evidence of a defendant's prior sexual misconduct with children. Hutton, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D.L. REV. 604, 604 (1989).

2. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 427 (1978).

3. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (1984 & Supp. 1991).

4. *See* Huddleston v. United States, 485 U.S. 681, 685 (1988) (noting that rule 404(b) applies to both civil and criminal cases).

5. *See* State v. McClain, 240 N.C. 171, 173-76, 81 S.E.2d 364, 366-68 (1954).

6. *See, e.g.*, State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); State v. Scott, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986); State v. Moore, 309 N.C. 102, 106-07, 305 S.E.2d 542, 544-45 (1983); State v. Shane, 304 N.C. 643, 654-56, 285 S.E.2d 813, 820-21 (1982), *cert. denied*, 465 U.S. 1104 (1984). For a discussion of these cases, see *infra* notes 57-77 and accompanying text.

7. *See, e.g.*, N.C.R. EVID. 404(b) (1986). For North Carolina's version of rule 404(b), see *infra* note 43.

8. *See* Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1467-68 (1985). For a discussion of Congress' adoption of Federal Rule of Evidence 404(b) and the rule's subsequent effects on the federal courts' approach to uncharged misconduct evidence, see *infra* notes 83-90 and accompanying text. For a discussion of state courts' reactions to their legislatures' adoption of a version of rule 404(b), see *infra* notes 104-10 and accompanying text.

In *State v. Coffey*[9] the North Carolina Supreme Court followed this trend and abrogated the traditional procedural safeguards against admission of this highly prejudicial class of evidence. The court ruled that evidence of the defendant's prior sexual misconduct was admissible to show motive and intent in a trial for the murder of a ten-year-old girl.[10] In upholding the trial court's admission of the evidence, the *Coffey* court announced that a "clear general rule of *inclusion*" governs the admissibility of uncharged misconduct evidence under rule 404(b).[11] The court stated that the adoption of rule 404(b) superseded any language to the contrary in its previous opinions.[12] Moreover, the conspicuous absence of an analysis under the previously applied two-pronged test of similarity and proximity in time[13] intimated that the court interpreted its adoption of the inclusionary approach as obviating the need to prove either of these previously required independent safeguards.[14]

This Note begins with a brief discussion of the evidence presented at the trial in *Coffey* and the court's rationale for upholding its introduction on appeal. The Note then outlines two lines of state precedent relating to the court's opinion in *Coffey*: cases delineating the general standard for admissibility of uncharged misconduct evidence and cases applying this general standard in situations involving evidence of uncharged sexual misconduct, similar to that in *Coffey*. The Note next analyzes two significant aspects of the court's decision. First, the Note discusses the propriety of the court's express adoption of a rule of inclusion for uncharged misconduct evidence and contends that the *Coffey* court's adoption of this approach is justified by the concomitant intent of the North Carolina General Assembly. Second, the Note analyzes the court's application of this approach to the present case and its apparent abandonment of the previously applied two-pronged test of similarity and proximity in time. The Note asserts that the *Coffey* court erroneously discarded these important safeguards. Specifically, it allowed the admission of uncharged misconduct evidence for the sole purpose of proving that the defendant was guilty of the charged offense because he had acted in in accordance with such behavior in the past, precisely the purpose rule 404(b) prohibits. The Note concludes that only the North Carolina General Assembly has the authority to restore the common-law presumption against admission of uncharged misconduct evidence. The Note, however, recommends that the court restore the previously required two-pronged test for admission of similar uncharged misconduct evidence.

On July 19, 1979, the beaten and asphyxiated body of ten-year-old Amanda Ray was found near a lake in Mecklenberg County, North Carolina.[15] Eight years later the State indicted the defendant for the first degree murder of the

9. 326 N.C. 268, 389 S.E.2d 48 (1990).

10. *Id.* at 280-81, 389 S.E.2d at 55-56.

11. *Id.* at 278, 389 S.E.2d at 54.

12. *Id.*

13. See *infra* notes 57-77 and accompanying text for a discussion of the application of this two-pronged standard in previous North Carolina cases.

14. *See Coffey*, 326 N.C. at 278-81, 389 S.E.2d at 54-56.

15. *Id.* at 274, 389 S.E.2d at 51.

child.[16] The prosecution based the first degree murder charge on the theory that the defendant kidnapped the victim with the intent to commit indecent liberties and subsequently murdered her to avoid exposure.[17]

The prosecution's proof at trial relied exclusively on various types of circumstantial evidence. The State produced numerous eyewitnesses who testified that they had seen Amanda talking with a man they identified as the defendant in the two days prior to the discovery of her body.[18] In addition to eyewitness identification, the State offered evidence that fibers found on the victim's body matched fibers found on several items proven to be in the defendant's possession around the time of the murder.[19]

Finally, the State offered the testimony of both Janet Ashe and her pastor, Reverend James Hall.[20] Mrs. Ashe testified about an incident involving the defendant and her three-year-old daughter, Angel. Mrs. Ashe stated that in May 1979 she left Angel with the defendant and, after returning home, learned from the child that the defendant had masturbated in front of her.[21] Both Janet Ashe and her pastor testified that, when confronted, the defendant admitted to masturbating in front of the child.[22]

Based on this circumstantial evidence, the jury convicted the defendant of first degree murder and, following the jury's recommendation, the trial court entered a death sentence.[23] On direct appeal to the North Carolina Supreme Court, the defendant raised numerous assignments of error from both the trial and sentencing proceedings.[24] The court rejected all of the defendant's objections arising from the trial and conviction phase, but remanded for a new sentencing proceeding because of prejudicial errors that occurred during that phase.[25]

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16. *Id.* at 274, 389 S.E.2d at 52.

17. *Id.* at 280, 389 S.E.2d at 55.

18. *Id.* at 274-75, 389 S.E.2d at 52. More specifically, several eyewitnesses testified that they saw the victim fishing on a lake with the defendant on July 18, 1979, the day before Amanda's body was discovered near the same lake. *Id.* at 275, 389 S.E.2d at 52. Several of the witnesses also saw the defendant in a white van at both the lake and Amanda's apartment complex. *Id.* at 274-75, 389 S.E.2d at 52.

19. The State introduced fibers taken from a sofa and van which belonged to the defendant at the time of the murder. *Id.* at 276, 389 S.E.2d at 53. Both the defendant and his ex-wife confirmed that the defendant owned a white and blue van in 1979. *Id.* at 276-77, 389 S.E.2d at 53. Apparently, the sofa had not been cleaned in approximately ten years; thus the police were able to obtain hair fibers from a dog, since deceased but admittedly owned by the defendant. *Id.* An expert in trace evidence testified that dog hairs found in the sofa matched those found on the victim's body and in the defendant's van. *Id.* The expert also stated that fibers from the carpet in the defendant's van matched fibers found on Amanda's body. *Id.*

20. *Id.* at 277-78, 389 S.E.2d at 54.

21. *Id.*

22. *Id.* In a *voir dire* hearing prior to the admission of this evidence, the court concluded that the incident involving Angel Ashe was admissible but excluded evidence of two other incidents where the defendant had taken indecent liberties with other young girls. *Id.* at 279, 389 S.E.2d at 55. The court ruled that the cumulative effect of this evidence would be more prejudicial than probative under Rule 403 of the North Carolina Rules of Evidence. *Id.*

23. *Id.* at 274, 389 S.E.2d at 51.

