University of Miami Law School
Institutional Repository

University of Miami Law Review

11-1-1993

The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice

Vivian M. Rodriguez

Follow this and additional works at: http://repository.law.miami.edu/umlr

Part of the Evidence Commons

Recommended Citation

Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L. Rev. 451 (1993)
Available at: http://repository.law.miami.edu/umlr/vol48/iss2/10

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice

I. INTRODUCTION 451
II. CLEAR AND CONVINCING STANDARD 457
III. THE INTENT EXCEPTION: AN OVERVIEW 459
IV. SPECIFIC INTENT VS. GENERAL INTENT 460
V. TIMING OF ADMISSION OF SIMILAR ACTS EVIDENCE 467
A. *Specific Intent Exception* 469
B. *Entrapment Defense Exception* 470
C. *"Not Guilty" Plea Exception* 471
VI. DEFENDANT'S OFFER TO REMOVE ISSUE OF INTENT 472
VII. SUMMARY/PROPOSAL 475
VIII. CONCLUSION 479

I. INTRODUCTION

Defendant is charged with the criminal offense of knowingly possessing cocaine.[1] At the start of the jury trial, the prosecuting attorney informs defense counsel that he intends to elicit testimony from a witness concerning previous incidents where the defendant had furnished third parties with cocaine. The government seeks to admit this evidence under Federal Rule of Evidence 404(b) to establish the general criminal *intent* of the defendant. Subsequently, the defendant expresses a willingness to stipulate to the requisite intent. The prosecution refuses to accept this offer on the grounds that the accused can not preclude the government from presenting relevant collateral acts evidence before the jury. Thereafter, as part of the government's case-in-chief, the witness convincingly testifies that he observed the defendant supply third parties, including minors, with cocaine on prior occasions. During its presentation, the government offers sufficient evidence to support a finding by the jury that the defendant committed this uncharged misconduct. The defendant immediately objects to the admission of this damaging evidence, arguing that his offer to stipulate removes the issue of intent from the case, thus barring the admissibility of other acts evidencing intent. Moreover, the defendant contends that intent is not a contested issue because the crime charged does not require proof of specific intent

1. The author created this hypothetical for purposes of illustrating current judicial application of the intent provision of Federal Rule of Evidence 404(b).

and he has not actively raised the issue of intent. Despite the absence of a genuine need for the collateral acts evidence, the trial judge, undertaking a Rule 403 balancing approach, overrules the objection. The court finds the incremental probative worth of the other acts evidencing intent substantial in view of the difficulties the government faces in proving its case. The defendant contends that the extrinsic testimony is unfairly prejudicial in comparison to its limited probative worth. The court, adopting the language of the Supreme Court in *Huddleston v. United States*,[2] responds as follows:

> [T]he protection against [unfairly prejudicial collateral evidence] emanates . . . from four sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose [of determining the defendant's intent].[3]

Consequently, the other acts evidence is admitted. The fact finder is exposed to this prejudicial relevant evidence, and then listens to the defendant's defense of non-involvement. Overwhelmed by the defendant's repeated criminal acts, the jury finds the defendant guilty of the drug offense. The defendant is sentenced to 10 years imprisonment and an appeal ensues. The defendant contends on appeal that the district court erred in not suppressing the incriminating other acts evidence. In light of the applicable standard of review giving maximum discretion to the trial judge's Rule 403 inquiry, the court of appeals affirms the court's admission of the collateral acts evidencing intent.

This hypothetical represents a typical application of the current law regarding admission of other acts evidencing intent. The current use of Rule 403 raises a legal concern about whether the witness's testimony is admitted solely to highlight the propensities of the accused to commit drug offenses. Furthermore, it is doubtful that the Rule 402 relevancy requirement and the Rule 403 balancing test, coupled with a Rule 105 limiting instruction, sufficiently protect against the admission of unduly prejudicial extrinsic evidence as the United States Supreme Court has recently asserted.[4]

---

2. 485 U.S. 681 (1988).
3. *Huddleston*, 485 U.S. at 691-92 (footnote omitted) (citation omitted).
4. *Id.*

The first part of Rule 404(b) of the Federal Rules of Evidence[5] provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[6] In other words, the government cannot introduce evidence of other acts committed by an accused in order to prove the defendant's propensity to commit the charged crime. The exclusion of other acts evidence[7] is founded on a fear that the fact finders will view the accused as a "bad man" and, thus, unacceptably convict the defendant because of his or her other wrongdoings.[8] The effect that knowledge of a defendant's extrinsic offenses has on a jury is shown by a study illustrating that disclosure of a defendant's prior crimes decreases the likelihood of acquittal from 65% to 38%, in a case otherwise described as evenly balanced.[9]

The second part of Rule 404(b), which narrows the scope of the exclusionary rule, states that "[e]vidence of other crimes . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[10] This Comment focuses primarily on the intent provision of Rule 404(b).

In *United States v. Beechum*,[11] the Fifth Circuit Court of Appeals, sitting *en banc*, determined that Congress intended to place greater emphasis on admissibility of extrinsic offense evidence than the Supreme Court.[12] In light of this view, the Fifth Circuit rejected a strict standard of admissibility which it had enunciated in *United States v. Broadway*[13] prior to the adoption of the Federal Rules of Evidence.[14]

---

5. Rule 404(b) of the Federal Rules of Evidence applies to both civil and criminal cases; Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 286 (8th Cir. 1984) (civil case); United State v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987) (criminal case).

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

7. Throughout this Comment, "other crimes evidence" is used interchangeably with the following phrases: "extrinsic acts evidence"; "extrinsic offense evidence"; "uncharged misconduct"; "other acts evidence"; "bad acts evidence"; "character evidence"; and "similar acts evidence." The cited authorities also tend to refer to such evidence interchangeably.

8. United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979).

9. HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 160 (1966).

10. FED. R. EVID. 404(b). As the language of the rule indicates, the enumerated categories are not collectively exhaustive. Other exceptions include allowance of the admission of prior crimes as substantive evidence when it tends to establish a *modus operandi*, an obstruction of justice, or the same transaction. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 190, 557-65 (Edward W. Clearly et al., eds., 3d ed. 1984).

11. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

12. *Id.* at 910 n.13.

13. 477 F.2d 991 (5th Cir. 1973).

14. *Beechum*, 582 F.2d at 911-12. The federal courts, relying on the second sentence of Rule 404(b), have departed from the traditional exclusionary approach by treating the federal propensity rule as an inclusionary rule, authorizing the admission of other crimes evidence unless

Broadway established two prerequisites to the admissibility of other acts evidence: first, that the physical elements of the extrinsic offense must include the essential physical elements of the charged crime; and second, that the prosecution establish the physical elements of the collateral crime by clear and conclusive evidence.[15] In contrast, the *Beechum* court established a two-step inclusionary approach for analyzing the admissibility of other acts evidence.[16] The two considerations are whether the other crimes evidence is relevant to an issue other than the defendant's propensity to commit a crime[17] and whether the evidence possesses probative value that is not substantially outweighed by its undue prejudice.[18] In 1988, the United States Supreme Court in *Huddleston v. United States*[19] adopted the Fifth Circuit position and pronounced that the relevancy requirement of Rule 402[20] coupled with a Rule 403 balancing test sufficiently protected the defendant against unduly prejudicial extrinsic evidence.[21]

---

the evidence merely proves the defendant's criminal propensities. *See, e.g.*, United States v. Brown, 956 F.2d 782, 786 (8th Cir. 1992); United States v. Watford, 894 F.2d 665, 671 (4th Cir. 1990); United States v. Wesevich, 666 F.2d 984, 988-89 (5th Cir. 1982); United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970 (1981); *Beechum*, 582 F.2d at 910-11. *See generally*, Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 156-63 (1984).

15. *Broadway*, 477 F.2d at 994. Notably, "conclusive" was later changed to "convincing" in United States v. San Martin, 505 F.2d 918, 921 (5th Cir. 1974).

16. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

17. Rule 401 establishes the standard for relevancy: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

18. Rule 403 provides that: "[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

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

20. Federal Rule of Evidence 402 provides that relevant evidence is generally admissible while irrelevant evidence is inadmissible. Notably, the Supreme Court erred when it interpreted Rules 401 and 402 as a restriction on the admissibility of other acts evidence to that *probative of a material issue. Huddleston*, 485 U.S. at 685-90. The relevancy standard of Rule 401 is broader than the "issue in dispute" standard applied in *Huddleston*. *See supra* note 17. For a discussion of a similar interpretation applied by the Second Circuit, see David. F. Guldenschuh, Comment, *Federal Rules of Evidence-Rule 404(b) Limits the Admission of Other Crimes Evidence, Under an Inclusionary Approach, to Cases Where It Is Relevant to an Issue in Dispute*, 55 NOTRE DAME LAW. REV. 574, 583-84 (1980). For an application of a broad standard of relevancy analogous to Rule 401, see United States v. Williams, 577 F.2d 188, 191-92 (2d Cir.), *cert. denied*, 439 U.S. 868 (1978).

21. The Supreme Court also noted that the requirement of a limiting instruction, Rule 105, instructing the jury to consider the evidence only for the limited purpose for which it is admitted serves as an additional protection against unfair prejudice to the defendant. *Huddleston*, 485 U.S. at 690.

