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The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence

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I. INTRODUCTION

THE advent of the Federal Rules of Evidence in 1975 was a heralded event. When President Ford signed the bill establishing the rules on January 3 of that year, he stated that the rules created "for the first time in our history uniform rules of evidence on the admissibility of proof in Federal court proceedings."[1] With the exception of the areas of presumption and privilege,[2] the Federal Rules comprehensively regulate federal evidence law.[3] Moreover, the Federal Rules dramatically liberalize many

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1. Statement by the President Upon Signing H.R. 5463 Into Law, 11 WEEKLY COMP. PRES. DOC. 12 (Jan. 3, 1975).

2. *See* FED. R. EVID. 301, 501.

3. Contrast, for example, the residual hearsay provision in the Federal Rules of Evidence with the treatment of the same problem under one of the most detailed state evidence statutes, the California Evidence Code. Section 1200 of the California Evidence Code declares that "[e]xcept as provided by law,

evidentiary doctrines. The Federal Rules relax the restrictions on the admission of expert opinions by abolishing the "ultimate fact" prohibition,[4] and by allowing experts to base opinions on data that is not independently admissible in evidence.[5] The Federal Rules similarly lower the barriers to the receipt of hearsay by creating new hearsay exceptions,[6] and by expanding recognized exceptions.[7] Rule 402 underscores the bias in favor of admitting relevant evidence by decreeing that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[8] The liberalizing influence of the Federal Rules has quickly spread to state courts, as thirty jurisdictions have adopted evidence codes patterned after the rules.[9]

One of the most important rules is rule 404(b). The rule reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge,

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hearsay evidence is inadmissible." CAL. EVID. CODE § 1200(b) (West 1966 & Supp. 1985). Section 160 of the California Evidence Code, however, defines "law" as including "decisional law." *Id.* § 160 (West 1966 & Supp. 1985). Hence, the California Evidence Code preserves the judge's common-law power to create new hearsay exceptions and does not announce any criteria that a trial judge must consider in deciding whether to fashion a new hearsay exception. In contrast, rules 803(24) and 804(b)(5) of the Federal Rules of Evidence allow the judge to admit statements that do not fall within an enumerated hearsay exception. The rules state specific factors which the judge must weigh in determining whether to admit such statements. *See* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978).

4. *See* FED. R. EVID. 704.

5. *See* FED. R. EVID. 703.

6. *See, e.g.*, FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(18) (learned treatise).

7. *See, e.g.*, FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment).

8. FED. R. EVID. 402.

9. Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming have adopted evidence codes patterned after the rules. *See* Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1317-20 & nn.15-16, 22-24 (1985).

identity, or absence of mistake or accident.[10]

The first sentence of rule 404(b) forbids the proponent, usually a prosecutor, from offering evidence of the defendant's uncharged misconduct to support a general inference of bad character. The prosecutor may not introduce the evidence to establish the defendant's immoral, law-breaking character and then rely upon the defendant's demonstrated bad character to increase the probability that the defendant committed the crime alleged in the indictment or information. The second sentence of rule 404(b) does, however, permit the proponent to offer such evidence when it has "independent" logical relevance. That is, the second sentence of the rule permits the proponent to introduce evidence that is relevant under a non-character theory, such as proving the defendant's motive, intent, or identity.[11]

These two sentences of rule 404(b) codify the "uncharged misconduct" doctrine. The doctrine is of enormous importance in civil and criminal practice. For example, in products liability cases, proof of other accidents involving the defendant's product often is the most cogent proof of the product's hazardous character.[12] Similarly, in criminal practice, the admissibility of the defendant's other crimes is the premier evidentiary issue. In most jurisdictions, alleged errors in the admission of evidence of uncharged misconduct are the most common ground for appeal,[13] and in many states they are the most frequent ground for reversal.[14] In federal courts, rule 404(b) has generated more reported decisions than any other subsection of the Federal Rules.[15]

Like the Federal Rules' opinion and hearsay provisions, rule 404(b) has had the effect of liberalizing evidentiary standards. For example, rule 404(b) has accelerated the trend toward the so-

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

11. United States v. Forgione, 487 F.2d 364, 366 (1st Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

12. *See generally* Note, *Product Liability Litigation: Impact of Federal Rule of Evidence 404(b) Upon Admissibility Standards of Prior Accident Evidence*, 61 WASH. U.L.Q. 799 (1983).

13. *See Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 201, 203 (1973) (letter of Professor Kenneth W. Graham, Jr.) ("the issue of evidence most often raised in the federal appellate cases") [hereinafter cited as *Hearings*]; Note, *Admissibility of Other Offense Evidence After State v. Houghton*, 25 S.D.L. REV. 166, 167 (1980).

14. *See* Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 156 n.29 (1978).

15. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[8], at 404-56 (1985).

called inclusionary approach to the uncharged misconduct doctrine.[16] The traditional view in America has been the exclusionary approach, which once was dominant in three-fifths of the states and a majority of federal circuits.[17] Under the exclusionary approach, there is a general rule that evidence of uncharged misconduct should be excluded unless it fits within a finite list of recognized exceptions—including motive, identity, and intent.[18] If the evidence of uncharged misconduct does not fit squarely within a previously approved pigeonhole, the evidence automatically is inadmissible. In contrast, the inclusionary approach identifies only one *verboten* theory: attempting to support a general inference of bad character.[19] This approach allows the proponent to offer evidence of uncharged misconduct for "any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."[20] Nine federal circuits have determined that Congress' use of "such as" in rule 404(b) commits the federal courts to the inclusionary approach.[21]

Another common limitation on the admission of evidence of the defendant's uncharged crimes has been the requirement that the prosecutor present extraordinarily strong proof that the defendant committed the uncharged act. Most courts insist that the prosecutor's foundational evidence satisfy some variation of the standard of clear and convincing proof.[22] The Federal Rules, however, do not codify any requirement for clear and convincing proof of the defendant's identity as the perpetrator of the un-

16. *See* Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984).

17. Chesnutt, *The Admissibility of Other Crimes in Texas*, 50 TEX. L. REV. 1409 n.4 (1972) (quoting Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1036 n.221 (1938)).

18. A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 368, at 1-501 (4th ed. 1984).

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

20. 484 F.2d at 134. Even so, the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused. *Id.*

21. Reed, *supra* note 16, at 159-60 (identifying the First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits as determining that rule 404(b) is an inclusionary rule). *See also* United States v. Moore, 732 F.2d 983 (D.C. Cir. 1984); United States v. Gustafson, 728 F.2d 1078 (8th Cir.), *cert. denied*, 105 S. Ct. 380 (1984).