24. *Id.*

25. *Id.* The court reversed the death sentence based on a failure to follow procedures outlined in § 15A-2000(c)(3) of the North Carolina General Statutes. *Id.* at 296, 389 S.E.2d at 64-65. This

The court's rationale for upholding the admission of the testimony involving the incident with Angel Ashe is especially significant. The court rejected the defendant's contention that evidence of other crimes, wrongs, or acts falls under a general rule of exclusion, subject only to certain exceptions.[26] Instead, the court embraced the position that the adoption of North Carolina Rule of Evidence 404(b) manifested a clear legislative intent on the part of the North Carolina General Assembly to codify a general rule of inclusion.[27] Under this standard of inclusion, the court stated, such uncharged misconduct evidence generally is admitted, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."[28] The court added that its prior decisions have been "markedly liberal" in admitting evidence of prior sex offenses of an "unnatural" character, such as in the present case.[29]

Under this general standard of inclusion, the court ruled that the trial court properly admitted evidence of the Angel Ashe episode because its admission satisfied two distinct purposes specifically enumerated in rule 404(b).[30] First, the court ruled that the incident with Angel Ashe could provide a motive for Amanda's murder.[31] In addition, the court held that the lower court properly admitted this evidence to prove specific intent, a necessary element of the underlying felony of kidnapping.[32] Finally, the court ruled that in admitting the evidence the trial court did not abuse its discretion under North Carolina Rule of Evidence 403.[33]

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statute requires that the foreman return a signed writing on behalf of the jury finding that mitigating circumstances were insufficient to outweigh the aggravating factors before imposing the death penalty. N.C. GEN. STAT. § 15A-2000(c)(3) (1988). Because the trial court did not follow this procedure, the supreme court remanded the case for a new sentencing proceeding. *Coffey*, 326 N.C. at 297, 389 S.E.2d at 65.

26. *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54.

27. *Id.*

28. *Id.* at 278-79, 389 S.E.2d at 54 (emphasis in original).

29. *Id.* at 279, 389 S.E.2d at 54-55 (quoting 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 92 (3d ed. 1988)).

30. The rule lists as proper purposes proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. N.C.R. EVID. 404(b) (1986). This list is identical to that contained in Federal Rule of Evidence 404(b) except for the addition of the word "entrapment." *Id.* 404(b) commentary.

31. *Coffey*, 326 N.C. at 280, 389 S.E.2d at 55. This reasoning reflects the prosecution's theory that the defendant killed the victim to avoid any exposure similar to that which occurred with Angel Ashe. *Id.* Although the prosecution was not required to prove a motive, the court held that motive is always admissible when the act is in question. *Id.* Consequently, the court ruled that the trial court properly admitted the evidence for this purpose. *Id.*

32. *Id.* at 280-81, 389 S.E.2d at 55-56. The prosecution theorized that the defendant took the victim with the intent to commit indecent liberties, thereby committing a kidnapping. *Id.* at 281, 389 S.E.2d at 55-56. The court agreed that the episode involving Angel Ashe tended to prove the necessary specific intent and ruled that the evidence was admitted properly on this theory as well. *Id.*

33. *Id.* at 281, 389 S.E.2d at 56. The court stated that under rule 403 the trial judge has wide discretion to determine if the probative value of the evidence is outweighed substantially by the danger of undue prejudice to the defendant. *See* N.C.R. EVID. 403. The court held that the trial court had remained within the bounds of its discretion on this issue. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56.

In addressing the admissibility of uncharged misconduct evidence, the North Carolina Supreme Court confronted a number of its previous decisions, decided both before and after the enactment of the North Carolina Rules of Evidence, which took effect on July 1, 1984.[34] The cases decided after the adoption of rule 404(b) retain some of the pre-rule safeguards, but also show a marked trend toward the admission of "other crimes evidence."[35] This trend toward admissibility is particularly prominent in the area of prior sexual acts, especially those of an "unusual" or "unnatural" character.[36]

Before the adoption of rule 404(b) and to some extent even after its adoption, the seminal case concerning other crimes evidence in North Carolina was *State v. McClain*.[37] In *McClain*, a jury convicted the defendant of prostitution. The defendant appealed and excepted to the admission of evidence that she surreptitiously stole $135 from her client subsequent to the alleged prostitution.[38] The North Carolina Supreme Court held that the trial court erred in admitting the evidence. The court announced that a general rule of *exclusion* "subject to certain well recognized exceptions" governed admission of evidence of uncharged offenses.[39] Applying this standard, the *McClain* court excluded evidence relating to the defendant's uncharged larceny because it did not fall within one of the listed exceptions to the general rule of exclusion.[40] Thus, under *McClain,* to admit evidence of other uncharged crimes the state had to prove that the evidence satisfied one of the finite number of well-recognized exceptions.

The *McClain* court expounded several strong justifications for the general rule of exclusion:

> "the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."[41]

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34. An Act to Simplify and Codify the Rules of Evidence, ch. 701, § 1, 1983 N.C. Sess. Laws 666, 668-69 (codified at N.C.R. EVID. 404(b)).

35. Other crimes evidence is a term of art used to refer to proffered evidence relating to an act that is independent of the charged crime. This is the type of evidence at issue in rule 404(b) cases such as *Coffey*.

36. *See infra* note 77 and accompanying text.

37. 240 N.C. 171, 81 S.E.2d 364 (1954).

38. *Id.* at 172-73, 81 S.E.2d at 365.

39. *Id.* at 174, 81 S.E.2d at 366. The Court then delineated eight exceptions to the exclusionary rule. *Compare id. with* N.C.R. EVID. 404(b) (1986) (the exceptions provided in *McClain* are extremely similar to those specifically enumerated in rule 404(b)).

40. *McClain*, 240 N.C. at 177, 81 S.E.2d at 368. The court subsequently held that admission of such evidence would be prejudicial to the defendant's right to a fair trial. *Id.*

41. *Id.* at 177, 81 S.E.2d at 368 (quoting State v. Gregory, 191 S.C. 212, 221, 4 S.E.2d 1, 4 (1939)); *see also id.* at 173-74, 81 S.E.2d at 356-66 (the court also discusses the reasons for an exclusionary rule); State v. Shane, 304 N.C 643, 654, 285 S.E.2d 813, 820 (1982) ("[F]undamental fairness

On July 1, 1984, the North Carolina Rules of Evidence took effect,[42] with rule 404(b) specifically addressing the admissibility of uncharged misconduct evidence.[43] Originally, the North Carolina Supreme Court interpreted the new rule to be consistent with prior North Carolina practice.[44] Despite this avowed consistency, North Carolina courts' interpretation of the general standard under rule 404(b) has been subtly, yet significantly, modified from the pre-rule standard to one allowing greater admissibility.

For example, in *State v. Morgan*,[45] an early case interpreting the new rule, the court stated that uncharged misconduct evidence is admissible so long as it is offered for some purpose other than to show action in conformity.[46] In *Morgan* the defendant allegedly came out of his place of business and shot the victim.[47] At trial, the State proffered evidence that the defendant had pointed a gun at an unrelated party three months earlier to disprove his claim of self-defense.[48] The court held that offering evidence of previous violent behavior to prove that the defendant was the aggressor in the affray was exactly the type of propensity evidence excluded by rule 404(b).[49] Thus, under *Morgan*, the court's announced standard appears to be more lenient than under *McClain* because it focuses not on the exclusion of evidence but instead on the admission of evidence assuming the prosecution can prove the existence of any proper purpose.[50] The *Morgan* court's application of this standard to the facts of the case, however, retains the same protections against propensity evidence present in pre-rule cases.[51]

In a case decided in the same year as *Morgan*, the court took an even broader reading of the admissibility of uncharged misconduct evidence under rule 404(b). In *State v. Weaver*,[52] the court asserted that under both rule 404(b) and previously under *McClain*, "the purposes for which evidence of other crimes, wrongs or acts is admissible is not limited to those enumerated either in

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requires giving defendant the benefit of the doubt and excluding the evidence. [Or, as it is more descriptively said in the game of baseball, the tie must go to the runner]." (brackets in original)).