The Rule 403 inquiry weighs the incremental probity of the other acts evidence against its potential for undue prejudice. No mechanical solution determines probative value.[22] The determination involves an array of factors, such as the similarities between the acts, the effectiveness of a limiting instruction and the availability of other means of proof.[23]

In *Huddleston*, the Supreme Court asserted that similar acts evidence is admissible "if there is sufficient evidence to support a finding by the jury that the defendant committed the [collateral] act."[24] The replacement of the "clear and convincing" measure of proof, as espoused by *Broadway*, with the *Huddleston* "sufficient evidence" standard significantly affects the assessment of the incremental probative value of similar acts evidence because the probability that the extrinsic act actually occurred is considered when conducting the Rule 403 balancing. Evidence of an unlawful act cannot have probative value unless the offense was, in fact, committed and the accused is linked to that act in a meaningful way.[25]

Significant factors affecting the probity of similar acts evidence under Rule 403 are whether the issue for which the extrinsic offense evidence is offered is a material issue[26] with respect to the charged act and whether the facts of consequence for which the evidence is offered are being contested.[27] The courts have attempted to narrow the scope of admissibility by adopting language restricting the use of extrinsic acts evidence to that probative of a genuine issue.[28] Arguably, this limitation suggests that similar acts evidence "meet more exacting standards of reliability and proof under [R]ule 404(b)"[29] than Rules 401 and 402 require in determining whether the evidence falls within an enumerated exception to Rule 404(b) or serves a purpose other than to draw the "bad man" inference. Proper application of the "issue in dispute" requirement is therefore essential when invoking the intent exception to the general rule of exclusion of character evidence.

22. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

23. *See id.* at 914-17.

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

25. McGuire v. Estelle, 902 F.2d 749, 753-54 (9th Cir. 1990).

26. *See, e.g.*, United States v. Goodapple, 958 F.2d 1402, 1407 (7th Cir. 1992) (holding that to knowingly and intentionally posses with the intent to distribute a controlled substance is a specific intent offense, thereby permitting the government to introduce other crimes evidence); United States v. Silva, 580 F.2d 144 (5th Cir. 1978);

27. *See, e.g.*, United States v. Holman, 680 F.2d 1340, 1349 (11th Cir. 1982); United States v. Figueroa, 618 F.2d 934, 941-42 (2d Cir. 1980).

28. *See* Guldenschuh, *supra* note 20, at 580; *see, e.g.*, Huddleston v. United States, 485 U.S. 681, 685 (1988); United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979).

29. Guldenschuh, *supra* note 20, at 580.

Because intent is an element in almost every crime, earlier courts admitted similar acts evidencing intent only if the court found the requisite intent in dispute.[30] The courts, in an effort to establish a guideline to meet this prerequisite, distinguished between "specific intent" and "general intent" crimes. Where the prosecution was required to prove specific intent, other acts evidence was admitted because the intent of the accused was more than a formal issue.[31] However, where the crime charged only required proof of general intent, the courts precluded admission of uncharged misconduct. The applicability of the specific/general intent classification is directly related to the court's calculation of the incremental probity of similar acts evidence.[32]

In determining the probity of extrinsic acts evidence under Rule 403, it is important that the judge consider the posture of the case. It has been asserted that a final determination on admissibility should normally await the conclusion of the defendant's case, at which time the court could properly consider whether the evidence is relevant to any disputed issues.[33] The accuracy of a Rule 403 inquiry is contingent upon the timing of the admission of uncharged misconduct.

The scaling of probative value and potential unfair prejudice under Rule 403 should take into consideration the defendant's offer to remove the issue of intent from the case. An accused's offer to stipulate to the requisite intent or admission as to its existence has a direct impact on the court's calculation of the necessity for collateral acts evidencing intent.

The aforementioned procedural and substantive considerations are critical in evaluating the probity and unfair prejudice of uncharged misconduct when determining the admissibility of similar act evidence under Rule 404(b). The judicial system's application of procedural and substantive protections for the accused in federal criminal trials, with respect to prosecutorial use of other acts evidence, has a significant impact on the Rule 403 inquiry and ultimately on the defendant's ability to develop a proper defense. This Comment will show that in recent years the courts have abandoned the procedural safeguards available to defendants in favor of admitting damaging extrinsic evidence. This trend is most evident in those criminal cases where the government invokes the intent exception to the federal propensity rule, Rule 404(b),

30. *See, e.g.*, United States v. Manafzadeh, 592 F.2d 81, 87 (2d Cir. 1979); United States v. Benedetto, 571 F.2d 1246, 1248 (2d Cir. 1978) (denying admissibility of other acts evidence pursuant to the intent exception to Rule 404(b) because intent was not in issue).

31. *See infra* notes 69-73 and accompanying text.

32. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.5 (3d ed. 1991).

33. *E.g.*, United States v. Colon, 880 F.2d 650 (2nd. Cir. 1989); United States v. Benedetto, 571 F.2d 1246 (2nd Cir. 1978); United States v. Adderly, 529 F.2d 1178, 1182 (5th Cir. 1976); United States v. Jones, 476 F.2d 533, 537 (D.C. Cir. 1973); GRAHAM, *supra* note 32, § 404.5.

as grounds for admissibility. In recognition of this caselaw, this Comment proposes a procedural approach to assist the courts in accurately assessing the probative worth of highly prejudicial similar acts evidencing intent.

II. Clear and Convincing Standard

The strength of the extrinsic evidence is a relevant consideration in determining probative value. Prior to *Huddleston v. United States*,[34] courts required "clear and convincing" evidence that the accused was guilty of the similar offense.[35] This standard has been defined as "[p]roof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt."[36] A decade ago, the Seventh Circuit, in *United States v. Shackleford*, required that the evidence of prior or subsequent acts be "clear and convincing" as part of its four-part test to determine whether extrinsic acts evidence should be admitted under Rules 404(b) and 403.[37] The purpose of this standard was to ensure that the prosecution's evidence directly established that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon "highly circumstantial inferences."[38]

Nevertheless, the Supreme Court recently held in *Huddleston*[39] that a preliminary showing that the existence of the other crime, wrong or act is "clear and convincing" is unnecessary.[40] The *Huddleston* Court held that extrinsic acts evidence is admissible if there is "sufficient evidence to support a finding by the jury" that the accused participated in the similar act.[41] Chief Justice Rehnquist, writing for a unanimous Court, took special cognizance of the legislative history behind Rule 404(b).[42]

---

34. 485 U.S. 681 (1988).

35. Rule 104(a) states:

> *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a). United States v. Leight, 818 F.2d 1297, 1303 (7th Cir. 1987); United States v. Vaccaro, 816 F.2d 443, 452 (9th Cir.), *cert. denied sub nom.* Alvis v. United States, 484 U.S. 914 (1987); United States v. Lavelle, 751 F.2d 1266, 1276 (D.C. Cir.), *cert. denied*, 474 U.S. 817 (1985); United States v. Liefer, 778 F.2d 1236 (7th Cir. 1985); United States v. Dolliole, 597 F.2d 102, 107 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Cobb, 588 F.2d 607, 612 (8th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

36. BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

37. 738 F.2d 776, 779 (7th Cir. 1984).

38. United States v. Dolliole, 597 F.2d 102, 107 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979).

39. 485 U.S. 681 (1988).

40. *Id.* at 685.

41. *Id.*

42. *Id.* at 687.

He noted that Congress was far more concerned with ensuring that limitations would not be placed on the admissibility of other crimes evidence than with the high risk of unfairness of such evidence.[43] According to the Court, the issue is one of relevance conditioned on a fact, that is, that the defendant actually committed the extrinsic offense.[44]

Consequently, the judge admits Rule 404(b) evidence, subject to the introduction of sufficient evidence to permit the jury to make the requisite finding. The determination is a jury question, unless the court believes that the jury could not reasonably find that the accused participated in the alleged "bad acts."[45] Moreover, *Huddleston* requires the court to determine whether the probative value of the other acts evidence is substantially outweighed by its potential for unfair prejudice under Rule 403.[46] If the government fails to offer the proper foundation, the trial court, at the objector's request, must instruct the jury to disregard the evidence.[47]

Prior to *Huddleston*, the Fifth Circuit had rejected the majority position requiring clear and convincing evidence that the defendant committed the extrinsic act. In *United States v. Beechum*,[48] the Fifth Circuit proposed a test of minimal relevancy under Rule 104(b) and balancing under Rule 403 in lieu of the clear and convincing test established in *United States v. Broadway*.[49] Subsequent decisions of the Fifth Circuit in the mid 1980s agreed with the *Beechum* minority view.[50] The First,[51] Fourth,[52] and Eleventh[53] Circuits subsequently adopted the Fifth Circuit position and admitted other acts evidence if the evidence sufficiently allowed the jury to find that the defendant committed the act. The underlying justification for abandoning the clear and convincing requirement enunciated in *Shackleford*[54] and *Broadway*[55] was that "the general protections afforded by Rule 104's threshold relevancy standard

43. *Id.* at 688.

44. Huddleston v. United States, 485 U.S. 681, 689 (1988). This standard of proof is supplied by Rule 104(b): "*Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

45. United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982).

46. 485 U.S. 681, 687 (1988).