22. *See, e.g.*, United States v. Fatico, 458 F. Supp. 388, 405 (E.D.N.Y. 1977) (in sentencing of defendant for conspiracy to receive and receiving goods stolen from interstate commerce, evidence of defendant's membership in organized crime is admissible if clear, unequivocal, and convincing), *cert. denied*, 444 U.S. 1073 (1980); 2 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 404[10], at 404-71.

charged act. For that reason, some courts have concluded that rule 404(b) requires only proof sufficient to support a permissive inference that the defendant committed the uncharged act.[23]

Rule 404(b) may liberalize the admissibility of evidence of uncharged misconduct in still another respect. Before the enactment of the Federal Rules, it was well settled in many jurisdictions that the prosecutor had the burden of convincing the judge that the probative value of the evidence outweighs any attendant dangers such as prejudice.[24] Thus, the courts took a cautious attitude toward such evidence[25] and admitted it only in cases of strict necessity.[26] In some jurisdictions, evidence of uncharged misconduct was so disfavored that the courts imposed upon the prosecution a "heavy burden" of proving that the probative value of admitting the proferred evidence outweighs the inherently prejudicial effect of admitting such evidence.[27] Rule 404(b) may overthrow the cautious judicial attitude toward evidence of uncharged misconduct. The rule itself is silent on the question of the burden of persuading the judge that the probative value of the evidence outweighs the dangers attendant to admitting it. The advisory committee note accompanying rule 404(b) does refer the reader to rule 403.[28] Rule 403 states that relevant evidence is admissible unless "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 de-

23. United States v. Astling, 733 F.2d 1446 (11th Cir. 1984) (in prosecution of charges arising out of scheme to import and distribute marijuana, evidence of earlier marijuana smuggling venture is admissible if jury could reasonably find from the evidence that defendant committed the extrinsic offense); United States v. Lemaire, 712 F.2d 944 (5th Cir.) (in prosecution for writing and possessing counterfeit United States notes with intent to defraud, evidence of prior conviction of passing counterfeit bills is admissible if there is sufficient evidence for jury to conclude that defendant committed the extrinsic act), *cert. denied*, 104 S. Ct. 535 (1983); United States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

24. United States v. Alfonso, 759 F.2d 728, 739 (9th Cir. 1985) (Ninth Circuit adhered to common law allocation of burden to prosecution before and after enactment of Federal Rules); People v. Alcala, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984); People v. Louie, 158 Cal. App. 3d Supp. 28, 205 Cal. Rptr. 247, 262 (1984); State v. Brown, 670 S.W.2d 140, 141 (Mo. Ct. App. 1984).

25. *See, e.g.*, United States v. Burkhart, 458 F.2d 201, 204-08 (10th Cir. 1972).

26. State v. Collins, 669 S.W.2d 933, 936 (Mo. 1984). *See also* State v. Powell, 684 S.W.2d 514, 517 (Mo. Ct. App. 1984) (evidence of extrinsic crimes should be subjected to "rigid scrutiny").

27. Smith v. State, 646 S.W.2d 452, 458 (Tex. Crim. App. 1983).

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

lay, waste of time, or needless presentation of cumulative evidence."[29] The sentence's passive wording arguably manifests a legislative intent to allocate the burden of persuasion to the party opposing admission; and once the proponent has demonstrated the probative worth of the evidence, the burden shifts to the opponent to convince the judge that the dangers outweigh the probative value. Furthermore, the opponent's burden is onerous; the opponent must show that the dangers "substantially" outweigh the probative worth. If this is the correct interpretation of rule 403, and if rule 404(b) incorporates rule 403's balancing test, rule 404(b) turns the common-law rules upside down.

The proper allocation of the burden under rule 404(b) has precipitated a sharp controversy. Even in jurisdictions that have adopted rule 404(b), some courts adhere to the common-law view and continue to insist that the prosecutor has the burden of showing that the probative value of the evidence outweighs its dangerous tendencies.[30] The advocates of the common-law view invoke precedent as well as policy. The cautious judicial attitude toward evidence of uncharged misconduct not only is deeply ingrained in many jurisidictions; the attitude also is eminently sensible. All the research conducted to date—studies by the Chicago Jury Project,[31] the London School of Economics,[32] and the National Science Foundation Law and Social Science Program[33]—confirm that evidence of the defendant's uncharged crimes is an especially dangerous type of evidence. Evidence of uncharged misconduct can effectively strip the defendant of the presumption of innocence[34] and predispose the jury to convict.[35] The virulent nature of such evidence makes it understandable that courts would prefer the common-law view. The difficulty, though, is that the Federal Rules nowhere codify the common-law view. The continued imposition of the common-law burden of proof seems to violate

29. FED. R. EVID. 403.

30. *See, e.g.*, United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982).

31. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160-61, 178-79 (1966).

32. Note, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 544 (1974); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

33. 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, 1162 (1983).

34. H. KALVEN & H. ZEISEL, *supra* note 31, at 179.

35. Shifflet, *Admissibility of Evidence Disclosing Other Crimes*, 5 HASTINGS L.J. 73 (1954).

the mandate of rule 402 that relevant evidence should be admitted unless exclusion is required by the Constitution, a federal statute, or a Supreme Court rule prescribed pursuant to statutory authority.[36]

This article examines the controversy over the question of whether the common-law view has survived the adoption of rule 404(b). The first section addresses the dispute as a question of statutory construction. Although the question is not free from doubt, the section concludes that the soundest construction of the Federal Rules is that rule 404(b) imposes upon the opponent the burden of proving that the dangers attending a particular item of uncharged misconduct evidence substantially outweigh the evidence's probative value. The second section of the article reaches the policy merits of the dispute. That section argues that the result achieved through the common-law view is superior to the result seemingly required by rule 404(b). Accordingly, the second section urges that rule 404(b) be amended to reinstate the common-law view. The third and final section advances the thesis that it is not only desirable but imperative that rule 404(b) be amended. This final section draws on the historical experience of the California Evidence Code, and contends that if rule 404(b) is not amended, many courts may succumb to the temptation to circumvent rule 402 in order to "correct" Congress' mistake in abandoning the common-law burden. As previously stated, rule 402 is the provision making all relevant evidence admissible unless there is a basis for exclusion in the Constitution, a statute, another Federal Rule of Evidence, or a Supreme Court rule promulgated pursuant to statutory authority. The courts' treatment of rule 402 is the key to the success of the Federal Rules as a self-contained evidence code. As a result of congressional inaction on rule 404(b), some courts may begin to develop a pernicious tendency to disregard rule 402 whenever the rule apparently permits the admission of dangerously prejudicial evidence.

II. THE STATUTORY CONSTRUCTION OF RULES 403 AND 404(b)

To resolve the question of statutory construction, we must consider rule 403 and then analyze the interaction between that rule and rule 404(b).

36. FED. R. EVID. 402.

A. *Federal Rule of Evidence 403*

Under rule 403, the trial judge must balance the probative worth of the evidence against attendant dangers such as the risk that the evidence will prejudice the jury or tempt the jury to decide the case on an improper basis.[37] Once it is clear that balancing is necessary, the questions of the allocation and measure of the burden naturally arise.[38] Who has the burden of convincing the judge that one factor outweighs the other, and what is the extent of that party's burden? Is it sufficient that one factor barely outweighs the other, or must the party show that that factor exceeds the other by a greater margin?

There is support for the view that under rule 403, as at common law in many jurisdictions, the proponent of evidence must show that probative value outweighs danger and that the measure of the burden is demonstrating only that one factor barely exceeds the other. One leading commentator has asserted that under rule 403, "it is proper to resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice" and against admissibility.[39] In contrast, Saltzburg and Redden have asserted that while rule 403 allocates the burden to the opponent, the term "substantially" in rule 403 should not be read literally.[40] Their position is that the burdened party need demonstrate only that one factor slightly outweighs the other.[41]

1. *The Measure of the Burden*

The position of Saltzburg and Redden understates the importance of the adverb "substantially" in rule 403. When Con-

37. FED. R. EVID. 403 advisory committee note.

38. This article does not use the term "burden" to implicate the normal technical sense of the burden of proof. The normal sense of the expression applies when a court is allocating the risk of nonpersuasion with regard to the existence or occurrence of historical facts such as crimes or accidents. C. MCCORMICK, EVIDENCE §§ 336-337 (3d ed. 1984). Under rule 403, the focus is not on whether discrete historical events occurred. Rather, the judge is balancing the intangible factors of probative value and prejudicial danger against each other. Thus, we are using the term "burden" in a looser sense. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 101 (3d ed. 1982). The most fundamental meaning of the burden, however, is the risk of nonpersuasion. C. MCCORMICK, *supra*, §§ 336-337. In this sense, there is a burden under rule 403. Rule 403 prescribes the course of action for the judge when the balance between prejudicial danger and probative worth is too close to call in the judge's mind.

39. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 233 (1976).

40. S. SALTZBURG & K. REDDEN, *supra* note 38, at 101.

41. *Id.*

gress deliberated over the Federal Rules, there was a split of authority among the federal and state courts over the proper measure of the burden.[42] Some jurisdictions required the burdened party to demonstrate only a "mere imbalance" between probative value and danger.[43] The majority formulation, however, was that one factor had to substantially outweigh the other.[44] We must presume that Congress was aware of this division of authority when it adopted the final wording for rule 403.[45] On the premise that Congress was aware of the split of authority, the inclusion of "substantially" in rule 403 manifests an intent to reject the minority view that it is sufficient if one factor barely outweighs the other.

The significance of "substantially" was highlighted during the congressional consideration of the rules. While the rules were pending in Congress, law reviews carried numerous articles calling attention to the presence of the adverb in the proposed rule.[46] Witnesses who appeared during the congressional hearings on the rules did likewise. For example, during the testimony of Richard Keatinge, the chairperson of the California Law Revision Commission, Mr. Keatinge submitted his written statement with the word "substantially" italicized.[47]

Cases construing rule 403 ascribe the ordinary, lay usage to the term "substantially." The common meaning of a term ordinarily is the preferred usage.[48] To a lay person, "substantial" denotes "to a large degree."[49] Applying that meaning, most courts require that one factor exceed the other by a wide margin. In the cases in which the courts have invoked rule 403, they typically characterize the probative value of the excluded evidence as deficient,[50] de minimis,[51] dubious,[52] low,[53] marginal,[54] minimal,[55]

42. Dolan, *supra* note 39, at 235-36 nn.55-56.

43. *Id.* at 236.

44. *Id.* at 235.

45. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (4th ed. 1973).

46. *See, e.g.*, Schmertz, *Relevancy and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1, 5 (1974).

47. *Rules of Evidence, Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 127, 139 (1974).

48. *See* 2A C. SANDS, *supra* note 45, § 47.28.

49. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 876 (1972).

50. United States v. Brown, 490 F.2d 758, 780 (D.C. Cir. 1973).

51. *See* Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME LAW. 556, 578 (1984).

52. United States v. Barnard, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

miniscule,[56] scant,[57] seriously lacking,[58] slight,[59] tangential,[60] tenuous,[61] vague,[62] or virtually nonexistent.[63] In the same opinions, the courts label the prejudicial potential of the evidence as egregious,[64] extreme,[65] great,[66] gross,[67] heinous,[68] high,[69] overmastering,[70] or strong.[71] In describing the balance between the factors, the courts declare that one factor must far exceed,[72] heavily outweigh,[73] or overwhelm,[74] the other. The language of these opinions makes it unmistakable that the courts take "substantially" in rule 403 seriously. The courts have opted to give the term its usual, lay meaning and to require the burdened party to show that one factor exceeds the other by a goodly margin.

2. *The Allocation of the Burden*

Who is the burdened party—the proponent of the evidence or the opponent? There are four different arguments pointing

53. State v. Allies, 186 Mont. 99, 606 P.2d 1043 (1979).

54. Nordine v. State, 95 Nev. 425, 596 P.2d 245 (1979).

55. Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 968 (7th Cir. 1983).

56. United States v. Davila, 704 F.2d 749, 753 (5th Cir. 1983).

57. United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985); Larue v. National Union Elec. Corp., 571 F.2d 51, 58 (1st Cir. 1978).

58. E.I. du Pont de Nemours & Co. v. Berkley & Co., 620 F.2d 1247, 1272 (8th Cir. 1980).

59. United States v. Robinson, 560 F.2d 507, 513-15 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).

60. Dyer v. State, 666 P.2d 438 (Alaska Ct. App. 1983).

61. Harless v. Boyle-Midway Div., Am. Home Prods, 594 F.2d 1051, 1057-58 (5th Cir. 1979).

62. *See* Sharpe, *supra* note 51, at 581.

63. Smith v. Spina, 477 F.2d 1140, 1145-46 (3d Cir. 1973).

64. Sharpe, *supra* note 51, at 566.

65. United States v. Brown, 490 F.2d 758, 779 (D.C. Cir. 1973).

65. Cohn v. Papke, 655 F.2d 191, 194-95 (9th Cir. 1981); Angus v. State, 76 Wis. 2d 191, 251 N.W.2d 28, *cert. denied*, 434 U.S. 845 (1977).

67. United States v. Brown, 490 F.2d 758, 782 (D.C. Cir. 1973).

68. United States v. Bobo, 586 F.2d 355, 372 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

69. United States v. McManaman, 606 F.2d 919, 925-26 (10th Cir. 1979); Harless v. Boyle-Midway Div., Am. Home Prods., 594 F.2d 1051, 1057-58 (5th Cir. 1979).

70. Adkinson v. State, 611 P.2d 528, 532 (Alaska), *cert. denied*, 449 U.S. 876 (1980).

71. Savoie v. Otto Candies, Inc., 692 F.2d 363, 369-71 & n.8 (5th Cir. 1982).

72. State v. Mehralian, 301 N.W.2d 409, 419 (N.D. 1981).

73. Nyzio v. Vaillancourt, 382 A.2d 856, 860 (Me. 1978).

74. Savoie v. Otto Candies, Inc., 692 F.2d 363, 370-71 (5th Cir. 1982); People v. McKinney, 410 Mich. 413, 301 N.W.2d 824 (1981).

toward the conclusion that rule 403 allocates the burden to the opponent of logically relevant evidence.

The first argument relates to the measure of the burden, discussed above. Rule 403 allows the exclusion of relevant evidence only when the dangers "substantially" outweigh the probative value, and most courts interpret "substantially" to mean that the dangers must far exceed the probative worth. If the proponent has the burden, the burden is to prove that the probative value is not substantially outweighed by the dangers of admission. That burden would be highly unusual and awkward. Not only would such a burden be essentially negative; it also would place the proponent in a strange position by requiring him to establish less than even a balance in his or her favor. It is true that on some issues, a few jurisdictions allocate burdens to parties even when the burden requires the proponent to establish less than a probability. For example, under the California Evidence Code, a criminal defendant sometimes has the "burden" of raising a reasonable doubt.[75] Yet, such allocations are rare. If the measure of the burden is heavily weighted in favor of one factor, as rule 403's burden is biased in favor of admissibility, the simpler, normal practice is to allocate the burden to the party urging the opposing factor.[76] Typically, the court announces that the latter party must establish the proposition by a heightened standard such as clear and convincing evidence.[77] Courts ordinarily prefer "an interpretation of a statute that produces a reasonable result."[78] It would be exceptional and awkward to assign the proponent of evidence the burden under rule 403 when the burden's measure is that the probative value must be substantially outweighed by the prejudicial dangers. Thus, it is more reasonable to assume that when Congress chose that measure, Congress allocated the burden to the opponent.

Secondly, the language of rule 403 supports the interpretation that the rule allocates the burden to the opponent. Rule 403 is written in the passive voice.[79] In contrast, rule 412 and rule

75. *See* CAL. EVID. CODE §§ 115, 502 (West 1966 & Supp. 1984).

76. C. MCCORMICK, *supra* note 38, § 340, at 959.

77. *Id.*

78. 2A C. SANDS, *supra* note 45, § 45.12. In the context of the interpretation of a document, "unreasonable" can mean "unusual and extraordinary." J. MURRAY, CONTRACTS § 116, at 247 n.8 (rev. ed. 1974) (citing Bank of Cashton v. La Crosse County Scandinavia Town Mutual Ins. Co., 216 Wis. 513, 518, 257 N.W. 451 (1934)).