42. An Act to Simplify and Codify the Rules of Evidence, ch. 701, § 1, 1983 N.C. Sess. Laws 666, 668-69 (codified at N.C.R. EVID. 404(b)).

43. Rule 404(b) reads:

> Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show 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, entrapment or accident.

N.C.R. EVID. 404(b).

44. State v. Young, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986). In fact, the commentary to rule 404(b) indicates this same point. *See* N.C.R. EVID. 404(b) commentary.

45. 315 N.C. 626, 340 S.E.2d 84 (1986).

46. *Id.* at 636, 340 S.E.2d at 91.

47. *Id.* at 629, 340 S.E.2d at 86. Apparently this incident evolved from a dispute between the defendant and the victim over closing down his business. *Id.*

48. *Id.* at 637-38, 340 S.E.2d at 91-92.

49. *Id.* at 638, 340 S.E.2d at 92.

50. *Id.* at 635-40, 340 S.E.2d at 90-93.

51. *See id.* at 637-38, 340 S.E.2d at 91-92.

52. 318 N.C. 400, 348 S.E.2d 791 (1986). The State charged the defendant with felonious breaking and entering and larceny of a chain saw and socket set. *Id.* at 400, 348 S.E.2d at 792.

the rule or in *McClain*."[53] The court stated, in even broader language, "[i]n fact, as a careful reading of rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused."[54] Under this expansive standard, the court found evidence of the defendant's prior dealings with a government witness admissible to show a common plan or scheme.[55] Thus, in both its language and its application, the *Weaver* court significantly relaxed the general admissibility standard for uncharged misconduct evidence.

In addition to cases delineating the general admissibility standard, numerous North Carolina cases have addressed the admissibility of "other crimes" evidence in the specific context of sexual misconduct. These cases, also decided before and after the adoption of rule 404(b), clearly show that the court's approach to admitting evidence of prior sex acts has been markedly different from its approach when evaluating cases involving all other crimes. The court stated in a pre-rule case: "Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule [of exclusion]."[56] Even in cases of prior sex acts, however, the court has required that the evidence meet certain safeguards in order to protect the defendant's right to a fundamentally fair trial.

In a pre-rule case in this specific context, *State v. Shane*,[57] the State charged a police officer with first degree sexual offense for allegedly using his position to gain sexual favors from employees of a massage parlor.[58] The trial court admitted testimony from the defendant's former employer about a similar but independent incident.[59] Despite the supreme court's finding that a "striking similarity" existed between the two episodes, it held that the period of time elapsing between the two events, approximately one year, "substantially negated the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities."[60] Consequently, the court held that the erroneous and prejudicial admission of such evidence required a new trial.[61]

53. *Id.* at 402-03, 348 S.E.2d at 793. This quotation is at variance with the clear holding of *McClain*. *See supra* note 39 and accompanying text.

54. *Weaver*, 318 N.C. at 403, 348 S.E.2d at 794 (citing 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 91 (1982)).

55. *Id.* at 404, 348 S.E.2d at 793-94. A defense witness testified that he, and not the defendant, had stolen and sold the tools. *Id.* at 402, 348 S.E.2d at 793. The court allowed admission of the defendant's prior dealings with the State's witness to disprove the claim of the defense witness. *Id.* at 403-04, 348 S.E.2d at 793-94.

56. State v. Greene, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978). In *Greene*, the court ruled that two cases of assault and rape had been properly consolidated and that testimony of the complaining witness in one case was admitted properly as to the other case under both the identity and common plan exceptions. *Id.*

57. 304 N.C. 643, 285 S.E.2d 813, *cert. denied*, 465 U.S. 1104 (1982).

58. *Id.* at 644-46, 285 S.E.2d at 815.

59. *Id.* at 652, 285 S.E.2d at 819. This other incident, like the one charged, involved the defendant's use of his position of authority to coerce the victim to engage in oral sex. *Id.*

60. *Id.* at 655-56, 285 S.E.2d at 820-21. The State had argued that this evidence should be admitted under the common plan or scheme purpose. *Id.* at 653-54, 285 S.E.2d at 820.

61. *Id.* at 656-57, 285 S.E.2d at 821-22.

Thus, in *Shane*, the court recognized the first essential requirement in admitting sexual misconduct evidence—proximity in time to the charged crime.

Another pre-rule case involving admission of uncharged sexual crimes illustrates a second requirement for admitting such evidence. In *State v. Moore*,[62] the trial court, during the defendant's trial for first degree sexual offense, admitted the testimony of a victim of a separate uncharged rape, who identified the defendant as her assailant.[63] The trial court admitted the evidence of the previous sexual offense under the theory that it helped identify the perpetrator of the charged crime—a recognized exception to the general rule of exclusion.[64] The *Moore* court, however, ruled that the testimony relating to the uncharged crime should have been excluded because of the limited similarities between the two crimes.[65] The court noted that "[t]o allow the admission of evidence of other crimes without such a showing of similarities would defeat the purpose of the general rule of exclusion."[66]

Thus, prior to the adoption of rule 404(b), the North Carolina Supreme Court recognized, in separate cases, the existence of two important constraints on the admissibility of sexual misconduct: proximity in time and similarity. The court initially reaffirmed the continued existence of these requirements after the adoption of rule 404(b) in *State v. Scott*.[67] In *Scott*, a jury convicted the defendant of a first degree sexual offense perpetrated on his three and four-year-old nieces.[68] The trial court admitted testimony that eight years previously, when the defendant was only thirteen, he had forced his sister to have sexual intercourse with him at knife-point.[69]

In analyzing the propriety of admitting such evidence, the court recognized that "no rule exists generally permitting evidence of a defendant's 'unnatural disposition.' "[70] Nevertheless, the court observed that it had made "exceptions under *McClain* or Rule 404(b) if the incidents . . . [were] sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test."[71] Applying this standard, the court ruled that the

62. 309 N.C. 102, 305 S.E.2d 542 (1983).

63. *Id.* at 103, 305 S.E.2d at 542-43.

64. *Id.* at 106, 305 S.E.2d at 544.

65. *Id.* at 108, 305 S.E.2d at 545-46. The court found that certain similarities did exist; specifically, the assailant in both instances had used a knife, both involved oral sex, and both occurred in Greensboro, North Carolina, within a two month period. *Id.* at 107, 305 S.E.2d at 545. The court, however, found that differences between the two—primarily the contrast between the relatively nonthreatening demeanor of the assailant in this case and the violent disposition of the assailant in the first assault—outweighed any similarities that might have existed. *Id.* Justice Meyer wrote a scathing dissent asserting that the appellate court should have focused upon the similarities and not the differences in evaluating the propriety of admitting the testimonial evidence. *Id.* at 109-10, 305 S.E.2d at 546-47 (Meyer, J., dissenting).

66. *Id.* at 106-107, 305 S.E.2d at 545. The court found the admission of evidence prejudicial and granted the defendant a new trial. *Id.* at 109, 305 S.E.2d at 546.

67. 318 N.C. 237, 347 S.E.2d 414 (1986).

68. *Id.* at 239, 347 S.E.2d at 415.

69. *Id.* at 244-45, 347 S.E.2d at 418-19. The trial court had allowed testimony regarding the incident to be elicited during the cross-examination of the defendant and his sister. *Id.*

70. *Id.* at 248, 347 S.E.2d at 420.