47. *Id.* at 690.

48. 582 F.2d 898, 913 (5th Cir. 1978).

49. 477 F.2d 991, 994 (5th Cir. 1973).

50. *E.g.*, United States v. Jardina, 747 F.2d 945, 952 (5th Cir. 1984).

51. *E.g.*, United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987).

52. *E.g.*, United States v. Martin, 773 F.2d 579, 582 (4th Cir. 1985).

53. *E.g.*, United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982).

54. 738 F.2d 776, 779 (7th Cir. 1984).

55. 477 F.2d 991, 995 (5th Cir. 1973).

and Rule 403's added requirement that even relevant evidence be assessed for possible unfair prejudice are sufficient safeguards against improper uses of such evidence."[56] The Seventh, Eighth, and Ninth Circuits and District of Columbia courts, however, were not persuaded by the *Beechum* position and adhered to the requirement that the government prove to the court by "clear and convincing" evidence that the accused committed the extrinsic acts.[57] The Second[58] and Sixth[59] Circuits required the trial court to find that the defendant was the perpetrator of the other misconduct by a "preponderance of the evidence" as a prerequisite to admissibility.

The Supreme Court's pronouncement in *Huddleston* was an effort to resolve a conflict among the federal courts. As a result of the *Huddleston* decision the issue was settled for the lower federal courts. Furthermore, the substitution of the "clear and convincing" standard with a more relaxed measure of proof places a lighter burden on the government and ultimately increases admissibility of other acts evidence.

III. The Intent Exception: An Overview

Similar acts evidence in *Huddleston* was admitted to prove the defendant's knowledge; however, the Court noted that other acts evidence is critical to the establishment of the actor's intent.[60] Criminal intent has been defined as "that state of mind which negatives accident, inadvertence or casualty."[61] The rationale that the government may offer evidence that the defendant committed a similar wrongdoing on other occasions to increase the probability of his intent to commit the charged crime is based on the doctrine of chances. That is, "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."[62] Plainly, the recurrence of a similar act suggests that it is less probable that a particular instance of the same act was committed innocently. Unlike some of the other exceptions in Rule 404(b), the "intent" exception is invoked to prove an element of the crime.[63] In ascertaining the relevance of the collateral act evidencing intent, one must consider the inference from the

56. *Martin*, 773 F.2d at 582.
57. *See* cases cited *supra* note 35.
58. United States v. Leonard, 524 F.2d 1076, 1090-91 (2nd Cir. 1975).
59. United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986).
60. Huddleston v. United States, 485 U.S. 681, 685 (1988).
61. M. C. Slough, *Relevancy Unraveled*, 6 Kan L. Rev. 38, 48 (1957).
62. 2 John H. Wigmore, Evidence in Trials at Common Law § 302 (3d ed. 1940).
63. 22 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 5242 (1978).

prior act to the requisite intent in the crime charged. The intent exception and other exceptions such as, motive, knowledge, or common scheme overlap because the latter require an additional inference as to some accompanying mental state.[64] It has been suggested that the intent exception be read broadly so as to include any necessary mental element of a crime whether knowledge, accident or absence of mistake.[65] Quite naturally, the intent category has been one of the most frequently employed for admitting extrinsic acts evidence.

The courts differ on when intent is an actual issue in dispute for purposes of applying Rule 404(b) and Rule 403. Some courts allow relevant collateral crimes evidence when specific intent, as opposed to general intent, is an element of the crime.[66] Prior to the adoption of Rule 404(b), federal courts prohibited admission of extrinsic offense evidence to prove intent where intent was not seriously in issue.[67] Hence, where a defendant stipulated that he possessed the requisite intent, this served to remove intent as an issue in the case, precluding the government from admitting similar acts evidencing intent.[68]

IV. SPECIFIC INTENT VS. GENERAL INTENT

Mid-twentieth century courts required specific intent as an element of the crime to ensure that uncharged misconduct evidencing intent was used to establish a matter in genuine dispute.[69] The distinction drawn between "general intent" and "specific intent" is ambiguous. However, the common usage of "specific intent" is to designate a unique state of mind beyond any mental state required with respect to the *actus reus* of the crime.[70] Where a crime requires proof of specific intent, the prosecution must prove that the accused knowingly committed (or failed to commit) an unlawful act, *purposely* intending to violate the law.[71] The

---

64. *Id.*

65. *Id.*

66. United States v. Williams, 816 F.2d 1527, 1532-33 (11th Cir. 1987) (holding that the probative value of the other similar crimes evidence was not outweighed by its prejudicial effect where the assaults required proof of defendant's specific intent to do bodily harm).

67. *E.g.*, United States v. Buckhanon, 505 F.2d 1079, 1083 (8th Cir. 1974). For a discussion of the federal practice prior to the adoption of the Federal Rules of Evidence, see Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 305-07 (1982).

68. *Buckhanon*, 505 F.2d at 1083 n.1. *But see infra* notes 174-78 and accompanying text.

69. Prior to the adoption of the Federal Rules of Evidence, the courts recognized the distinction between specific intent and general intent crimes. *See, e.g.*, Bloch v. United States, 221 F.2d 786, 788 (9th Cir. 1955) (holding that it is error to charge presumptive intent where specific intent is an element of the crime charged). For offenses falling under the "specific intent" classification see, e.g., cases cited *infra* notes 74-81 and accompanying text.

70. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 28, 202 (1972).

71. 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND

Burger Court, in an attempt to set a standard for defining the intent element of crimes, stated that "[i]n a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent."[72] Consistent with this view is that a charge of knowingly or intentionally committing the alleged unlawful acts does not create a specific intent crime.[73]

Extrinsic acts evidence has been used in the prosecution of specific intent crimes, such as entering a credit union with an intent to commit larceny,[74] conspiring to possess with an intent to distribute heroin,[75] assault with a dangerous weapon with an intent to do bodily harm,[76] attempting to evade payment of income taxes,[77] and conspiring to commit bank fraud.[78] The federal courts have also permitted introduction of other crimes evidence to prove specific intent in prosecutions for possession of cocaine with an intent to distribute,[79] wire fraud,[80] and mail fraud.[81] These decisions have rested on statutory language setting forth the elements of the offense to admit or exclude evidence of prior acts.[82] The rationale for admissibility in these cases is that because specific intent is an essential element of the crime charged, it cannot be inferred from the act. The government is required to prove that the defendant specifically intended the consequences of his wrongdoings. Under this

---

INSTRUCTIONS § 13.03 (2d ed. 1970). The prevailing view in jurisdictions recognizing the specific/general intent classification is that because intent is an element of proof in specific intent crimes, the defendant cannot bar the government from submitting evidence to prove an element of an offense. *E.g.*, United States v. Liefer, 778 F.2d 1236, 1243 (7th Cir. 1985) (explaining that where the government charges the accused with a specific intent crime, the prosecution has the automatic right to present other crimes evidence despite the defendant's attempt to concede the issue).

72. United States v. Bailey, 444 U.S. 394, 405 (1980).

73. United States v. Manganellis, 864 F.2d 528, 539 (7th Cir. 1988) (holding that the offense of "knowingly and unlawfully" distributing cocaine in violation of 21 U.S.C. § 841(a)(1) is not a specific intent crime). *But see* United States v. Liefer, 778 F.2d 1236, 1243 (7th Cir. 1985) (stating that the charge of conspiracy to distribute, 21 U.S.C. § 846, with an intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) is a specific intent crime). The court in *Manganellis* distinguished *Liefer* on the grounds that conspiracy is a separate offense from the crime of knowingly distributing cocaine. *Manganellis*, 864 F.2d at 534.

74. United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989).

75. United States v. Briscoe, 896 F.2d 1476, 1499 (7th Cir. 1990).

76. United States v. Williams, 816 F.2d 1527 (11th Cir. 1987).

77. Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).

78. United States v. Harrod, 856 F.2d 996 (7th Cir. 1988).

79. United States v. McKinnell, 888 F.2d 669 (10th Cir. 1989).

80. United States v. Bradford, 571 F.2d 1351, 1353 (5th Cir.), *cert. denied*, 437 U.S. 908 (1978); United States v. Weidman, 572 F.2d 1199, 1202 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

81. United States v. Chaimson, 760 F.2d 798 (7th Cir. 1985).

82. *See Briscoe*, 896 F.2d at 1499; *Harrod*, 856 F.2d at 1001; *Wiedman*, 572 F.2d at 1202.

approach, the need for such evidence strengthens its incremental probative value in the Rule 403 balancing process.

The Seventh Circuit has used a similar rationale for barring admission of other acts evidence where the crime charged does not require proof of specific intent. In *United States v. Shackleford*,[83] the court distinguished between situations where intent is at issue because the charged crime includes an element of specific intent and where intent can be inferred from the surrounding circumstances. The court found that the offense of attempting to collect a debt by use of extortionate means did not require proof of specific intent and disapproved admission of similar misconduct.[84] Similarly, in the case of *United States v. Gruttadauro*,[85] the court excluded extrinsic evidence in a prosecution of a union business agent for willfully receiving money from an employer because specific intent was not an element of the crime charged. The court noted that the mental state of willfulness was more analogous to a general intent crime than to a specific intent crime.[86] In addition, admission of other acts evidence has been barred in prosecutions for second degree murder,[87] possession of a firearm by a felon,[88] and obstruction of justice,[89] because general intent could be inferred from the commission of the act itself.