79. *See* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 797 n.74 (1981). In this respect, rule 403 is similar

609(a)(1) are written in the active voice. Rule 412 governs the admissibility of evidence of the prior sexual conduct of complainants in rape cases. The rule allows the judge to admit such evidence when "the probative value of such evidence outweighs the danger of unfair prejudice."[80] Rule 609(a)(1) controls the admission of evidence regarding certain types of convictions offered to impeach the defendant's credibility. Before admitting the conviction record, rule 609(a)(1) requires that the judge determine that "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[81] Rule 412 is so new that there is little case law construing the statute, but there is a large body of decisional law interpreting rule 609. Notwithstanding some authority to the contrary,[82] the virtually unanimous sentiment among the commentators[83] and courts[84] is that rule 609(a)(1) assigns the burden to the prosecutor offering the evidence of a prior conviction.

That construction is in accord with rule 609(a)(1)'s wording. The sentence in question is written in the active voice. The voice of the sentence implies that the subject—probative value—must actively overcome the object—any prejudicial dangers. The passive wording of rule 403 creates the contrary implication, suggesting that the probative value can be overcome by prejudicial dangers. When the legislature decides to use varying language in similar statutes, there is an inference that different intents inspired the differing language[85] and that the legislature selected

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to its counterparts in earlier model evidence codes. Rule 303(1) of the *Model Code of Evidence* authorized the judge to exclude relevant evidence "if he finds that its probative value is outweighed" by specified risks. MODEL CODE OF EVIDENCE Rule 303(1) (1942). Uniform rule 45 used the wording, "its probative value is substantially outweighed." UNIF. R. EVID. 45 (1953).

80. FED. R. EVID. 412(c)(3).

81. FED. R. EVID. 609(a)(1).

82. *See* United States v. Vanderbosch, 610 F.2d 95, 97-98 (2d Cir. 1979) ("defendant is required to show that the prejudicial effect outweighs probative value at the time the motion is made to suppress the prior conviction").

83. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 315, at 326-27 (1979); S. SALTZBURG & K. REDDEN, *supra* note 38, at 365; Curran, *Federal Rule of Evidence 609(a)*, 49 TEMP. L.Q. 890, 894 (1976).

84. United States v. Bagley, 772 F.2d 482 (9th Cir. 1985); Government of Virgin Islands v. Bedford, 671 F.2d 758, 761 (3d Cir. 1982); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981); United States v. Portillo, 633 F.2d 1313, 1323 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981); United States v. Lewis, 626 F.2d 940, 948-50 (D.C. Cir. 1980); United States v. Hendershot, 614 F.2d 648, 652-53 (9th Cir. 1980); United States v. Gross, 603 F.2d 757, 758 (9th Cir. 1979); United States v. Stewart, 581 F.2d 973, 974 (D.C. Cir. 1978).

85. *See*, 2A C. SANDS, *supra* note 45, § 51.02 (citing Commonwealth v. Bu-

different words to indicate that it contemplated differing legal consequences.[86] The inference is particularly strong when the legislature uses different wording in two parts of the same statutory scheme.[87] Congress worded rule 403 differently than either rule 412 or rule 609(a)(1). Congress' deliberate choice of differing language implies that unlike rules 412 and 609, rule 403 allocates the burden to the opponent of the evidence.

The third argument favoring construing the text of rule 403 as allocating the burden to the opponent rests on rule 403's immediate context, specifically, rule 402. A statute's context, which includes other provisions in the same statutory scheme,[88] sheds light on the meaning of its text.[89] Statutory provisions do not even have to be enacted simultaneously to be deemed part of the same scheme and *in pari materia*.[90] Thus, it stands to reason that when provisions are enacted simultaneously and placed immediately next to each other in the statutory scheme, as in the case of rules 402 and 403, one provision can furnish valuable clues to the meaning of the other. Rule 402 is cast in roughly the same mold as its counterparts in prior model evidence codes. Rule 9(f) of the Model Code of Evidence stated that "[e]xcept as otherwise provided in these Rules . . . all relevant evidence is admissible."[91] Uniform rule 7(f) was virtually the same as rule 403, providing: "Except as otherwise provided in these Rules . . . all relevant evidence is admissible."[92] Like its earlier counterparts, rule 402 creates a bias in favor of admitting relevant evidence and when there is ambiguity, "Rule 402's clear result is to make relevant evidence admissible."[93] Allocating the burden under rule 403 to the opponent similarly effectuates the bias manifest in rule 402.

The final argument for allocating the burden to the opponent is based on the broader context of rule 403, the basic philosophy permeating the Federal Rules of Evidence. As previously stated,

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zak, 197 Pa. Super. 514, 516, 179 A.2d 248, 250 (1962) ("[W]here words of a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction.")

86. *Id.* § 45.12.

87. *Id.* (citing People v. Ector, 231 Cal. App. 2d 619, 42 Cal. Rptr. 388 (1965)).

88. *Id.*

89. *Id.* §§ 45.12, 50.01-.02.

90. *Id.* § 51.03.

91. MODEL CODE OF EVIDENCE Rule 9(f) (1942).

92. UNIF. R. EVID. 7(f) (1953).

93. 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 402[07], at 402-29 (quoting Drafter's Analysis of Military Rule of Evidence 402).

the Federal Rules significantly liberalize the admission of both opinion evidence and hearsay statements.[94] Rule 402 is one example of the fact that the Federal Rules, as a whole, demonstrate a bias toward admissibility.[95] The policy theme running throughout the Federal Rules favors the admissibility of logically relevant evidence,[96] and their basic thrust is the relaxation of the barriers to admitting relevant evidence.[97] In the early hearings on the then proposed Federal Rules of Evidence before the House of Representatives, Albert E. Jenner, Jr., the chairperson of the United States Judicial Conference Advisory Committee on Federal Rules of Evidence, asserted that "the overall philosophy and thrust of the rules" is to "place the burden upon he who seeks the exclusion of relevant evidence."[98] The allocation of the burden under rule 403 to the opponent would therefore be consonant with the overall spirit of the Federal Rules.

Rule 403 contemplates that the trial judge will assess the probative value and dangers of evidence on a case-by-case, ad hoc basis.[99] The exclusion of relevant evidence under rule 403 is an extraordinary remedy,[100] and therefore courts should exercise the power to exclude cautiously[101] and sparingly.[102] Rule 403

94. *See supra* notes 4-7 and accompanying text.

95. *See* Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. B.J. 21, 21-26 (1974).

96. United States v. Guerrero, 667 F.2d 862, 867 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); United States v. 1129.75 Acres of Land, 473 F.2d 996, 999 (8th Cir. 1973); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5213, at 258 (1978); Dolan, *supra* note 39, at 236. The comment to Minnesota Rule of Evidence 402, modeled after Federal Rule 402, states that "[t]he rule favors the admission of relevant evidence." 22 C. WRIGHT & K. GRAHAM, *supra*, § 5221, at 309 (citing MINN. R. EVID. 403 committee comment (1977); MINN. R. CT. 332 (1985)).

97. 1 J. WEINSTEIN & M. BERGER, *supra* note 93, ¶ 403[03], at 403-46 to -51. *See also* Rossi, *The Silent Revolution*, 9 LITIGATION, A.B.A., Winter 1983, at 13.

98. *Rules of Evidence, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 77, 87 (1983) [hereinafter cited as *Hearings, Rules of Evidence*].