71. *Id.*

incident with defendant's sister eight years ago was too remote in time and dissimilar from the charged crime to be admitted under any theory recognized by the court.[72]

In other cases decided after the adoption of rule 404(b), however, the court has repeatedly held admissible under this two-pronged standard of proximity in time and similarity evidence of "unnatural" prior sex acts. The court frequently admits evidence of uncharged sexual wrongs where a defendant has sexually abused members of his family on various independent occasions.[73] For example, in *State v. DeLeonardo*,[74] the defendant faced charges of sexually molesting his sons.[75] The trial court, however, admitted evidence that the defendant also had sexually abused his three-year-old daughter.[76] Without reservation, the supreme court held that the evidence relating to defendant's daughter was admissible to establish a common plan or scheme on the part of the defendant to sexually abuse his children.[77]

Thus the court has been more liberal in allowing evidence of uncharged sexual misconduct than it has been concerning evidence of other uncharged crimes. The court, however, has placed some restraint on the admissibility of this type of evidence by employing consistently the two-pronged standard requiring sufficient similarity and proximity in time to the charged act. The decisions of the North Carolina Supreme Court reflect a general adherence to these procedural safeguards in evaluating evidence of uncharged sexual misconduct.

The court's decision in *Coffey* is significant for two distinct but related reasons. First, the *Coffey* court expressly adopted the inclusionary approach to

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72. *Id.* The court granted the defendant a new trial as a result of the erroneous and prejudicial admission of this evidence. *Id.*

73. *See, e.g.*, State v. Miller, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988); State v. Boyd, 321 N.C. 574, 577-78, 364 S.E.2d 118, 120 (1988); State v. DeLeonardo, 315 N.C. 762, 771-72, 340 S.E.2d 350, 357 (1986).

74. 315 N.C. 762, 340 S.E.2d 350 (1986).

75. *Id.* at 763, 340 S.E.2d at 352.

76. *Id.* at 767, 340 S.E.2d at 354-55.

77. *Id.* at 770-71, 340 S.E.2d at 356-57. In a similar case, the court affirmed the admission of evidence, pursuant to the same common-plan exception, that the defendant had sexually abused the victim, his son, the day after the charged incident. State v. Miller, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988).

On the same day as the *Miller* decision, the court handed down another case approving the admission of evidence of uncharged sex crimes with another member of the defendant's family. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988). In *Boyd*, the defendant was convicted of the rape of his thirteen-year-old step-daughter. *Id.* at 575-76, 364 S.E.2d at 118-19. The trial court admitted testimony that within a year of the charged rape, the defendant's wife had discovered the defendant in the step-daughter's bed with an eight-year-old female cousin. *Id.* at 576, 364 S.E.2d at 119. Applying the two-pronged standard announced in *Scott*, the *Boyd* court found the incident "sufficiently similar to the act charged and not too remote in time" so as to be properly admitted. *Id.* at 578, 364 S.E.2d at 120.

In a case decided a few months after *Boyd*, the court again applied this standard to uphold the admission of similar evidence in State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988). In *Rosier*, the defendant faced charges of first degree sexual offense for forcing an unrelated seven-year-old to have anal intercourse. *Id.* at 827, 370 S.E.2d at 360. The court held that testimony regarding the defendant's prior conviction for fondling other young children only three months prior to the charged offense was similar and not too remote in time. *Id.* at 828-29, 370 S.E.2d at 360-61. Accordingly, the court ruled that the evidence was properly admitted because it established a common scheme or plan. *Id.*

uncharged misconduct evidence under rule 404(b). Although the court attempted to de-emphasize the importance of this decision by stating that it was merely announcing a principle recognized by its former cases, in fact the court's adoption of a general inclusionary approach is an important transformation of court policy.[78] Second, the *Coffey* decision is significant because the court inexplicably abandoned the two-pronged test it previously employed to determine the admissibility of uncharged sexual misconduct evidence.

The exclusionary approach to uncharged misconduct generally prohibits the admission of evidence of other crimes subject only to a finite number of well-recognized exceptions.[79] Under this traditional doctrine, evidence that does not fit within one of the previously acknowledged "pigeonhole[s]" is automatically excluded.[80] In contrast, the inclusionary approach allows the admission of other crimes evidence unless its only probative value is to show the accused's propensity to commit the charged crime. In other words, admissibility of such evidence is not limited to one of the specifically enumerated exceptions, but can be introduced if it satisfies any valid purpose other than to illustrate the defendant's propensity to commit crimes.[81]

To evaluate the *Coffey* court's express adoption of the inclusionary approach and equally explicit rejection of the exclusionary approach, two independent factors must be examined: the original intent of the North Carolina

78. For a discussion of the propriety of the *Coffey* court's depiction of its precedent as unquestionably establishing a rule of inclusion under rule 404(b), see *infra* note 123 and accompanying text.

79. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 713 (1981) [hereinafter Reed, *Trial by Propensity*].

80. Imwinkelried, *supra* note 8, at 1468. The exclusionary approach is founded on nothing less than the nature of the Anglo-American accusatorial system, as opposed to the European inquisitorial system. Reed, *Trial by Propensity*, *supra* note 79, at 713. In an accusatorial system, the state has the burden of proving that a criminal defendant committed some act prohibited by law. In juxtaposition, the inquisitorial system assumes the accused committed a crime and requires him to prove his innocence. *Id.* More specifically, the emergence of the propensity rule can be linked to a seventeenth-century reaction against the use of the Star Chamber during the Tudor and Stuart Regimes. The Star Chamber was a royal court designed to eliminate political and religious rivals of the monarchy through treason trials. *Id.* at 716-17.

The exclusionary approach was the traditional view in American jurisdictions, with a majority of the states subscribing to it in the early twentieth century. Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1036 n.221 (1938). The North Carolina Supreme Court traditionally followed this approach, as indicated by the court's decision in State v. McClain, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954). For a discussion of the *McClain* decision, see *supra* notes 37-41 and accompanying text. The exclusionary approach remained in force in a majority of states at the time of the adoption of the Federal Rules of Evidence. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 303-04 (1982) [hereinafter Reed, *Federal Causes*].

81. Imwinkelried, *supra* note 8, at 1468. This approach originated in Dean Wigmore's character rule. J. WIGMORE, EVIDENCE § 216 (1904); *see* Reed, *Trial by Propensity*, *supra* note 79, at 736-37. Dean Wigmore asserted that evidence of an accused's character was highly probative and that courts were too cautious in excluding this evidence to protect a criminal defendant. As a result of this view, Wigmore proposed instead that character evidence should be excluded only when it was offered solely to establish an accused's propensity to criminal activity—essentially the modern inclusionary rule. J. WIGMORE, § 216; *see also* Reed, *Trial by Propensity*, *supra* note 79, at 736-37 (explaining Dean Wigmore's views on the subject).

This inclusionary approach prevailed in a minority of federal jurisdictions before the adoption of the Federal Rules of Evidence. *See* Reed, *Federal Causes*, *supra* note 80, at 303-04; Reed, *Admission of Other Criminal Act Evidence After Adoption of The Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 113-14 (1984) [hereinafter Reed, *After Adoption*].

General Assembly in adopting rule 404(b) and, conversely, the justifications typically given by many state courts for retaining the exclusionary rule. Because North Carolina rule 404(b) is modeled after its counterpart in the federal rules,[82] determining congressional intent is a useful starting point for any attempt to determine the intent of the North Carolina General Assembly in enacting its corresponding state version. The congressional history of the House[83] and Senate,[84] as well as the explanations set forth in the advisory committee's note[85] to Federal Rule of Evidence 404(b), indicate that Congress intended to place more emphasis on the admissibility of uncharged misconduct evidence. As a result, many commentators concluded that Congress intended to adopt an inclusionary approach in enacting federal rule 404(b).[86]

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82. *See* N.C.R. EVID. 404(b) commentary (1986).

83. *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7081;

> The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered." The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that *this formulation properly placed greater emphasis on admissibility* than did the final Court version.

Id. (emphasis added).

84. *See* S. REP. No. 1277, 93d Cong., 2d Sess. 24-25, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7071;

> [Rule 404(b)] provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.
>
> Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge *may exclude it only on the basis of those considerations set forth in Rule 403*, i.e. prejudice, confusion or waste of time.

Id. (emphasis added).