The justification for admitting similar acts evidence is that the government, in a general intent crime, need not prove "separately and directly"[90] the state of mind of the accused. Thus, when weighing the probity of an extrinsic act evidencing intent against its unfair prejudice, the necessity for other acts evidence does not justify admission under the intent provision of Rule 404(b). On the other hand, when a statute requires specific intent, the prosecution has an extra burden of proof that requires admission of other acts evidencing intent.

Nevertheless, the distinction between specific and general intent has been highly criticized. Prior to the adoption of the Federal Rules of Evidence, Judge Rives in the concurring opinion of *Baker v. United States*[91] expressed his disapproval of barring the admission of prior convictions simply because the crime charged does not require proof of specific intent.[92] He noted that to have the court "reason from the abstract

83. 738 F.2d 776, 781 (7th Cir. 1984).
84. *Id.*
85. United States v. Gruttadauro, 818 F.2d 1323 (7th Cir. 1987).
86. *Id.* at 1328.
87. United States v. Soundingsides, 820 F.2d 1232, 1236 (10th Cir. 1987).
88. United States v. Shomo, 786 F.2d 981 (10th Cir. 1986).
89. United States v. Schaffner, 771 F.2d 149, 153 (6th Cir. 1985).
90. *Id.*
91. 227 F.2d 376, 378 (5th Cir. 1955).
92. *Id.*

legal definition of the crime backward, rather than from the acts of the defendant forward to the intent with which they were done" creates confusion and erroneously excludes crimes not requiring specific intent from application of the exception to Rule 404(b).[93] Relying on Judge Rives's opinion, the Fifth Circuit announced in *United States v. Adderly*[94] that whether intent is a material issue depends on the circumstances of the case and on the nature of the offense and not on statutory language.[95] The court, without citing any supporting caselaw, stated that in every case where the Fifth Circuit denied admissibility of other acts evidence because of lack of specific intent there were additional grounds for the exclusion.[96] Criticizing the prerequisite for admission established in earlier decisions, the court permitted the government to introduce evidence of prior convictions to establish general intent.[97] The panel, in a conclusory fashion, stated that the "offense of conspiracy by its very nature requires an element of intent or knowledge."[98] Therefore, prior misconduct which tends to establish the conspiracy is admissible pursuant to the intent exception.[99]

The Fifth Circuit court in *Beechum*[100] focused on other considerations in assessing the incremental probative value of the extrinsic offense evidence instead of recognizing the well-established distinction between specific and general intent crimes. In *Beechum* the defendant was accused of unlawfully possessing a silver dollar stolen from the mails. The court's extensive analysis of the application of the Rule 403 test favored the admissibility of extrinsic offense evidence notwithstanding the fact that the relevant statute did not require proof of specific intent nor did the accused place his intent in issue by asserting mistake or lack of intent.

The *Beechum* court, relying on Rule 401 Advisory Committee's Note,[101] explained that other acts evidence is *relevant* with regard to an uncontested issue.[102] The court, however, suggested that exclusion of extrinsic acts evidence offered to prove a fact not in dispute is justified because the probative force of such evidence is outweighed by the dan-

93. *Id.*

94. 529 F.2d 1178 (5th Cir. 1976).

95. *Id.* at 1181.

96. *Id.*

97. *Id.* at 1180. Admittedly, the applicable statutes setting forth the elements of the conspiracy offense did not specifically refer to intent or knowledge.

98. *Id.*

99. United States v. Adderly, 529 F.2d 1178, 1180 (5th Cir. 1976).

100. 582 F.2d 898, 914 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

101. FED. R. EVID. 401 advisory committee's note.

102. *Beechum*, 582 F.2d at 914 n.19.

ger of undue prejudice.[103] This approach relies on the judicial balancing of interests.[104] Thus, the federal courts have discretion in deciding whether the probative value of the character evidence is outweighed by its unfair prejudice.[105] According to the *Beechum* court, Rule 403 balancing uniformly results in the exclusion of similar acts evidencing intent when the defendant's intent is not at actual issue in the case.[106]

The *Beechum*[107] opinion in the late 1970s was followed two years later by the same court in *United States v. Roberts*.[108] However, in applying the prejudice evidence rule,[109] the court did not balance the trial concerns in favor of the defendant.[110] The absence of a specific intent crime was again immaterial because collateral evidence "as may be probative of a defendant's state of mind is admissible unless [the accused] 'affirmatively take[s] the issue of [general] intent out of the case.' "[111] A similar formulation was recently applied by the Eleventh Circuit in *United States v. Ospina*.[112] Without mention of the statutory elements of the charge, the *per curiam* opinion held that the probative value of the extrinsic evidence was not substantially outweighed by its undue prejudice.[113] The court merely provided the similarity of the convictions as the reason for affirming the district court's admission of the

---

103. *Id.* at 914. This approach assumes that other crimes evidence has "any tendency" under Rule 401 to make the existence of a consequential fact more probable, even if it relates to an uncontested issue.

104. In *Beechum,* however, the court in *dictum* stated that where the issue of intent is uncontested, the extrinsic acts evidence, although highly probative, is uniformly excluded. *Id.*

105. The trial judge's discretion in balancing the Rule 403 scales is very broad and only rarely will a district court's judgment be reversed. *E.g.*, United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989); Freeman v. Package Machinery Co., 865 F.2d 1331, 1340 (1st Cir. 1988).

106. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979).

107. 582 F.2d at 898.

108. 619 F.2d 379 (5th Cir. 1980) (conspiracy to operate illegal gambling business).

109. FED. R. EVID. 403; *see supra* note 18.

110. *Roberts,* 619 F.2d at 383.

111. *Id.* Apparently, the court in *Roberts* did not recognize the distinction between specific intent and general intent crimes. This same court in United States v. Adderly, 529 F.2d 1178, 1180 (5th Cir. 1976), noted that a conspiracy charge did not require proof of specific intent. *See supra* notes 94-99 and accompanying text. The panel in *Roberts* was primarily concerned with the unique nature of conspiracy charges and the difficulties of proving intent when a defendant is accused of conspiring. Despite the court's reliance on *Beechum,* the court refused to adopt the policy suggested in *Beechum* of excluding other crimes evidence when intent was uncontested. Moreover, the *Roberts* court noted that the defendant's offer to not actively contest the issue of intent was insufficient because of the burden on the government to establish general intent. *Roberts,* 619 F.2d at 383.

112. 823 F.2d 429, 433 (11th Cir. 1987) (knowingly possessing marijuana with an intent to distribute).

113. *Id.*; *see also* United States v. Webb, 625 F.2d 709, 710 (5th Cir. 1980) (willfully shooting a passing helicopter).

other crime.[114]

Contemporaeneously, the Sixth Circuit in *United States v. Hatfield* allowed admission of other wrongs evidencing intent even though the court recognized that the crime of being a felon in possession of a firearm did not require proof of specific intent.[115] The court's reasoning was based on the fact that intent could not be inferred from proof of possession even though the statute required proof that the defendant *knowingly* possessed the gun.[116] This decision is inconsistent with the Supreme Court's earlier pronouncement that a charge of *knowingly* committing a wrongful act (a general intent crime) does not justify admission of collateral acts evidence.[117] The Sixth Circuit's disregard for the specific/general intent classification is further demonstrated by its holding that intent is not inferred from the commission of the act itself in a "general intent" crime.[118]

The Fifth, Sixth, and Eleventh Circuits are in accord with the view that other acts evidence is relevant and admissible to prove intent whether or not the crime charged requires proof of general or specific intent.[119] *Beechum*[120] and its progeny suggest that the specific/general intent classification is no longer regarded as a consideration in evaluating the incremental probative value of other acts evidence.

When the balancing process of Rule 403 is applied, there is a greater tendency to admit other crimes evidence. This tendency of the courts to overvalue the probity of such evidence is shown by the United States Court of Appeals for the District of Columbia's recent pronounce-

---

114. *Id.* Notably, the opinion did not articulate a Rule 403 analysis; rather, the court, in a conclusory fashion, held that the two-prong test for admissibility was met.

115. 815 F.2d 1068, 1072 (6th Cir. 1987). The Tenth Circuit, a year prior to *Hatfield*, barred admission of other acts evidencing intent in a prosecution for being a convicted felon in possession of a firearm, because specific intent was not required and general intent could be inferred from commission of the act. United States v. Shomo, 786 F.2d 981, 985 (10th Cir. 1986).

116. *Hatfield*, 815 F.2d at 1072.

117. *See supra* note 72 and accompanying text.

118. *Hatfield*, 815 F.2d at 1072.

119. *See*, United States v. Kramer, 955 F.2d 479, 490-91 (7th Cir. 1992)(failing to classify the statutory offense of conspiring to distribute marijuana as a specific intent crime while recognizing this classification in United States v. Liefer, 778 F.2d 1236 (7th Cir. 1985); United States v. Hutchins, 818 F.2d 322, 329 (5th Cir. 1987)(focusing on the similarities between the charged crime and the collateral crime as grounds for admissibility in a prosecution for conspiracy to possess marijuana with an intent to distribute); United States v. Bourgeois, 746 F.2d 401, 405 (8th Cir. 1984)(holding that the other crimes evidence was relevant and probative without the court considering the nature of the crime charged or the issue in dispute requirement); United States v. Adcock, 558 F.2d 397, 402 (8th Cir. 1977)(allowing similar acts evidence to show motive in prosecution for general intent crime for extortion); EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 5:09 (1984).