99. State v. Williams, 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983); Rothstein, *supra* note 95, at 21.

100. United States v. King, 713 F.2d 627, 631 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1924 (1984); United States v. Thevis, 665 F.2d 616, 633 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

101. United States v. McRae, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979).

102. Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1502 (11th Cir. 1985); Dartez v. Fibreboard Corp., 765 F.2d 456, 461 (5th Cir. 1985); United States v. Cole, 755 F.2d 748, 766 (11th Cir. 1985); United States v. Plotke, 725 F.2d 1303, 1308 (11th Cir.), *cert. denied*, 105 S. Ct. 151 (1984); United States v. King, 713 F.2d 627, 631 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1924 (1984); Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 722 (11th Cir. 1982),

places greater emphasis on the admissibility of probative evidence.[103] Thus, the net effect of the rule is to create a presumption[104] or balance[105] favoring admissibility. When there is a genuine doubt, the doubt should be resolved in favor of admitting relevant evidence.[106] Further, an examination of the legislative intent behind rule 403 indicates that Congress intended to allocate the burden under the rule to the opponent of relevant evidence. That burden demands that the opponent convince the judge that the dangers attendant to admitting the evidence outweigh the probative value of the evidence by a wide margin. The measure of the burden, the text of rule 403, rule 402, and the rules' basic philosophy all support this allocation of the burden.

B. *The Relationship of Rule 403 to Rule 404(b)*

The next question that arises is whether and how rule 403 relates to rule 404(b). Some courts have held that under rule 404(b), the prosecution still has the burden of demonstrating that the probative value of uncharged misconduct evidence outweighs the attendant probative dangers.[107] A number of distinguished commentators support the same view. This view preserves the common-law allocation of the burden to the proponent of the evidence.[108] The contrary view is that rule 404(b) incorporates rule 403's balancing test, requiring the opponent to convince the judge that the prejudicial dangers substantially outweigh the pro-

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cert. denied, 460 U.S. 1083 (1983); United States v. Pirolli, 673 F.2d 1200, 1203 (11th Cir.), *cert. denied*, 459 U.S. 871 (1982); 2 D. LOUISELL & C. MUELLER, *supra* note 83, § 124, at 14-15; 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5224, at 321 n.25.

103. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342, *cert. denied*, 449 U.S. 852 (1980); 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[03], at 403-50.

104. Eben v. State, 599 P.2d 700, 711 (Alaska 1979) (quoting the commentary to Alaska Rule 403), *cert. denied*, 53 U.S.L.W. 3365 (U.S. 1984); *Privacy of Rape Victims, Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 3, 6 (1976) (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, U.S. Dep't of Justice), [hereinafter cited as *Hearing, Privacy of Rape Victims*]; S. SALTZBURG & K. REDDEN, *supra* note 38, at 101; 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[03], at 403-50.

105. United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984); Dente v. Riddell, Inc., 664 F.2d 1, 6 (1st Cir. 1981); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980); 2 D. LOUISELL & C. MUELLER, *supra* note 84, § 125.

106. United States v. Cole, 670 F.2d 35 (5th Cir. 1982); 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[01], at 403-10.

107. *See, e.g.*, United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982).

108. 2 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 404[18], at 404-156.

bative value. The latter view is a sounder interpretation of the Federal Rules.

Rule 403 was intended to have virtually universal application.[109] On its face, the rule purports to apply to any item of evidence. The commentators have observed that rule 403 "apparently cuts across the entire body of the Rules,"[110] and that "every rule of admissibility [is] subject to the power of discretionary exclusion" under rule 403.[111] The solitary exception that the courts have recognized is the admissibility of evidence of convictions qualifying under rule 609(a)(2). Rule 609(a)(2) refers to a narrow category of convictions, those involving "dishonesty or false statements."[112] The rule omits any mention of balancing the probative value of the conviction against prejudicial danger. Most courts and students of federal evidence law have concluded that evidence of prior convictions qualifying under rule 609(a)(2) cannot be excluded by balancing.[113] The reasoning underlying the majority view is that in light of the explicit inclusion of a balancing test in rule 609(a)(1), the omission of such a test in 609(a)(2) manifests congressional intent to make those convictions automatically admissible.[114] To date, the courts have not found such an intent in any other provision. Thus, rule 403 interfaces with the other provisions of the Federal Rules unless, like rule 609(a)(2), a particular rule manifests a congressional intent to preclude rule 403's application.

There is strong evidence, however, that Congress intended rule 404(b) rulings to be subject to rule 403. During the hearings on the Federal Rules before the House Subcommittee on Criminal Justice, Representative William Cohen submitted the written comments of Professor Richard Field, the consultant to the Maine

109. Dolan, *supra* note 39, at 269. In this respect, rule 403 is similar to rule 303 of the *Model Code of Evidence*, and "the universality of application" of rule 303 has long been recognized. MODEL CODE OF EVIDENCE Rule 303 (1942).

110. Rothstein, *supra* note 95, at 29.

111. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5213, at 262-63.

112. FED. R. EVID. 609(a)(2).

113. *See* United States v. Noble, 754 F.2d 1324, 1331 (7th Cir. 1985); United States v. Kuecker, 740 F.2d 496, 502 (7th Cir. 1984); United States v. Wong, 703 F.2d 65, 68 (3d Cir.), *cert. denied*, 104 S. Ct. 140 (1983); United States v. Leyva, 659 F.2d 118, 121-22 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); United States v. Coats, 652 F.2d 1002, 1003 (D.C. Cir. 1981); 3 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 609[03], at 609-62; *id.* ¶ 609[04], at 124 (Supp. 1984). *See also* United States v. Lipscomb, 702 F.2d 1049, 1057 n.28 (D.C. Cir. 1983) ("The current weight of authority is that Rule 609(a)(2) crimes cannot be excluded under Rule 403.").

114. 3 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 609[03], at 609-62.

Advisory Committee on Rules of Evidence.[115] Professor Field's comments described his understanding of the operation of rule 404(b).[116] The comments indicated that in Professor Field's view, evidence satisfying rule 404(b) would not be automatically admissible.[117] Rather, even when evidence of a defendant's uncharged crime complied with rule 404(b), "the determination" of its admissibility would be left "to other rules," presumably rule 403.[118] The final Senate report on the Federal Rules of Evidence expressly states that the trial judge may apply the rule 403 factors to evidence satisfying rule 404(b).[119] The advisory committee note to rule 404(b) also mentions rule 403.[120]

It has been suggested that rule 404(b) only partially incorporates rule 403.[121] It is possible that Congress intended that under rule 404(b), the trial judge would "consider the kinds of facts appropriate under Rule 403" but not use rule 403's balancing test weighted in favor of admissibility.[122] This possibility is consistent with the literal language of the Senate report and the advisory committee note. The Senate report states that "the trial judge may exclude [relevant evidence of uncharged misconduct] only on the basis of those considerations set forth in Rule 403."[123] Similarly, the advisory committee note to rule 404(b) alludes to the judge's consideration of "factors appropriate for making decisions of this kind under Rule 403."[124] If the partial incorporation theory is sound, the common-law allocation of the burden to the proponent of uncharged misconduct evidence may survive the adoption of the Federal Rules. If rule 404(b) incorporates rule 403's factors but not its balancing test, the trial judge still could insist that the prosecutor show that the probative value of proffered uncharged misconduct outweighs any apparent dangers. In

115. *Hearings, supra* note 13, at 268.

116. *Id.* at 269.

117. *Id.*

118. *Id.*

119. S. REP. NO. 1277, 93d Cong., 2d Sess. 25 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7071.

120. FED. R. EVID. 404(b) advisory committee note.

121. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 797 n.74 (1981).