85. *See* FED. R. EVID. 404(b) advisory committee note:

> Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently [sic] with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. 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 means of proof and other factors appropriate for making decisions of this kind under Rule 403.

Id.

86. *See* Imwinkelried, *supra* note 8, at 1484; Reed, *After Adoption*, *supra* note 81, at 156.

Professor Imwinkelried conducted an extensive survey of the available legislative history surrounding the adoption of Federal Rule of Evidence 404(b). Specifically, he questioned whether rule 404(b) retained the common-law allocation of burden to the proponent of evidence or, alternatively, whether the rule switched the burden to the defendant by incorporating the rule 403 balancing test. Imwinkelried, *supra* note 8, at 1479-80. The rule 403 balancing test places the burden of excluding evidence on the defendant by requiring that relevant evidence should be admitted unless the danger of unfair prejudice substantially outweighs its probative value. FED. R. EVID. 403. Professor Imwinkelried concluded that Congress intended to incorporate the rule 403 balancing test, which in effect adopts an inclusionary approach by allocating the burden of excluding evidence to the defendant. *See* Imwinkelried, *supra* note 8, at 1479-80. His conclusion was based on three main arguments.

First, he asserted that rule 403 was incorporated into all rules contained within the federal rules

Although the United States Supreme Court has not directly addressed the issue,[87] the overwhelming majority of federal circuits have interpreted rule 404(b) as adopting an inclusionary approach.[88] These courts stressed the significance of the placement of the words "such as" preceding the list of exceptions,

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that did not expressly preclude its application. Because rule 404(b) does not exclude the rule 403 balancing test, he deduced that the test is included. *Id.* at 1480.

Second, Imwinkelried rejected the partial incorporation theory, which maintains that rule 404(b) allows a judge to consider the rule 403 factors but preserves the common-law burden. *Id.* at 1481. Although conceding that this theory is consistent with the literal language of the advisory committee note, he rejected this notion as contrary to the congressional intent to broaden admissibility for uncharged misconduct evidence. *Id.* at 1481-82.

Finally, he rejected the argument that Congress would have made such a sweeping change explicit in the rule if such a change was truly intended. *Id.* at 1483. Imwinkelried asserted that Congress interpreted the language of rule 402, permitting admission of relevant evidence unless otherwise excluded, as precluding the need for an express repudiation of the common law standard. *Id.* at 1483-84.

87. The Supreme Court, however, has addressed the related issue of whether a trial court must make a preliminary finding that the uncharged misconduct occurred before admitting rule 404(b) evidence. *See* Huddleston v. United States, 485 U.S. 681, 685 (1988). The Court held that the proponent of 404(b) evidence is not required to prove by a preponderance of the evidence that the act occurred. *Id.* at 687-89.

Although not directly addressing the issue of which approach Congress intended to adopt in rule 404(b), the Supreme Court, in two distinct portions of its opinion in *Huddleston*, gave conflicting indications of its interpretation of this matter. The Court stated: "Federal Rule of Evidence 404(b) . . . *generally prohibits* the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." *Id.* at 685 (emphasis added). Although not conclusive, this language intimates a general rule of exclusion.

In contrast, at the conclusion of its opinion, the Court implied that rule 404(b) incorporates an inclusionary approach. To allay the fears of the petitioner, the Court observed that even without a preliminary finding requirement the admission of uncharged misconduct evidence would not be unrestrained because other protective measures bar introduction of unduly prejudicial evidence. *Id.* at 691-92. In dicta the Court stated that one such measure is the incorporation of the rule 403 balancing test into rule 404(b). *Id.* at 691. This interpretation of rule 404(b), if accepted as binding, would effectively reverse the common-law presumption of exclusion. *See* Imwinkelried, *supra* note 8, at 1484.

88. *See, e.g.*, United States v. Ayers, 924 F.2d 1468, 1473 (9th Cir. 1991) ("We have construed Rule 404(b) as being 'a rule of inclusion.' ") (quoting Heath v. Cast, 813 F.2d 254, 259 (9th Cir.), *cert. denied*, 484 U.S. 849 (1987)); Berkovich v. Hicks, 922 F.2d 1018, 1022 (2d Cir. 1991) ("But such evidence may be admitted for any other relevant purpose under our 'inclusionary' approach.") (quoting United States v. Brennan, 798 F.2d 581, 589 (2d Cir. 1986), *cert denied*, 490 U.S. 1022 (1989)); United States v. Yerks, 918 F.2d 1371, 1373 (8th Cir. 1990) ("We view Rule 404(b) as a rule of inclusion . . . ."); Virgin Islands v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990) ("Rule 404(b) is a rule of inclusion, not exclusion . . . ."); United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) ("The rule [404(b)] is one of inclusion . . . ."); United States v. Acosta-Cazares, 878 F.2d 945, 948 (6th Cir.) ("Thus, we have explained that Rule 404(b) 'is actually a rule of inclusion rather than exclusion . . . .' ") (quoting United States v. Blankenship, 775 F.2d 735, 739 (6th Cir. 1985)), *cert. denied*, 110 S.Ct. 255 (1989); Morgan v. Foretich, 846 F.2d 941, 944 (4th Cir. 1988) ("This Court has held Rule 404(b) to be an 'inclusionary rule . . . .' ") (quoting United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980)); United States v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988) ("It is well settled that the rule [404(b)] is one of inclusion . . . ."); United States v. Moore, 732 F.2d 983, 987 & n.30 (D.C. Cir. 1984) (finding congressional intent in enacting rule 404(b) to adopt an inclusionary approach); United States v. Jordan, 722 F.2d 353, 356 (7th Cir. 1983) (" 'The draftsmen of Rule 404(b) intended it to be construed as one of inclusion, and not exclusion.' ") (quoting United States v. Long, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978)); United States v. Ackal, 706 F.2d 523, 531 (5th Cir. 1983) (en banc) (" 'This test [adopted by the circuit] takes an inclusionary and not an exclusionary approach.' ") (quoting United States v. King, 703 F.2d 119, 125 (5th Cir.), *reh'g denied*, 711 F.2d 1054 (1983)). *But see* United States v. Rodriguez-Cardona, 924 F.2d 1148, 1153 (1st Cir. 1991) ("Rule 404(b) is a rule of exclusion.").

and concluded that the list of exceptions is only illustrative, not exhaustive.[89] Consequently, these courts have held that the federal version of rule 404(b) adopts an inclusionary approach, rather than one characterized by a general rule of exclusion with a limited number of enumerated exceptions.[90]

The accepted interpretation of the federal rule is important because the North Carolina General Assembly apparently intended to follow the federal model. The most authoritative support for this interpretation, besides the almost identical language of the two rules, is the commentary following the North Carolina rule. This commentary repeats verbatim the language contained in the federal advisory committee's note.[91] If this was not itself a sufficient indication of an intent to follow the federal rule, the North Carolina commentary appends an illuminating sentence: "The list in the last sentence of subdivision (b) is nonexclusive and the fact that evidence cannot be brought within a category does not mean that the evidence is inadmissible."[92] Thus it appears that, like Congress, the North Carolina General Assembly's intent in enacting its version of rule 404(b) was to adopt an inclusionary approach.

Although the legislative intent is relatively clear, there are other important policy concerns that warrant discussion in analyzing the *Coffey* court's holding. State courts have repeatedly expressed these policies in retaining the exclusionary approach despite the adoption of rule 404(b) in their respective jurisdictions. For example, in the seminal pre-rule case on "other crimes" evidence in North Carolina, *State v. McClain*,[93] the supreme court delineated several of these important policy concerns.