120. 582 F.2d 898 (5th Cir. 1978).

ment that they "lean towards admitting evidence in close cases."[121] Similarly, the Eleventh Circuit's existing practice of using Rule 403 sparingly to exclude similar acts evidence fails to protect criminal defendants from unduly prejudicial evidence.[122] The post-*Huddleston*[123] decisions suggest that the courts prefer balancing the Rule 403 trial concerns in favor of the government.[124] This trend is evident in the government's use of prior convictions and misconduct as substantive evidence in recent drug cases.[125] *Beechum's*[126] earlier prediction that judicial application of the relevancy rule and Rule 403 would protect defendants from the admission of unfairly prejudicial extrinsic evidence has not come true.

Perhaps the courts have disregarded the distinction between specific intent and general intent crimes because of the difficulties with placing every offense neatly into one of the two categories. In addition, the Supreme Court did not clearly distinguish the cateogires.[127] Nevertheless, the recent trend to disregard this classification strips the courts of a useful guideline for determining whether intent is an actual issue in the case thereby making it necessary to admit uncharged misconduct evidence. The inability of the courts to properly apply the Rule 403 analysis articulated by the *Beechum*[128] court signals the need for specific guidelines to assist the judiciary in determining probity of extrinsic evidence. The courts' failure to replace the specific/general intent classification with a procedural protection creates additional uncertainty in ascertaining whether the "issue in dispute" standard will be properly applied.

---

121. United States v. Miller, 895 F.2d 1431, 1436 (D.C. Cir.), *cert. denied*, 498 U.S. 825 (1990) (quoting United States v. Manner, 887 F.2d 317, 322 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990)).

122. United States v. Cross, 928 F.2d 1030, 1048 (11th Cir.), *cert. denied*, 112 S. Ct. 594 (1991).

123. 485 U.S. 681 (1988).

124. *See, e.g.*, United States v. Rubio-Villareal, 927 F.2d 1495, 1503 (9th Cir. 1991), *vacated in part, on reh'g en banc*, 967 F.2d 294 (1992); United States v. Paulino, 935 F.2d 739, 754 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 883 (1992); United States v. Orr, 864 F.2d 1505, 1510 (10th Cir. 1988).

125. United States v. Kramer, 955 F.2d 479, 491 (7th Cir. 1992) (finding that in a prosecution for conspiracy to distribute marijuana, the prejudicial effect of prior misconduct testimony did not substantially outweigh its probative value); United States v. Aranda, 963 F.2d 211, 216 (8th Cir. 1992); United States v. Gonzalez, 940 F.2d 1413, 1421 (11th Cir. 1991); United States v. Hernandez, 896 F.2d 513, 522-23 (11th Cir. 1990); United States v. Record, 873 F.2d 1363, 1375 (10th Cir. 1989).

126. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

127. *See supra* note 72 and accompanying text.

128. 582 F.2d at 914-17.

V. Timing of Admission of Similar Acts Evidence

In addition to a weakened application of the specific intent and general intent crime distinction, there is a trend among the circuits to circumvent the timing rule that requires courts to defer admission of "bad acts" evidence until the conclusion of the defense's case.[129]

No requirement in Rule 404(b) delineates the proper time to introduce extrinsic acts evidence. As discussed earlier, the court must first determine that the evidence is relevant to the case before weighing the probity of other acts testimony and the undue prejudical effect. Logically, the timing of the introduction of extrinsic evidence pursuant to the intent exception is greatly important, because intent may not be a real issue until the defendant's case is presented.

As a general rule, the government should wait until the defense concludes before introducing other crimes evidence under the intent exception.[130] This limitation applies to both specific intent and general intent crimes.[131] The underlying design of the timing rule is that if the government introduces the extrinsic evidence when the defense rests, the court then will best be able to balance the probative value of and the necessity for such evidence against the unfair prejudice to the defendant.[132] The federal courts, however, have created exceptions to the timing rule that basically have negated the rule's value.[133] The basic reason for the exceptions is the concern that if the government does not present specific intent evidence in its case-in-chief, the government at the conclusion of the defense may be foreclosed from introducing such evidence if the defendant rests without presenting evidence.[134] Although it is the role of the judge to consider whether to admit the other acts evidence during the government's case-in-chief, the current application of Rule 403 signals the demise of this procedural safeguard and the advent

129. *E.g.*, United States v. Simon, 842 F.2d 552, 554 (1st Cir. 1988); United States v. Reed, 639 F.2d 896, 906-07 (2d Cir. 1981);

130. *E.g.*, United States v. Colon, 880 F.2d 650, 660 (2d Cir. 1989); United States v. Adderly, 529 F.2d 1178, 1182 (5th Cir. 1976); United States v. Jones, 476 F.2d 533, 537 (D.C. Cir. 1973). *See* 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 404(09) (1992); Graham, *supra* note 32, § 404.5.

131. See *supra* text accompanying notes 69-90 (for a discussion of the specific/general intent classification).

132. Graham, *supra* note 32, § 404.5.

133. *See, e.g.*, United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984) (crime charged requires proof of specific intent); United States v. Gilmore, 730 F.2d 550, 554 (8th Cir. 1984) (holding that a plea of not guilty required the government prove every element of the offense, including intent); United States v. Price, 617 F.2d 455, 459 (7th Cir. 1979) (opening statement suggested lack of general intent in a prosecution for extortion); United States v. Brunson, 549 F.2d 348, 361 n.20 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977) (lack of general intent foreshadowed by introduction of evidence not objected to by defendant).

134. *See infra* text accompanying notes 137-171.

of permitting the government to assume that intent will come into issue.[135]

A series of Second Circuit cases suggests that the timing rule normally should be applied to ensure that the similar acts evidence specifically reaches an issue in dispute.[136] Nevertheless, the Second Circuit recently narrowed the application of the timing rule. The Second Circuit first refused to apply the timing rule in the early 1980s in *United States v. Reed.*[137] The court in *Reed* approved the government's introduction of extrinsic acts evidence during its case-in-chief because it was "already apparent" that the issue of specific intent would be contested.[138] Six years later in *United States v. Caputo,*[139] the court expanded the meaning of "apparent" used in its earlier decision[140] to include circumstances where the government was required to prove the defendant's specific intent.[141] According to the court, this requirement automatically made the defendant's intent a real issue, thereby allowing the government to introduce the accused's previous acts during its case-in-chief. As a result, the Second Circuit's former policy[142] of requiring the prosecution to withhold uncharged misconduct evidence until rebuttal was eroded.

The Second Circuit decisions are not the exception in the federal courts; rather, they are in line with the majority view. In fact, the Second Circuit's disregard for the timing rule pales in comparison to that of

135. The standard of review for admission of evidence is abuse of discretion. *See, e.g.*, United States v. Caputo, 808 F.2d 963, 968 (2d. Cir. 1987); United States v. Crocker, 788 F.2d 802, 804 (1st Cir. 1986).

136. *E.g.*, United States v. Colon, 880 F.2d 650, 660 (2d Cir. 1989); United States v. Figueroa, 618 F.2d 934, 939 (2d Cir. 1980); United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978).

137. 639 F.2d 896, 906-07 (2d Cir. 1981).

138. *Id.* The court based its ruling on the fact that the defendant refused the government's request to stipulate to knowledge and intent. *Id.* The court did not raise as an actual issue the existence of either specific intent or general intent, even though mail fraud and securities fraud charges require proof of specific intent. *See, e.g.*, cases cited *supra* notes 80-84.

139. 808 F.2d 963, 968 (2d Cir. 1987).

140. *Reed*, 639 F.2d at 906.

141. *Caputo*, 808 F.2d at 968. The government was required to prove that the defendant possessed unauthorized access devices with an intent to defraud. *Id.* Although the court did not refer to the crime charged as a specific intent crime, arguably, this offense fits into the 'specific intent' category. *See supra* notes 74-82 and accompanying text; *see also* United States v. Simon, 842 F.2d 552, 554 (1st Cir. 1988) (approving admission of other acts evidencing general intent to commit a drug offense during the government's case-in-chief when the defendant suggested that he would contend lack of intent in his opening argument, despite his later admission of use of marijuana); United States v. Mills, 895 F.2d 897, 907 (2d Cir.), *cert. denied*, 495 U.S. 951 (1990) (noting that, in a trial for possession of counterfeit obligations, the government can introduce extrinsic evidence during its case-in-chief if the defendant raises the issue of general intent in his opening statement).