122. *Id. See also* United States v. Beechum, 582 F.2d 898, 923 n.16 (5th Cir. 1978) (Goldberg, J., dissenting), *cert. denied*, 440 U.S. 920 (1979).

123. S. REP. NO. 1277, 93d Cong., 2d Sess. 25 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7071.

124. FED. R. EVID. 404(b) advisory committee note.

the final analysis, however, the partial incorporation theory is flawed.

The partial incorporation theory is at odds with the general tenor of rule 404's legislative history. When the House Subcommittee on Criminal Justice prepared the committee print of the Federal Rules, the subcommittee added a note declaring that rule 404(b) was intended to place "greater emphasis on admissibility."[125] The report of the House Committee on the Judiciary reaffirmed that intent.[126] The courts have seized on that language as proof that the draftsmen of rule 404(b) "intended to emphasize admissibility of 'other crime' evidence."[127] The partial incorporation theory would effectively preserve the common-law standard for the admissibility of uncharged misconduct evidence—the *status quo ante*. Thus, the partial incorporation theory would frustrate Congress' general intent to place greater stress on the admission of relevant evidence of uncharged misconduct. In contrast, the full incorporation of rule 403 into rule 404(b) effectuates the legislative intent.

There are more specific indications in the legislative history that Congress appreciated that, under its scheme, evidence of uncharged misconduct qualifying under rule 404(b) could be excluded only when it ran afoul of rule 403's balancing test. In an analysis of the proposed Federal Rules of Evidence presented to both the House and the Senate, the Justice Department made it clear that it believed that rule 404(b) fully incorporated rule 403's balancing test. William Ruckelshaus, then acting deputy attorney general, presented the Justice Department's analysis to the House.[128] That analysis was highly influential with Congress, and Congress ultimately adopted many of the revisions proposed by the Justice Department. In his presentation, Mr. Ruckelshaus urged Congress to clarify certain aspects of rule 404(b),[129] but he explained that the Justice Department understood relevant evidence of uncharged misconduct to be excludable "[o]nly if the probative value of these facts is substantially outweighed by the danger of unfair prejudice."[130] W. Vincent Rakestraw, assistant

125. *Hearings, supra* note 13, at 145, 154.

126. H.R. REP. No. 650, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7081.

127. United States v. Long, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978); S. SALTZBURG & K. REDDEN, *supra* note 38, at 134, 154.

128. *Hearings, supra* note 13, at 342.

129. *Id.* at 344.

130. *Id.*

attorney general for legislative affairs, was the Justice Department spokesperson during the Senate hearings.[131] Mr. Rakestraw reiterated the Justice Department's understanding as stated by Mr. Ruckelshaus in the earlier House hearings.[132] During all the legislative hearings no one—neither representatives, nor senators, nor witnesses—disputed the Justice Department's position on this issue. Mr. Rakestraw expressed the Department's fear that the use of "may" in rule 404(b) would lead some judges to conclude that they had unfettered discretion in deciding whether to admit relevant evidence of uncharged misconduct.[133] The final Senate report attempted to allay that fear by declaring that the judge may exclude relevant evidence of uncharged misconduct "only on the basis of those considerations set forth in Rule 403."[134] This legislative history has led most courts[135] to conclude that after deciding that evidence of uncharged misconduct satisfies rule 404(b), the judge may exclude the evidence only by applying the rule 403 test biased in favor of admissibility. By applying that test, the courts necessarily eschew the common-law view allocating the burden to the proponent of the evidence.

It might be argued that the common-law burden was so well settled that Congress surely would have used more explicit language if Congress had intended to repudiate the common law. However, that argument flies in the face of the congressional treatment of the business entry exception to the hearsay rule in rule 803(6). At common law, it was well established that to bring a document within the business entry exception, the proponent had to demonstrate that it was the business' regular practice to prepare the type of entry in question.[136] That proposition was at least as well settled as the common-law allocation of the burden on uncharged misconduct evidence. Despite the authorities limiting the business entry doctrine to routine records, both the Advi-

131. *Rules of Evidence, Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 121 (1974).

132. *Id.* at 123.

133. *Id.* For the text of rule 404(b), see *supra* text accompanying note 10.

134. S. REP. No. 1277, 93d Cong., 2d Sess. 25 (1974) (prejudice, confusion, waste of time), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7071.

135. *See* United States v. Leichtman, 742 F.2d 598, 604 n.6 (11th Cir. 1984); United States v. Walker, 710 F.2d 1062, 1067-68 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 995 (1984); United States v. Potter, 616 F.2d 384, 388-89 (9th Cir. 1979), *cert. denied*, 449 U.S. 832 (1980); United States v. Sangrey, 586 F.2d 1312, 1315 (9th Cir. 1978).

136. C. MCCORMICK, *supra* note 38, §§ 306-308.

sory Committee[137] and the Supreme Court[138] wanted to eliminate that foundational requirement. The committee asserted that the courts had exhibited "a tendency unduly to emphasize a requirement of routineness and repetitiveness."[139] The House of Representatives disagreed, stating that the limitation of the doctrine to routine records is "a necessary further assurance of trustworthiness."[140] The House Judiciary Committee accordingly "amended the Rule to incorporate the limitation."[141] Interestingly, the opponents of the limitation thought that omitting the limitation from rule 803(6) was sufficient to abolish the limitation. Likewise, the proponents of the limitation apparently believed that it was necessary to explicitly incorporate the limitation to preserve it.

The proponents and opponents both proceeded on the implicit assumption that rule 402 means what it says. If the rules do not impose a restriction on the admission of relevant evidence, judges are not free to add the restriction as a matter of decisional law even if the restriction was a hoary requirement of common law. By the same reasoning, rules 402 through 404 overturn the common law allocation of the burden on uncharged misconduct evidence even though Congress did not expressly repudiate the common-law view in the rules' text.

III. THE DESIRABILITY OF AMENDING RULE 404(b)

The previous section of this article considered the issue of the allocation of the burden of proof for evidence of uncharged misconduct from the perspective of statutory construction. That section addressed the question of whether Congress did, in fact, allocate the burden of proof to the proponent or the opponent. This section prescinds from statutory interpretation to pose a different question: Should Congress have allocated the burden to the opponent? Thus, this section examines whether the onus

137. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE U.S. JUDICIAL CONFERENCE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 186 (1969) [hereinafter cited as COMMITTEE ON RULES].

138. Rules of Evidence: Communication from Chief Justice of the United States Transmitting the Proposed Rules of Evidence of the United States Courts and Magistrates 130 (1973).

139. COMMITTEE ON RULES, *supra* note 137, at 186-87.

140. H.R. REP. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7088, *quoted in* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 803-11 (1984).

141. H.R. REP. No. 650, 93d Cong., 1st Sess. 14 (1973).

should rest on the opponent or the proponent as a matter of policy.

A. *The General Soundness of the Allocation and Measure of the Burden under Rule 403*

In the previous section, we saw that in rule 403 Congress chose to allocate the burden to the opponent and that Congress weighted the burden heavily in favor of admissibility. As general propositions, both legislative choices were wise.

Allocating the burden to the opponent reflects the primacy of the search for truth in the litigation process. All the leading authorities on American evidence law have suggested that the courts and legislatures should recognize that primacy. At the turn of the century, Thayer asserted that a fundamental principle of any rational body of evidence law is that "everything which is . . . probative should come in, unless a clear ground of policy or law excludes it."[142] Dean Wigmore counseled that "every intendment should be made against . . . a demand" that relevant evidence be excluded.[143] In the post-World War II era, then Professor Weinstein reminded us that in the case of conflict, "The court's truth-finding function should receive primary emphasis."[144] The admission of all relevant evidence ordinarily promotes the public interest in discovering the truth in litigation,[145] and that interest is weightier than any of the competing interests listed in rule 403.