First, the *McClain* court observed that logically the commission of an independent offense did not, in itself, prove the commission of the charged offense.[94] Second, the admission of evidence that the defendant has been guilty of another heinous crime falsely leads the jury to a belief that he is guilty of the charged crime and, therefore, effectively strips him of the presumption of inno-

89. Imwinkelried, *supra* note 8, at 1468; *see, e.g.*, *Cohen*, 888 F.2d at 776 ("The list provided by the rule is not exhaustive . . . ."); *Acosta-Cazares*, 878 F.2d at 948 (" '[T]he list of permissible uses of evidence of other crimes or acts set forth in Rule 404(b) is neither exhaustive nor conclusive.' ") (quoting United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986), *cert. denied*, 480 U.S. 922 (1987)); *Moore*, 732 F.2d at 987 n.31 ("The uses specified in the rule [404(b)] are not meant to be exhaustive, but merely illustrative."); *Jordan*, 722 F.2d at 356 ("The rule [404(b)] does not exhaust the purposes for which evidence of other wrongs or acts may be admitted."); United States v. Johnson, 634 F.2d 735, 737 (4th Cir. 1980) ("The Rule's [404(b)] list is merely illustrative, not exclusive."), *cert. denied*, 451 U.S. 907 (1981).

90. Imwinkelried, *supra* note 8, at 1468.

91. *See* N.C.R. EVID. 404(b) commentary (1986). For the text of the federal advisory committee's note, see *supra* note 85.

92. N.C.R. EVID. 404(b) commentary. The sentence following this one, however, seems contradictory: "Subdivision (b) is consistent with North Carolina practice." Standing alone and interpreted in light of North Carolina practice up until the adoption of rule 404(b), this sentence might be interpreted as intending the application of an exclusionary approach, or so the literal language suggests. In light of various other statements to the contrary in the commentary, however, this sentence is probably best viewed as an anomaly or legislative misunderstanding of the current state of the law in North Carolina prior to adoption.

93. 240 N.C. 171, 81 S.E.2d 364 (1954). For a discussion of the historical significance of *McClain*, see *supra* notes 37-41 and accompanying text.

94. *McClain*, 240 N.C. at 173-74, 81 S.E.2d at 365.

cence.[95] Finally, introduction of this type of evidence unnecessarily diverts the attention of the jury away from the point in issue and compels the defendant to meet accusations for which he was not charged.[96]

Numerous empirical studies reinforce the underlying purposes of the exclusionary rule by confirming that admission of uncharged misconduct evidence has a significant impact on juries. For example, the Chicago Jury Project[97] determined that after the proponent disclosed uncharged misconduct evidence, juries employed a "different . . . calculus of probabilities" when determining the guilt or innocence of an accused.[98] Specifically, the study documented that conviction rates were significantly greater after such disclosure.[99] Furthermore, in a study conducted on behalf of the National Law and Social Science Foundation,[100] researchers concluded that potential jurors were in substantial agreement in ranking any immoral acts by the defendant as one of the most prejudicial types of evidence.[101] The significance of this finding is augmented because the potential jurors exhibited virtually no common evaluations regarding the degree of prejudice for other types of evidence.[102]

The inclusionary approach adopted by the *Coffey* court, however, discards these important arguments against relaxed admissibility of other crimes evidence. A survey of state court decisions on this issue decided under statutes similar to Federal Rule of Evidence 404(b) discloses a striking disparity of interpretation when compared to the rulings of the federal courts.[103] To date, thirty-four states have enacted an uncharged misconduct rule modeled after Federal Rule of Evidence 404(b).[104] Thirty of these states have adopted statutes that are either verbatim copies of the federal rule or reflect only minor technical changes.[105] Of these states, sixteen have retained the exclusionary approach,[106]

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95. *Id.* at 174, 81 S.E.2d at 366.

96. *Id.*

97. This title refers to an extensive, exhaustive study of the American jury system conducted at the University of Chicago Law School. This project attempted to combine the research of attorneys and social scientists in studying various aspects of the jury system. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY at v (1966).

98. *Id.* at 179.

99. *Id.* at 178-79.

100. This study focused on the effects that different aspects of the legal system have on modeling jury behavior. Professors from the Psychology Department and the School of Law at the University of New Mexico analyzed the aspect of the study dealing with the prejudicial effect of certain evidence. Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1147.

101. *Id.* at 1162.

102. *Id.* at 1163.

103. For a discussion of the federal circuit courts' almost unanimous interpretation of the federal version of rule 404(b) as a rule of inclusion, see *supra* note 88 and accompanying text.

104. *See* 1 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES ch. 14: Rule 404, at 11-24 (1987 & Supp. 1990) (listing the state statutes).

The states adopting a rule modeled after the federal rule include: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 1-24.

105. *See id.* Of the states listed in note 104 *supra*, all except Florida, Louisiana, Maine, and

six have expressly adopted the inclusionary approach,[107] and eight states either have not addressed the issue or have reached inconclusive results.[108]

The discrepancy between federal and state court interpretations of rule 404(b) stems primarily from most state courts' refusal to disregard the policies underlying the exclusionary rule. These state courts looked primarily to the purposes underlying the exclusionary rule as a basis for their retention of it.[109] Consequently, they implicitly have chosen to disregard the apparent intent of the legislators to adopt an inclusionary rule[110] in favor of the policies behind the exclusionary rule.

The *Coffey* court could have followed these state courts and chosen to ignore the intent of the North Carolina General Assembly in favor of the policies governing its case law prior to adoption of rule 404(b). A judicial decision following this route, however, arguably presents a serious danger to the whole structure of the rules of evidence because it ignores the intent of the legislature in favor of judge-made rules.[111] Rule 402 allows admission of evidence unless it is expressly prohibited by another rule, the United States or North Carolina Constitutions, or other legislative acts.[112] Rule 402's fundamental premise—all

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Tennessee have adopted a rule which essentially codifies Federal Rule of Evidence 404(b) in their respective states. *See id.*

106. *See, e.g.*, Burke v. State, 624 P.2d 1240, 1247-48 (Alaska 1980); Soper v. State, 731 P.2d 587, 589-90 (Alaska Ct. App. 1987); State v. Roscoe, 145 Ariz. 212, 216-18, 700 P.2d 1312, 1316-18 (1984), *cert. denied*, 471 U.S. 1094 (1985); State v. Bainbridge, 108 Idaho 273, 278, 698 P.2d 335, 340 (1985); People v. Devine, 168 Mich. App. 56, 58, 423 N.W.2d 594, 596 (1988); Elmore v. State, 510 So. 2d 127, 130 (Miss. 1987); State v. Fitzgerald, 238 Mont. 261, 265, 776 P.2d 1222, 1225 (1989); Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983); State v. Ferguson, 391 N.W.2d 172, 174-75 (N.D. 1986); State v. Broom, 40 Ohio St. 3d 277, 281-82, 533 N.E.2d 682, 689-90 (1988), *cert. denied*, 490 U.S. 1075 (1989); Little v. State, 725 P.2d 606, 607 (Okla. Crim. App. 1986); State v. Houghton, 272 N.W.2d 788, 790-91 (S.D. 1978) (en banc), *overruled on other grounds*, State v. Willis, 370 N.W.2d 193 (S.D. 1985); Turner v. State, 754 S.W.2d 668, 671-72 (Tex. Crim. App. 1988); State v. Shickles, 760 P.2d 291, 295 (Utah 1988); State v. Catsam, 148 Vt. 366, 380-82, 534 A.2d 184, 193 (1987); State v. Dolin, 347 S.E.2d 208, 212 (W. Va. 1986), *overruled on other grounds*, State v. Edward, 398 S.E.2d 123 (W. Va. 1990); Gezzi v. State, 780 P.2d 972, 974 (Wyo. 1989).