142. *See* United States v. Colon, 880 F.2d 650, 660 (2d Cir. 1989); United States v. Figueroa, 618 F.2d 934, 939 (2d Cir. 1980); United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978).

the other federal courts. For instance, the Fifth Circuit stated in the early 1980s that the government could introduce similar acts evidence to prove intent initially because the government cannot predict whether the defense will contest the issue.[143] This view assumes that, irrespective of the actual defense, intent will be an actual issue in the case. Thus, the court applies the balancing test of Rule 403 early in the case, assuming that the evidence is necessary and relevant to a potential issue in dispute. A majority of the courts make this assumption to avoid the timing rule, including the Second Circuit which introduced the principle prior to the adoption of the Federal Rules of Evidence.[144]

A. *Specific Intent Exception*

Rather than taking the Fifth Circuit route of openly rejecting the timing rule, other courts have circumvented the rule by creating exceptions. For instance, the Seventh[145] and Eighth[146] Circuits consistently have upheld the introduction of other acts evidence during the government's case to establish intent for specific intent crimes. The courts justify this exception because the statutorily imposed burden of establishing specific intent affords the prosecution an absolute right to present such evidence even though the defendant attempts to remove the issue by either conceding the requisite intent or denying commission of the act.[147] The courts view extrinsic evidence as necessary because the accused's defense does not impact the government's burden.[148]

This approach has been attacked by Judge Cudahy, in a concurring

143. United States v. Renteria, 625 F.2d 1279, 1281-82 (5th Cir. 1980); United States v. Roberts, 619 F.2d 379 (5th Cir. 1980). Although in *Renteria* the defendant conceded intent during his defense, the court found that the government had no way of anticipating this with certainty at the time it presented its case. *Renteria*, 615 F.2d 1281-82 The charged offense involved a conspiracy to possess illicit drugs with an intent to distribute. Despite the court's failure to recognize that this crime requires proof of specific intent, this offense has been categorized as a specific intent crime. *See supra* note 75 and accompanying text; *see also* United States v. Brunson, 549 F.2d 348, 361 n.20 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977) (ruling that in an armed robbery and murder trial it was not plain error to permit the government to introduce extrinsic acts evidence during its case-in-chief where lack of general intent was foreshadowed by evidence the defendant did not object to being admitted).

144. United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965).

145. *See, e.g.*, United States v. Chaimson, 760 F.2d 798, 805-06 (7th Cir. 1985); United States v. Liefer, 778 F.2d 1236, 1243 (7th Cir. 1985); United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984).

146. *See, e.g.*, United States v. Burkett, 821 F.2d 1306, 1309 (8th Cir. 1987).

147. See cases cited *infra* notes 183-85 and accompanying text (for a discussion on the recent treatment by the courts of a defendant's attempt to concede the issue of intent and make it irrelevant).

148. United States v. Weidman, 572 F.2d 1199, 1202 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

opinion,[149] which suggested that the government "cannot simply flood the courtroom with other-crimes evidence on the grounds that the crime was one of specific intent."[150] Instead, Judge Cudahy recommends that the courts adhere to the general rule that extrinsic acts evidencing specific intent cannot be admitted unless the defendant disputes intent.[151] This view, consistent with the Second Circuit's reasoning in *United States v. Manafzadeh*,[152] permits a defendant to remove the issue of specific intent as an issue in the case, thereby precluding admission of extrinsic evidence. Thus, even when the prosecution must prove specific intent, the point at which it may introduce uncharged misconduct evidencing intent remains a significant factor because the evidence must be reasonably necessary in light of the government's other available evidence under Rule 403. Nonetheless, only a minority of circuits have followed this rule since the mid 1980s.[153]

B. *Entrapment Defense Exception*

The courts have recently dispensed with the timing rule to permit introduction of uncharged misconduct evidence during the prosecution's case where an entrapment defense is raised in the defense's opening statement.[154] The seminal case on the use of other acts evidence to rebut a defense of entrapment is *Sorrells v. United States*.[155] In this case, the court justified its conclusion on the grounds that a defendant seeking acquittal by reason of entrapment is not in a position to object to the government's search for relevant character evidence to prove disposition.[156] The Seventh Circuit,[157] however, broadened the scope of *Sorrells* by permitting the prosecution to introduce *dissimilar* acts evidence to rebut an entrapment defense. In *United States v. Murzyn*,[158] the

149. United States v. Chaimson, 760 F.2d 798, 813 (7th Cir. 1985). Although Judge Cudahy disagreed with the majority's reasons for upholding admission of the evidence on the question of intent, he found the evidence to be admissible under other exceptions to Rule 404(b).

150. *Id.*

151. *Id.*

152. 592 F.2d 81, 87 (2d Cir. 1979) (holding that, in a case of transporting fraudulent checks, it was error to admit other acts evidence when intent was not in dispute).

153. *See* cases cited *supra* notes 145-48.

154. *See, e.g.*, United States v. Goodapple, 958 F.2d 1402, 1407 (7th Cir. 1992); United States v. Parkin, 917 F.2d 313, 316 (7th Cir. 1990); United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981), *cert. denied*, 457 U.S. 1107 (1982). *But cf.* United States v. McGuire, 808 F.2d 694, 695 (8th Cir. 1987) (holding that the government cannot introduce rebuttal evidence in its case-in-chief in anticipation of an entrapment defense that was referred to in opening argument, but never actually materialized).

155. 287 U.S. 435, 451-52 (1932).

156. *Id.*

157. United States v. Murzyn, 631 F.2d 525 (7th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

158. *Id.*

defendant was charged with interstate transportation and sale of stolen automobiles.[159] In an attempt to rebut the accused's defense of entrapment, the government introduced evidence that Murzyn threatened to kill a federal agent, solicited services for an assassination, used crude sexual language and displayed a shotgun to an undercover agent.[160] Applying the balancing approach of Rule 403, the court affirmed the trial court's denial of the defendant's motion for a mistrial.[161]

The introduction of extrinsic acts evidence to rebut an entrapment defense in *Sorrells* and *Murzyn* was permitted only after the defense had presented its case and subsequent to the defendant's clear assertion that he was entrapped by federal agents. Thus, the court was in a position to examine whether such evidence was narrowly geared to rebut the precise issues raised by the accused. However, where the government introduces uncharged misconduct evidence during its case-in-chief to rebut a defense of entrapment raised during a defendant's opening statement, the admission is permitted at a time when the defense has not yet materialized.[162] Therefore, the court can not determine whether the rebuttal evidence closely tracks the manner in which the accused presents the entrapment defense. Instead, the courts must predict the nature and extent of the defendant's response and assume that the incremental probative value of the character evidence, in light of the imagined defense, outweighs its potential prejudicial effect.[163]

C. *"Not Guilty" Plea Exception*

Whether a not guilty plea sufficiently raises the issue of intent to make extrinsic offense evidence admissible in the government's case-in-chief is a question that the Sixth[164] and Seventh[165] Circuits answered in the negative two decades ago. This view is squarely on point with the requirement that there exist an actual dispute on the issue to which the prejudicial evidence is relevant. As Lord Sumner stated in *Thompson v. The King*, "[t]he prosecution cannot credit the accused with fancy

159. *Id.* at 526-27.

160. *Id.* at 528.

161. *Id.* at 531.

162. *See* cases cited *supra* note 154.

163. The courts also have been reluctant to apply the timing rule where the defense has suggested in its opening statement that the evidence to be produced by the defense might generate uncertainty. *See, e.g.*, United States v. Price, 617 F.2d 455, 459 (7th Cir. 1979); United States v. Olsen, 589 F.2d 351, 352 (8th Cir. 1978). For example, in a prosecution for drug related offenses, the Seventh Circuit recently held that the issue of specific intent raised during opening argument opens the door to similar acts evidence. United States v. Parkin, 917 F.2d 313, 316 (7th Cir. 1990).

164. United States v. Ring, 513 F.2d 1001 (6th Cir. 1975)(dictum).

165. United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969).

defences [sic] in order to rebut them at the outset with some damning piece of prejudice."[166] Nevertheless, this attitude is currently the minority position among the circuit courts. Where the accused pleads "not guilty" to the crime charged, a majority of the courts have consistently permitted the government to use other crimes evidencing intent as part of its case-in-chief.[167] This view is premised on the incorrect belief that a not guilty plea is sufficient to make all the elements of the charged crime, including intent,[168] a real issue in the case, thereby creating the prosecution's need for such other crimes evidence.[169] Even where the government has had no reason, other than the defendant's not guilty plea, to anticipate a denial of criminal intent, the admission of character evidence is upheld.[170]

The serious flaw with this approach is that a not guilty plea does not necessarily give rise to the inference that the accused did commit the unlawful act charged, but rather did so without the required intent. However, absent additional grounds, this assumption is a prerequisite to a finding that the requisite intent is a real issue. In light of the inability of the courts to draw such an inference, it follows that such a position is inconsistent with the traditional view requiring a material issue as to the defendant's intent. Nevertheless, the courts summarily conclude that a plea of not guilty sufficiently raises the issue of general or specific intent which warrants admission of uncharged misconduct during the prosecution's case-in-chief.[171] This illogical approach highlights the importance of giving the government an opportunity to prove its case with *all* available evidence and the triviality of affording the defendant a right to a fair trial free from unnecessary prejudicial evidence.

VI. DEFENDANT'S OFFER TO REMOVE ISSUE OF INTENT

The ultimate question of admissibility of other acts evidence pursuant to the intent provision of Rule 404(b) is affected by the defendant's actions. In balancing the probity and prejudice of extrinsic evidence

166. 1918 App. Cas. 221, 232 (appeal taken from Crim. App.).