In its hearings on the Federal Rules of Evidence, Congress specifically was urged to recognize the primacy of the search for truth in the litigation process. During the House hearings on proposed rule 412 (restricting the admissibility of evidence of rape complainants' sexual conduct), Roger Pauley, deputy chief of the Legislation and Special Projects Section of the Criminal Division, spoke on behalf of the Justice Department.[146] Mr. Pauley urged Congress to place "priority on the principle of relevance. . . . Relevance in terms of the search for truth is . . . the predominant interest."[147]

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142. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 530 (1898).

143. 8 J. WIGMORE, EVIDENCE § 2175, at 2 (3d ed. 1940). *See also* Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 237 (1966).

144. Weinstein, *supra* note 143, at 246.

145. *Id.* at 237, 243, 246.

146. *Hearing, Privacy of Rape Victims, supra* note 104, at 3.

147. *Id.* at 17.

Even if the opposing interests were of equal weight, it would be justifiable to allocate the burden to the opponent. This is so because the exclusion of the relevant evidence undeniably deprives the trier of fact of helpful information, while it ordinarily is only speculation that the admission of the evidence will prejudice the jury. After the proponent shows the logical relevance of evidence under rule 401, it is "unquestioned" that the evidence has some probative value.[148] Thus, the probative worth of the evidence is demonstrable. In contrast, the countervailing considerations listed in rule 403 are usually merely "risks."[149] To be sure, in a given case the likelihood of prejudice may be great rather than remote. But there is a kernel of wisdom in the old bromide that a bird in the hand is worth two in the bush. Barring the evidence certainly denies the trier proof, the relevance of which is "unquestioned." Probative value is a reality, while prejudicial danger ordinarily is only a risk. Thus, it makes sense to allocate the burden to the opponent of relevant evidence.

Like the allocation of the burden to the opponent, the measure of the burden specified in rule 403 is defensible on policy grounds. It would be ideal if the judge could quantify probative value and danger and then contrast the two on a common, objective scale of measurement. We do not live in an ideal world, however, and judges are forced to make subjective value judgments when balancing probative value against potential danger.[150] The factors involved are intangible,[151] and there is a large element of subjectivity in their evaluation.[152] Even if the judge could objectively gauge either probative value or danger, the factors themselves could not be so measured against each other.[153] Striking a balance between such factors is a "procrustean task,"[154] and judges will inevitably differ in the manner in which they balance

148. FED. R. EVID. 403 advisory committee note.

149. *Id.*

150. *Hearings, supra* note 13, at 193, 197 (comments of Alan B. Morrison).

151. United States v. Bowe, 360 F.2d 1, 15-16 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[04], at 403-65.

152. United States v. Long, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978); 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[03], at 403-33 to -34.

153. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5221, at 309.

154. Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity*—United States v. Woods, 484 F.2d 127 (4th Cir. 1973), 6 RUT.-CAM. L.J. 173, 177 (1974).

the factors.[155] Common sense suggests that these differences will occur, and the most recent research supports the same conclusion.[156]

Rule 403 compensates for the subjectivity of the balancing process by mandating a burden with an extraordinary measure. Before excluding the evidence, the judge must first conclude that the probative dangers outweigh the probative value, and then the judge must engage in a sober second thought and ask himself or herself whether the dangers do so "substantially." The judge may bar the evidence only when there is a "significant tipping of the scales."[157] By requiring the judge to be so firmly convinced of the propriety of exclusion, rule 403 insures that relevant evidence is admitted whenever the balance is genuinely debatable.[158]

B. *The Application of Rule 403's Burden to Uncharged Misconduct Evidence*

Although the allocation and measure of the burden under rule 403 are generally sensible, at the very least the burden should be shifted when the proffered evidence involves uncharged misconduct. The severely prejudicial character of uncharged misconduct evidence justifies allocating the burden to the proponent, and that allocation would end the inconsistency between rules 404(b) and 609.

The likelihood of prejudice is acute when the proffered evidence is proof of a defendant's uncharged misconduct. As part of the Chicago Jury Project, researchers attempted to determine the impact of a defendant's prior criminal record on the probability of conviction.[159] The researchers found that conviction rates were significantly greater after a jury learned that the defendant had a criminal record or had been charged with even a minor crime. The researchers concluded that juries aware of prior misconduct employ an entirely "different . . . calculus of probabilities" to de-

155. 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 403[03], at 403-51 to -52.

156. *See generally* Teitelbaum, Sutton-Barbere & Johnson, *supra* note 33.

157. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5221, at 309-10. *See also* Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C.D. L. REV. 59, 94 (1984).

158. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5221, at 309.

159. H. KALVEN & H. ZEISEL, *supra* note 31, at 178-79.

termine the defendant's guilt or innocence.[160] In 1983, the National Science Foundation released the results of research[161] designed to assess the reactions of lay jurors and judges to various types of evidence. The research consisted of simulated trials, in which the researchers used lay members of the community to serve as jurors and attorneys as surrogates for judges. The researchers found that there were frequent disagreements between jurors and attorneys as groups, as well as among the individual members of the two groups. The researchers did discover, however, that "the greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant."[162] Attorneys and lay persons alike consistently rated such evidence as highly prejudicial.

These results could have been expected. A confession may be the most damning type of prosecution evidence, but uncharged misconduct evidence is not far behind. Furthermore, uncharged misconduct is subject to greater abuse than confession evidence.[163] A defendant's confession usually is offered as proof of the facts admitted, and the jury ordinarily will use the confession for precisely that purpose. In the case of uncharged misconduct evidence, however, the evidence often has dual relevance. Evidence of uncharged misconduct may be admitted for some limited purpose such as proving the defendant's motive. Under such a theory the evidence would have the independent relevance required by rule 404(b). Nevertheless, any act of misconduct by the defendant also is relevant to show his general bad character, and lay jurors are "imbued with the commonly held . . . notion, 'once a crook, always a crook.' "[164]

160. *Id.* at 179. *See* Beaser & Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 50 TEMP. L.Q. 585, 602 (1985).

161. *See* Teitelbaum, Sutton-Barbere & Johnson, *supra* note 33.

162. *Id.* at 1162. *See also* Gray & Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOLOGY REP. 727 (1976); Greene & Loftus, *When Crimes Are Joined at Trial*, 8 LAW & HUM. BEHAV. 193 (1985); Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 7 J. EXPERIMENTAL SOC. PSYCHOLOGY 141 (1969); London School of Economics (L.S.E.) Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208 (1973); Nemeth & Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOLOGY 221 (1973); Wissler & Saks, *On the Inefficacy of Limiting Instructions—When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37 (1985); Comment, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1326 (1969) (evidence of prior criminal record is strongest single factor that causes juries to impose death peantly).

163. Dolan, *supra* note 39, at 226.

164. State v. Cook, 673 S.W.2d 469, 472 (Mo. Ct. App. 1984).

In response, the courts have recognized the special dangers posed by the dual relevance of uncharged misconduct evidence. Thus, the courts evolved the common-law doctrine of balancing probative value against probative danger in uncharged misconduct cases.[165]

There also is an apparent consensus among the courts that uncharged misconduct is peculiarly dangerous and necessitates unique safeguards. We already have seen that in many jurisdictions, errors in the admission of uncharged misconduct are the most common ground for reversal.[166] In some jurisdictions, trial judges "uniformly" declare mistrials when the jury is exposed to inadmissible evidence of uncharged misconduct.[167] Even some appellate courts reverse the normal presumption that any error is harmless and assume that any erroneous admission of uncharged misconduct is prejudicial.[168] Furthermore, the courts and legislatures of many jurisdictions have imposed special procedural restrictions governing the admission of evidence of uncharged misconduct. These restrictions often include requirements for pretrial notice by the prosecution of its intent to offer evidence of uncharged misconduct at trial,[169] out-of-court hearings to adjudicate the admissibility of such evidence,[170] limiting instructions given at the time the evidence is admitted as well as in the final jury charge,[171] and explicit findings on the record by the trial

165. Dolan, *supra* note 39, at 279.

166. Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 156 n.29 (1978).