107. *See, e.g.*, Sullivan v. State, 289 Ark. 323, 328, 711 S.W.2d 469, 471-72 (1986); Getz v. State, 538 A.2d 726, 730-31 (Del. 1988); State v. Plaster, 424 N.W.2d 226, 228-29 (Iowa 1988); State v. Parker, 127 N.H. 525, 532, 503 A.2d 809, 813 (1985); *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54; State v. Johns, 301 Or. 535, 544, 725 P.2d 312, 317-18 (1986).

In addition, two other states with substantially modified versions of rule 404(b) have also adopted an inclusionary approach. *See* Garron v. State, 528 So. 2d 353, 358 (Fla. 1988); State v. DeLong, 505 A.2d 803, 805-06 (Me. 1986).

108. These states include Colorado, Hawaii, Minnesota, Nebraska, New Mexico, Rhode Island, Washington, and Wisconsin.

109. *See, e.g.*, *Houghton*, 272 N.W.2d at 790 (South Dakota); *Turner*, 754 S.W.2d at 671-72 (Texas).

110. Because these decisions are from states with statutes almost identical to the federal rule, it is logical that the intent of the adopters from these states was to follow Congress' intent to adopt an inclusionary rule. For a discussion of congressional intent in enacting rule 404(b), see *supra* notes 83-86 and accompanying text.

111. Imwinkelried, *supra* note 8, at 1491-95.

112. The North Carolina version of Rule 402 reads: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by an Act of Congress, by an Act of the General Assembly, or by these rules. Evidence which is not relevant is not admissible." N.C.R. EVID. 402 (1986).

The commentary following the rule adds: "This rule is identical to Fed. R. Evid. 402 except that the phrases 'by the Constitution of North Carolina' and 'by Act of the General Assembly' were

relevant evidence should be admitted unless expressly excluded by legislative act—is the basis of the federal rules and is designed to eliminate the existence of judge-made rules of evidence.[113] Interpreting rule 404(b) as exclusionary, contrary to its clear language, is in essence a judicial decision which subverts the comprehensive codification effort of the rules.[114] Therefore, ignoring legislative intent and preferring the common-law purposes behind the exclusionary approach could precipitate continuous undermining of the foundational principle behind the rules of evidence.[115]

Thus, although strong support exists in both empirical studies and state case law for the continued application of the exclusionary approach to uncharged misconduct evidence, following these policy concerns could have detrimental effects on the integrity of the North Carolina Rules of Evidence. The North Carolina General Assembly expressed a relatively clear intent to adopt an inclusionary approach when it enacted North Carolina Rule of Evidence 404(b).[116] Given the intent of the General Assembly and the limited role of the courts, the *Coffey* court's adoption of an inclusionary approach is wholly justified. Furthermore, because subverting the intent of the General Assembly could have potentially pernicious effects on the integrity and success of the entire structure of the North Carolina Rules of Evidence, the *Coffey* court cannot be faulted for adopting an inclusionary approach, despite the strong policies supporting the exclusionary rule.[117]

A second significant aspect of the *Coffey* decision is more dubious, however. The North Carolina Supreme Court consistently has held, both before and after the adoption of rule 404(b), that evidence of prior sexual misconduct must satisfy a two-pronged test of substantial similarity and proximity in time to the charged crime.[118] For example, in *State v. Boyd*[119] the court cited the broad admissibility standard enunciated in post-rule cases that relate to sexual misconduct evidence.[120] In the next sentence, however, the court stated: "Nevertheless, the ultimate test for determining whether such [uncharged misconduct] evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403."[121] Thus, as *Boyd* illustrates, the court previously did not

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added and the phrase 'by other rules prescribed by the Supreme Court pursuant to statutory authority' was deleted." *Id.* 402 commentary.

113. 22 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5199, at 220-23.

114. *See* Imwinkelried, *supra* note 8, at 1493-94.

115. *See id.* at 1494-95. Professor Imwinkelried discusses other instances where courts have ignored the framers' intent in adopting a rule and its deleterious effect on the corresponding evidentiary code. *Id.* at 1494-96.

116. N.C.R. EVID. 404(b) commentary.

117. For a discussion of the appropriate legislative response in light of this empirical support for the exclusionary rule, see *infra* text accompanying notes 141-43.

118. *See, e.g.*, State v. Rosier, 322 N.C. 826, 828-29, 370 S.E.2d 359, 360-61 (1988); State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); State v. Scott, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986). For a discussion of North Carolina cases applying this rule, see *supra* notes 57-77 and accompanying text.

119. 321 N.C. 574, 364 S.E.2d 118 (1988). For a discussion of *Boyd*, see *supra* note 77.

120. *Boyd*, 321 N.C. at 577, 364 S.E.2d at 119.

121. *Id.*

interpret the adoption of a broad admissibility standard as superseding the application of this independent two-pronged test.[122]

Furthermore, the *Boyd* court expressly acknowledged the grave risks inherent in the adoption of a broad admissibility standard for uncharged misconduct evidence. The court stated: "We are not unmindful of the danger of allowing Rule 404(b) exceptions to become so pervasive that they swallow the rule, a danger vigorously argued in defendant's brief. We, however, do not find that its application to the facts of this case encourages that danger."[123]

This express concern for the untrammeled admission of other crime evidence is entirely lacking from the court's decision in *Coffey*. In fact, an analysis under the two-pronged test is conspicuously absent from the court's opinion.[124] The court mentioned the defendant's contention that the incident with Angel Ashe was not similar to the charged murder.[125] It did not, however, employ the two-pronged test of similarity and proximity in time to reject this argument; instead, the court implied that the broad admissibility standard under rule 404(b) disposed of the defendant's contention.[126] The court's analysis intimates that it believed the adoption of a broad inclusionary approach under rule 404(b) supersedes any previously recognized requirements that the proponent of the other crimes evidence prove its similarity and timeliness.[127] This reasoning is a dramatic departure from the analysis employed by the court just two years previously in *Boyd*.[128]

It is possible that the *Coffey* court implicitly considered the two-pronged standard in making its analysis. The court concluded that evidence of the Angel Ashe episode satisfied both the motive and specific intent purposes under rule 404(b).[129] The court found this evidence relevant to prove the intent and motive for the underlying felony of kidnapping for the purpose of committing indecent liberties.[130] Presumably, the court implicitly concluded that the incident involving Angel Ashe was similar to the State's contention that the defendant had taken indecent liberties with the victim.

The fallacy of this argument, however, is patent: the State had no extrinsic

122. In fact, the *Boyd* court explicitly found that evidence of the defendant's prior acts with a related victim fell squarely within this two-pronged test. *Id.* at 578, 364 S.E.2d at 120.

123. *Id.* This quotation also calls into question the *Coffey* court's depiction of its post-rule cases as effectively adopting an inclusionary approach. This language suggests that the court is still following a general standard of exclusion. The reference to "exceptions swallowing up the rule" is more consistent with an exclusionary than an inclusionary approach. The standard announced in *State v. Weaver*, two years prior to *Boyd*, however, supports the court's view. *See* State v. Weaver, 318 N.C. 400, 402-03, 348 S.E.2d 791, 793 (1986). Thus, it is probably most accurate to describe the court's approach to rule 404(b) prior to *Coffey* as inconclusive or perhaps inconsistent. This inconsistency only reinforces the view that the *Coffey* court's express adoption of the inclusionary rule is an extremely significant ruling, not the mere reaffirmance of prior case law, as the court asserts. *See Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

124. *See Coffey*, 326 N.C. at 278-81, 389 S.E.2d at 54-56.

125. *Id.* at 278, 389 S.E.2d at 54.

126. *See id.* at 278-79, 389 S.E.2d at 54-55.

127. *See id.*

128. *See supra* notes 119-23 and accompanying text.

129. *Coffey*, 326 N.C. at 280-81, 389 S.E.2d at 55-56.