167. *See, e.g.*, United States v. Miller, 974 F.2d 953, 960 (8th Cir. 1992); United States v. Gilmore, 730 F.2d 550, 554 (8th Cir. 1984); United States v. Buchanan, 633 F.2d 423, 426 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980).

168. The courts do not distinguish between specific intent and general intent. For example, the statutory offense of mail fraud, 18 U.S.C. § 1341, clearly fits into the category of specific intent crimes. *See supra* note 81. However, a charge of conspiracy to operate an illegal gambling business, 18 U.S.C. § 371, does not require proof of specific intent. *See supra* text accompanying note 111.

169. *See* IMWINKELRIED, *supra* note 119, § 8:10.

170. *See e.g., Roberts*, 619 F.2d at 382.

171. *See* cases cited *supra* note 167.

under Rule 403, the court must inquire into whether the defense truly disputes the material fact of consequence that the similar acts evidence is offered to prove.[172]

A defendant's offer to stipulate to the existence of a material fact impacts on the incremental probative value of the extrinsic evidence. The Second Circuit maintains that an unequivocal offer to stipulate to the existence of the requisite intent removes intent as an issue in the case and, thus, precludes admission of uncharged misconduct.[173] This view is premised on the notion that once the defense offers to stipulate to a particular issue there is no need for other acts evidence.[174] Nevertheless, the Second Circuit position is the minority view.[175] In lieu of adopting a *per se* rule either for or against admission of relevant other acts evidence when the defendant offers to stipulate, the Third Circuit merely incorporates the offer as one factor in the Rule 403 balancing process.[176] This court, however, applies the prejudice evidence rule, Rule 403, with the belief that "it is for the prosecutor, not the defendant, to shape the government's trial strategy with a view toward sustaining its heavy burden of proof."[177]

The prevailing concern for the prosecution's opportunity to present the complete picture of its case has led other courts since the late 1970s to hold that an offer to stipulate does not necessarily result in exclusion

172. United States v. Figueroa, 618 F.2d 934, 941 (2d Cir. 1980); GRAHAM, *supra* note 32, § 404.5.

173. United States v. Manafzadeh, 592 F.2d 81, 87 (2d Cir. 1979); United States v. Mohel, 604 F.2d 748 (2d Cir. 1979).

174. *See* IMWINKELRIED, *supra* note 111, § 8:11.

175. Interestingly, the First Circuit in United States v. Garcia, 983 F.2d 1160, 1174-75 (1st Cir. 1993), in refusing to consider the defendant's offer to stipulate to knowledge and intent, attempted to distinguish the Second Circuit decisions. *Id.* (citing United States v. Figueroa, 618 F.2d 934, 940 (2d Cir. 1980) and United States v. Mohel, 604 F.2d 748, 752 (2d Cir. 1979)).

In *Mohel*, the defense argued that the alleged sale of cocaine was a complete fabrication. *Mohel*, 604 F.2d at 753. Similarly, the defendant in *Figueroa* alleged that the unlawful conduct never occurred. *Figueroa*, 618 F.2d at 940. In *Garcia*, however, the accused did not assert the absence of drugs in his closet; rather, he claimed that he was not aware of their presence and offered to concede knowledge and intent in the event the jury found that he in fact possessed the cocaine. *Garcia*, 983 F.2d at 1174.

Arguably, a defendant who claims lack of knowledge and possession of the presence of drugs or stolen property as a defense, although presently living or otherwise associated with a place where such items were found, may not stipulate with respect to the questions of knowledge or intent while maintaining that "it is not mine" or "I don't know anything about it." In other words, where a defendant sets forth a "mere-presence" defense, the court is not likely to recognize an offer to stipulate. Conversely, an accused will be permitted to stipulate to knowledge or intent when his defense is lack of identification, i.e., "there was no crime" or "it was not me."

176. United States v. Schwartz, 790 F.2d 1059, 1061 (3d Cir. 1986); *see also* United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985).

177. *Schwartz*, 790 F.2d at 1061.

of similar acts evidence.[178] The general rule is that the prosecution is not bound by the accused's offer to stipulate.[179] Moreover, where the defendant offers to stipulate to the issue of intent in a specific intent case, the trial judges' weighing of the unfair prejudicial impact of other acts evidence is minimal compared to the alleged probativeness of the evidence.[180] The basic notion is that a defendant cannot bar the prosecution's offer to prove an element of the offense and remove the need for such evidence simply by offering to stipulate. Thus, in cases requiring proof of specific intent, an offer to stipulate will rarely affect the balancing test so as to warrant exclusion of Rule 404(b) evidence.[181]

A defendant can also remove an actual issue of intent from a case by expressly admitting the existence of a material fact without offering a formal stipulation. Theoretically, it should be more difficult for the prosecution to introduce Rule 404(b) evidence where the defense has agreed not to contest the requisite intent as compared to when the defendant has not entered into such an agreement.[182] The courts, however, usually rule that the defendant's testimony does not preclude the government from introducing similar acts evidence.[183] The case law highlights that a defendant's concession of intent does not affect the necessity of the evidence when balancing the probative force of the extrinsic evidence against its prejudicial effect.[184] This is most apparent where the crime charged involves proof of specific intent.[185]

On the other hand, the Second Circuit reaches a more sensible result based on the rationale that a formal stipulation is not necessary where the defendant clearly expresses a decision not to dispute the issue of specific intent.[186] The Second Circuit explains that it is the signifi-

---

178. United States v. Hadley, 918 F.2d 848, 852 (9th Cir. 1990), *cert. dismissed*, 113 S. Ct. 486 (1992); United States v. Davis, 792 F.2d 1299, 1305 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986); United States v. Peltier, 585 F.2d 314, 324-25 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979). *But see* United States v. Buckhanon, 505 F.2d 1079, 1083 (8th Cir. 1974) (noting that the requisite intent was not in issue because the defendant was willing to stipulate to the material fact).

179. *Peltier*, 585 F.2d at 324.

180. *See, e.g.*, United States v. Miller, 974 F.2d 953 (8th Cir. 1992) (conspiring to distribute and possess cocaine with an intent to distribute).

181. *Id.*

182. *See* United States v. Figueroa, 618 F.2d 934, 941-42 (2d Cir. 1980).

183. *E.g.*, United States v. Mergist, 738 F.2d 645, 650 (5th Cir. 1984) (quoting United States v. Renteria, 625 F.2d 1279, 1282 (5th Cir. 1980)); United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980) (conspiracy case); United States v. Spillone, 879 F.2d 514 (9th Cir. 1989), *cert. denied sub. nom.* Citro v. United States, 498 U.S. 864 (1990).

184. *See, e.g.*, *Spillone*, 879 F.2d at 520.

185. *See, e.g.*, United States v. Hudson, 884 F.2d 1016, 1022 (7th Cir. 1989), *cert. denied*, 496 U.S. 939 (1990) (entry in a credit union with an intent to commit larceny).

186. *E.g.*, *Figueroa*, 618 F.2d at 942 (2d Cir. 1980) (conspiring to possess and distribute heroin with an intent to distribute).

cance that the trial court attaches to the words, rather than the form of the words used by the defense, that determines whether a particular issue remains truly in dispute.[187] Nevertheless, the view that an offer not to contest the requisite intent affirmatively takes the issue out of the case is the minority position.[188]

VII. SUMMARY/PROPOSAL

Under Federal Rule of Evidence 404(b), the prosecution may not introduce evidence of a defendant's uncharged misconduct to prove his or her propensity to commit the charged crime. Such evidence is admissible, however, for other purposes, such as proof of motive or intent.[189] When invoking the intent exception to the federal propensity rule, the court must weigh the probative value of the similar acts evidence against the potential danger of unfair prejudice. After *Huddleston*, this discretionary balancing process, coupled with the relevancy determination of Rules 401 and 402, is the only evaluation the courts engage in when determining the admissibility of evidence of other crimes, wrongs or acts. Thus, to avoid arbitrary decisions, the courts need to follow established guidelines when evaluating the prejudicial effect of extrinsic acts evidence.

The courts in the past have pronounced procedural and substantive safeguards, such as the timing rule and the specific/general intent classification, that have aided the courts in determining admissibility of such evidence under the intent exception. Nevertheless, the judicial treatment of these protections suggests that they are ineffective.

When the *Beechum* court first relaxed the requirements for admission of similar acts evidence in the late 1970s, many courts were still properly addressing considerations that were a legitimate part of the Rule 403 balancing process. By the mid 1980s, however, many circuits, in light of the influential *Beechum* view, replaced the requirement that the prosecution prove commission of the extrinsic act by "clear and convincing" evidence with the "sufficient evidence" standard of proof. The Supreme Court adopted this approach at the end of the decade.[190] As a result of *Huddleston*, there is a lighter burden imposed on the government for introducing other acts evidence.

The abandonment of the specific/general intent classification removed an additional obstacle to the government's admission of extrinsic evidence. The courts began announcing their disregard for the dis-

---

187. *Id.*

188. *See, e.g.*, cases cited *supra* note 183.

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

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

tinction between specific and general intent crimes immediately after the adoption of the Federal Rules of Evidence.[191] This position gained general acceptance by the late 1980s.[192] Yet, the modern trend deprives trial judges of a useful guideline for determining whether the requisite intent is genuinely in dispute and whether the extrinsic evidence is incrementally probative as determined by the government's actual need for such evidence. This results in an even more discretionary balancing test to apply that, as illustrated by the post-*Huddleston* cases, strengthens judicial preference for scaling the trial concerns in the government's favor.