130. *Id.*

evidence that Coffey took any indecent liberties with Amanda Ray. The only connection between the completely unrelated Angel Ashe incident and the present case was the prosecutor's naked theory.[131] In other words, the court upheld the defendant's conviction of kidnapping with the intent to commit indecent liberties[132] based solely on the testimony that he committed similar acts in the past in an entirely unrelated incident. Application of this reasoning is tantamount to trying the defendant based on his propensity to commit such acts. As the court stated in *State v. Morgan*,[133] the inference that the defendant acted a certain way in the past and thus acted the same way in the present case is "*precisely* what is prohibited by Rule 404(b)."[134] In previous cases, the North Carolina Supreme Court consistently required independent extrinsic evidence to establish that the charged sexual crime occurred before it would admit evidence of defendant's prior sexual wrongs.[135]

Thus, the *Coffey* court not only abandoned the two-pronged test requiring evidence of uncharged misconduct to be substantially similar to and not too remote in time from the charged act,[136] but also failed to require that there be any independent extrinsic evidence that such a similar act actually occurred in the present case. The *Coffey* court disregarded its own post-rule precedents recognizing these requirements as important protections against the admission of marginally relevant but extremely prejudicial evidence.[137] By abandoning these important procedural prerequisites, the court has unleashed a "prosecutor's delight,"[138] where the admission of uncharged misconduct evidence is unanchored

131. The State conceded that the Angel Ashe incident was its only evidence of the underlying felony of kidnapping with the intent to commit indecent liberties. Brief for Respondent at 35, *Coffey*, (No. 613A87). As counsel for petitioner noted, without such extrinsic evidence, "the jury is afloat in a sea of speculation." Brief for Petitioner at 49, *Coffey*, (No. 613A87).

132. This conviction supported the felony-murder charge, which in turn resulted in a conviction of first degree murder and a sentence of death. *Coffey*, 326 N.C. at 277, 389 S.E.2d at 53.

133. 315 N.C 626, 340 S.E.2d 84 (1986). For a discussion of *Morgan*, see *supra* notes 45-51 and accompanying text.

134. *Id.* at 638, 340 S.E.2d at 92 (emphasis added).

135. *See, e.g.*, State v. Rosier, 322 N.C. 826, 827, 370 S.E.2d 359, 360 (1988) (victim's testimony that defendant forced her to engage in anal intercourse); State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 120 (1988) (victim testified that stepfather sexually assaulted her on four occasions); State v. DeLeonardo, 315 N.C. 762, 768, 340 S.E.2d 350, 355 (1986) (testimony of son that father sexually abused him, his brother, and his sister).

Although the victim's testimony is obviously unavailable in *Coffey*, there are many other forms of evidence which could have been used to prove that the victim had been sexually abused, such as presence of semen or abnormalities in the victim's sexual organs.

136. Once the pretext of the unsupported underlying felony is sheared away, it is apparent that the court has no firm basis on which to admit such evidence, besides propensity—masturbation in front of a young girl has no similarity to murder. Furthermore, numerous North Carolina cases excluded other crimes evidence with less tenuous similarities than those offered in *Coffey*. *See, e.g.*, State v. Scott, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986) (acts of cunnilingus on three and four-year-old nieces ruled not similar to forced intercourse with sister, the mother of the girls); State v. Moore, 309 N.C. 102, 107-08, 305 S.E.2d 542, 545-46 (1983) (two attacks both involving the use of a knife to force the victim to engage in oral sex occurring within Greensboro within a two month period of each other ruled not sufficiently similar).

137. *See, e.g.*, State v. Boyd, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); State v. Scott, 318 N.C. 237, 244, 248, 349 S.E.2d 414, 418, 420 (1986).

138. This term comes from the characterization of uncharged misconduct evidence in a student-written law review article. Comment, *Evidence of Prior Acquittals: An Attack on the "Prosecutors Delight,"* 21 UCLA L. REV. 892, 896 (1974).

by any protective safeguards to a defendant's right to a fair trial.

Moreover, the language of the opinion is alarmingly general and does not appear to be limited to the particular facts in *Coffey* or even just to evidence of prior sexual acts.[139] Thus, the ruling potentially could be applied to all types of cases involving the introduction of uncharged misconduct evidence. Without the two-pronged requirements, the State may freely admit evidence of prior misconduct that is dissimilar and distant in time from the charged act, so long as the prosecutor can conceive of any possible theory under which it may be relevant. Furthermore, without a requirement that there be some extrinsic evidence of the charged crime, a prosecutor desiring to introduce evidence of a defendant's uncharged behavior could merely add a plausible, related charge to the indictment and thereby gain admittance of evidence that is damaging and highly prejudicial to the defendant.

The North Carolina Supreme Court's ruling in *Coffey* is significant in several important respects. First, the court expressly adopted an inclusionary approach to rule 404(b) and rejected the traditional exclusionary approach followed at common law. Second, the court's ruling implies that the adoption of this broad approach to admissibility of other crimes evidence precludes the application of the previously recognized two-pronged test which served to protect the defendant against introduction of unrelated and unduly prejudicial evidence. Finally, the general language of the court's opinion intimates that this holding is not limited to the particular facts of *Coffey*, but could apply to all cases adjudicating the admissibility of uncharged misconduct evidence.

Strong empirical data and other states' case law support the continued application of the exclusionary approach to uncharged misconduct evidence.[140] The *Coffey* court is bound jurisprudentially, however, to follow the North Carolina General Assembly's intent to adopt an inclusionary approach in enacting rule 404(b). Given the limited role of the courts, a better alternative to court renunciation of legislative intent would be for the general assembly to amend rule 404(b).[141] The amendment could take into account the strong empirical support indicating the highly prejudicial effect of uncharged misconduct evidence as well as the decisions of other state courts retaining the exclusionary approach without jeopardizing the integrity of either the North Carolina Rules of Evidence or the North Carolina court system.

This Note recommends adoption of the following amendment, proposed by a distinguished commentator on rule 404(b) evidence:

> 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. Before the judge admits evidence for such a purpose, the proponent of the evidence must

139. *See Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54-55.

140. *See supra* notes 97-102 & 103-10 and accompanying texts.

141. Imwinkelried, *supra* note 8, at 1497.

persuade the judge that the probative value of the evidence outweighs the danger of unfair prejudice.[142]

This amendment would restore the common-law burden of proving that the evidence should be admitted to the proponent of uncharged misconduct evidence.[143] Consequently, this reformulation of rule 404(b) would recognize the important policies behind the original adoption of the exclusionary rule by reestablishing the presumption against admittance of this often unduly prejudicial type of evidence.

In addition, the court should reaffirm its commitment to the requirements of substantial similarity and proximity in time as prerequisites to admission of uncharged misconduct evidence. These requirements serve a useful and necessary purpose by guarding against untrammeled admission of propensity evidence. Without these important safeguards, as the ruling in *Coffey* indicates, there exists a substantial danger that the prosecutor will misuse uncharged misconduct evidence essentially to put a defendant on trial for prior bad acts and not for those crimes properly contained in the indictment.

Coffey was not a sympathetic defendant and it is difficult to be outraged by the procedural error which occurred in this particular case. Nevertheless, this rationale does not justify the *Coffey* court's ruling establishing a potentially pernicious precedent in this important area of evidence law. The *Coffey* court allows the State to introduce evidence of a defendant's unrelated prior sexual acts without any supporting extrinsic evidence that a similar act occurred in connection with the actions for which the defendant is specifically charged. This approach is contrary not only to all North Carolina precedent on the subject, but also, and more importantly, to the fundamental postulate of the American accusatorial system of criminal justice—an accused can be tried only on the charges against her.[144]

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142. *Id.*

143. *Id.*

144. *Cf.* Reed, *Trial by Propensity*, *supra* note 79, at 713 (asserting that the exclusionary rule originated in the accusatorial system, which requires the State to prove the defendant is guilty of a particular crime and not merely past uncharged misconduct).