Furthermore, the prevailing concern for the prosecution's opportunity to present *all* relevant evidence encouraged the federal courts to limit the applicability of the timing rule. The courts have gone so far as to assume early in the case that a genuine issue of intent exists establishing a preponderant need for evidence of uncharged misconduct. Naturally, the courts contemplate the accused in fact raising the issue of intent coupled with the introduction of extrinsic acts evidence possessing maximum incremental probity. The fiction that such evidence is reasonably necessary for the prosecution affects the balancing process of Rule 403. Thus, the greater weight on the probative value side of the scale tips the balance away from the unfair prejudice concern. The courts' refusal to apply the timing rule questions their ability to fairly determine the probative value and undue prejudice of extrinsic acts evidence at a time when it is unknown if such evidence is directed at the issues raised by the accused.

Finally, the recent cases involving a defendant's offer to remove the intent issue from the case as immaterial when determining incremental probity highlight the courts' compelling concern for giving the government an opportunity to present the complete scope of its case. This Rule 403 application questions whether the courts can really apply the "issue in dispute" limitation while forbidding the defendant from removing this prerequisite to admission. Recent caselaw suggests that the defendant's actions do not affect the genuine need for similar acts evidence under the Rule 403 balancing test.

The failure of the courts to properly address these considerations is inconsistent with the strict prohibition against admitting evidence under the intent provision of Rule 404(b) unless intent is an actual issue in dispute. The lack of discernible standards to guide application of the intent aspect of Rule 404(b) and Rule 403's balancing approach pre-

191. United States v. Adderly, 529 F.2d 1178-80 (5th Cir. 1976).

192. United States v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987).

cludes trial judges from adequately assessing whether intent is a real issue.

One could assert that a solution to this dilemma is to follow the *Huddleston* approach,[193] eliminating the clear and convincing standard of proof, and to go further and simply abandon the remaining considerations, such as the distinction between specific and general intent crimes, the timing rule, and the defendant's willingness to remove the issue of intent. This would result in a total disregard for the requirement that there exist an actual issue of intent as a prerequisite to invoking the intent exception to Rule 404(b). The text of Rule 404(b), arguably, does not require the existence of a contested issue to which the other acts evidence is relevant.[194] The negligent application of the Rule 403 balancing test in the post-*Huddleston* cases, however, illustrates the inadequacy of this solution.[195] This scaling process is an empty gesture that results in the mechanical admission of other acts evidence, in spite of the policies underlying Rule 404(b). In addition, the current standard of review which affords trial courts maximum discretion in applying the balancing test provides no appellate safeguard against the negligent application of the Rule 403 balancing test.

Moreover, seventy five years before the adoption of the Federal Rules of Evidence, the common law forbade admission of other acts showing intent unless intent was a genuine issue.[196] If the prosecution offers extrinsic evidence to prove a material fact in issue, the evidence is incrementally probative and necessary for the government to prove its case. If the prosecution does not present the evidence to rebut an issue raised by the accused, it is exceedingly plausible that this prejudicial evidence merely highlights the defendant's propensities to commit wrongful acts. Absent language indicating otherwise, one can not assume the drafters of the Federal Rules of Evidence intended to disregard the sound common law practice of applying the "intent in issue" requirement when invoking the intent exception to Rule 404(b). To ascertain whether the proffered evidence legitimately meets this require-

193. The Supreme Court provided a four-step framework for determining the admissibility of other acts evidence: first, the Court mandated that the evidence be offered for a proper purpose under Rule 404(b); second, the Court announced the relevancy requirement of Rule 402, as enforced through Rule 104(b); third, the Court instructed trial courts to determine whether the potential for unfair prejudice under Rule 403 substantially outweighs the probative value of the extrinsic evidence; and fourth, the Court required the trial judge, upon request, to instruct the jury, under Rule 105, that the other acts evidence must be considered only for the purpose for which it was offered. *Huddleston*, 485 U.S. at 691-91.

194. Relevancy is governed by Rule 401. *See supra* note 17.

195. *See* cases cited *supra* note 125.

196. *See supra* note 68.

ment, the courts therefore need to follow the discernible guidelines that the recent courts have disregarded.

Notably, the repudiation of the requirement that evidence of prior or subsequent acts be clear and convincing reflects the courts' liberality in admitting highly prejudicial evidence. This trend runs counter to the philosophy expressed in a dissenting opinion in *United States v. Conley*.[197] According to Judge Lay, "[t]he rule that evidence of other crimes shall not be admissible in the trial of a criminal case is rooted in the due process concerns that a man should not be tried for crimes without notice of the charges, nor should he be forced to defend against a confusing mass of unrelated allegations."[198] The introduction of highly prejudicial extrinsic acts evidence that fails to meet the clear and convincing standard of proof denies a defendant the right to a fair trial.[199] Contrary to Judge Lay's statement, the Supreme Courts' current pronouncement in *Huddleston* inhibits the federal courts from demanding a standard of proof more stringent than the "sufficient evidence" requirement.

There is still room, however, for the reawakening of the specific/general intent classification. The requirement of specific intent as an element of the crime charged where the accused has not actually raised the issue of intent would provide the courts with a standard for determining the incremental probative value of collateral acts evidence. By recognizing the specific/general intent classification and its underpinnings, the courts can apply the Rule 403 balancing process in an impartial fashion.

Moreover, the judicial inquiry of Rule 403 can be improved by establishing a formula that considers the defendant's attempt to remove the issue of intent from the case. If the prosecution offers evidence of an uncontested issue, the admission of extrinsic evidence in the circumstances clearly defeats the "issue in dispute" requirement set forth by the early courts. The Rule 403 process cannot be properly applied if the courts ignore the lack of a genuine need for similar acts evidence. Proper consideration of the defendant's actions would further assist the courts in adequately determining the real incremental probative value of collateral crimes evidence.

A prevailing concern influencing the relaxation of the requirements for admissibility of similar acts evidence is that the prosecution may be

197. United States v. Conley, 523 F.2d 650, 659 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

198. *Id.*

199. United States v. Woods, 484 F.2d 127, 139 (4th Cir. 1973) (Widener, J., dissenting), *cert. denied*, 415 U.S. 979 (1974).

precluded from proving its case if the defendant rests without introducing evidence or offers a general denial. This concern is most evident in the courts' refusal to apply the timing rule. Nevertheless, the courts can follow the general rule requiring the prosecution to introduce other crimes evidence during rebuttal without disregarding the government's need to prove its case. A practical and rational solution would be to prohibit the government from introducing character evidence during its case-in-chief, reserving the right to reopen to present such evidence in the event the defendant rests without introducing evidence. Thus, even if the court considered intent a significant issue (because the charged crime requires proof of specific intent or the accused denies the requisite intent) the safer course would be to allow the accused the opportunity to present its defense before admission of such evidence. This would enable the trial judge, at the conclusion of the defense, to determine whether intent is really in dispute so as to warrant the admission of other acts evidence. The court would then be in the best position to assess the probative worth of the evidence against it prejudicial effect. If the defendant fails to present a defense and an actual issue exists as to the perpetrator's intent, the court may subsequently admit the evidence. The trial judge, in such a situation, can inform the jury that the court compelled the government to defer admission of its extrinsic acts evidence. The application of this approach would render useless any exception to the timing rule. In addition, it would give the trial judge the opportunity, before ruling on the admissibility of such harmful evidence, to consider the defendant's willingness to remove the issue of intent from the case.

VIII. CONCLUSION

The presumption of innocence is a fundamental characteristic of our criminal procedure system. Yet, Rule 404(b) evidence tends to draw the attention of the jurors away from the substantive issues on trial toward the defendant's bad character. The rule expresses the concern that the accused will be tried for his or her uncharged misconduct rather than for the crime charged.[200] The drafters of the Federal Rules of Evidence were aware that the introduction of other acts evidence encourages fact finders to draw the subjective "bad man" inference. The Supreme Court recognized almost half of a century ago that such evidence is "said to weigh too much with the jury and to overpersuade them as to prejudge one with a bad general record and deny him a fair oppor-

200. United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979); *see supra* text accompanying note 8.

tunity to defend against a particular charge."[201] The soundness of this conclusion is apparent, despite the Second Circuit's recent observation that the prejudicial effect of extrinsic evidence is minimal where the collateral crime and the charged crime are equally "sensational" and "disturbing."[202] Thus, to ensure that a defendant receives a fair and unbiased trial, federal courts must limit admission of uncharged misconduct evidence. This demands the accurate weighing of the probative force of the evidence against its undue prejudicial effect. However, the application of this naked balancing process alone is not sufficient to limit the admission of other criminal acts. Clear standards to guide application of the intent aspect of Rule 404(b) must be considered in conjunction with the trial concerns of Rule 403 in order for the federal propensity rule and the balancing test to have their intended effect.

VIVIAN M. RODRIGUEZ

201. Michelson v. United States, 335 U.S. 469, 476 (1948).
202. United States v. Pitre, 960 F.2d 1112, 1120 (2d Cir. 1992).