167. State v. Cook, 673 S.W.2d 469, 472 (Mo. Ct. App. 1984).

168. State v. Brooks, 675 S.W.2d 53, 59 (Mo. Ct. App. 1984); State v. Brown, 670 S.W.2d 140, 141 (Mo. Ct. App. 1984); Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 ALA. L. REV. 241, 242 (1984). *See also* United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984). In *Shackleford*, the court stated:

> Except in unusual circumstances, emanations from evidence of a defendant's bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts and tend to impugn his or her credibility, and errors in admitting such evidence consequently often go to the fundamental fairness of the trial. Unless there is other evidence that overwhelmingly establishes the defendant's guilt, we think evidence of other acts or crimes will reasonably play a substantial role in swaying the jury.

Id. at 783-84.

169. *See, e.g.*, State v. Prieur, 277 So. 2d 126, 130 (La. 1973).

170. *See* E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 9.46 (1984).

171. *See* COLO. REV. STAT. § 16-10-301(3) (1978 & Supp. 1984); FLA. STAT. ANN. § 90.404(2)(b) (West 1979 & Supp. 1984). *See also* Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence: The Last Line of Defense Against Jury Misuse of the Evidence*, 8 TRIAL DIPLO., Fall 1985, at 23.

judge.[172] The courts have hedged the process of admitting evidence of uncharged misconduct with these safeguards because the courts appreciate that the evidence can be devastating. It is precisely this devastating effect of evidence of uncharged misconduct which makes such evidence different from the run-of-the-mill evidence to which rule 403 is applied. It may be the sheerest conjecture that the admission of a photograph challenged under rule 403 will prejudice the jury. However, empirical research indicates, and many courts acknowledge, that evidence of uncharged misconduct poses a grave likelihood of prejudice. In sum, there is a compelling case for treating evidence of uncharged misconduct differently and allocating the burden to the proponent.

Reallocation of the burden would bring rule 404(b) into alignment with rule 609. Rule 609(a)(1) governs the admissibility of evidence of certain types of convictions for purposes of impeachment, and it allocates the burden to the prosecution to show that the probative value of the conviction evidence exceeds its prejudicial dangers.[173] Allocating the burden to the proponent under rule 609 but to the opponent under rule 404(b) is unjustifiable, since evidence of uncharged misconduct offered under rule 404(b) can be even more prejudicial than evidence of a prior conviction introduced under rule 609. If the uncharged act has not resulted in a conviction, the jury may leap to the conclusion that the defendant has escaped unpunished for the act.[174] The jury may be tempted to punish the defendant for the uncharged offense.[175] The jury may subconsciously desire to "sanction the defendant for another crime he seems to have 'got away with.' "[176] In addition, the evidence of the defendant's uncharged misconduct may alter the jury's regret matrix,[177] in the sense that the jurors may now have less concern and regret about the possibility of an erroneous conviction. Thus, jurors may be

172. United States v. Robinson, 700 F.2d 205, 213-14 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008 (1984).

173. *See supra* notes 83-88 and accompanying text.

174. United States v. Beechum, 582 F.2d 898, 914-15 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); Sharpe, *supra* note 51, at 561, 589. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 289 (1979).

175. United States v. Beechum, 582 F.2d 898, 914-15 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); Sharpe, *supra* note 51, at 561, 589; Williams, *supra* note 174, at 289.

176. Sharpe, *supra* note 51, at 561.

177. *Id.* at 561 n.23. *See* Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977). The regret matrix model is based upon the assumption that individual such as jurors wish to minimize the expected regret felt in the long run as a consequence of their decisions. *Id.* at 1032.

more inclined to resolve doubt in the prosecution's favor. Given these considerations, it makes little sense to give the defendant more protection under rule 609 when evidence proffered under rule 404(b) can be more prejudicial. The inconsistency between rules 404(b) and 609, coupled with the exceptionally prejudicial character of uncharged misconduct evidence, lead to the conclusion that Congress has misallocated the burden on uncharged misconduct. Rule 404(b) should be amended to shift the burden to the proponent, who had the risk of non-persuasion at common law and who ought to bear the burden in the interests of justice.

IV. THE NECESSITY FOR AMENDING RULE 404(b)

The second section of this article noted that uncharged misconduct evidence is extremely prejudicial. Moreover, the courts are conscious of the fact that evidence of uncharged misconduct can poison jurors' minds against the defendant.[178] How will that consciousness affect the courts' administration of rule 404(b) and, more broadly, the Federal Rules of Evidence?

In the short term, as a result of their recognition of the danger of uncharged misconduct evidence, some courts may feel impelled to revive the common-law allocation of the burden. Suppose, for example, that the case arises in a jurisdiction where the appellate courts have surrounded uncharged misconduct evidence with a host of special procedural safeguards and in which errors in the admission of uncharged misconduct are the leading ground for appellate reversal. Assume further that the trial judge is familiar with the empirical studies of the impact of uncharged misconduct evidence and understands that the admission of such evidence will likely motivate some jurors to convict although they have a bona fide doubt about the defendant's guilt of the charged offense. Finally, suppose that prior to the state legislature's adoption of the Federal Rules, it was black letter law in the jurisdiction that the prosecutor had the burden of showing that the probative value of any uncharged misconduct outweighs the prejudicial dangers. It is understandable that a judge in this position might conclude that rule 404(b) leaves the common-law allocation intact.

If judges follow this inclination, however, one consequence will be the undermining of rule 402.[179] One of the purposes of

178. H. UNDERHILL, CRIMINAL EVIDENCE § 205, at 447 (5th ed. 1956).
179. FED. R. EVID. 402.

rule 402 was the abrogation of common-law rules not grounded in constitutional or statutory authority.[180] It is true that rule 402 is less radical than the corresponding provisions in some earlier model evidence codes.[181] Rule 9 of the 1942 Model Code of Evidence purported to abolish all pre-existing exclusionary rules except those "provided in the following Rules."[182] The 1953 Uniform Rules of Evidence contained a similar provision, effecting a wholesale abolition of prior exclusionary rules.[183] The draftsmen of uniform rule 7 avowed an intent to "wipe the slate clean of all . . . limitations on the admissibility of relevant evidence."[184] Both the Model Code and the Uniform Rules would have repealed all the earlier exclusionary rules and permitted the courts to enforce only the rules expressly included therein.[185] Rule 402 has a more modest effect. Under rule 402, pre-existing exclusionary rules survive to the extent that they are based on "the Constitution of the United States, . . . Act of Congress, . . . or other rules prescribed by the Supreme Court pursuant to statutory authority."[186] Thus, the only retroactive impact of rule 402 is the abolition of "rules that are found in judicial decisions and that are not based upon some provision in the constitution or on federal statutes."[187]

Rule 402 has an important prospective effect as well.[188] Rule 402 attempts to prevent the courts from creating new evidentiary rules by common-law process.[189] After a careful review of the legislative history of the federal rules, Professors Wright and Graham concluded that "the record rather strongly suggests that Congress assumed that, except where the Evidence Rules otherwise provide, there would be no decisional law of evidence."[190] To support their conclusion, Wright and Graham marshaled numerous passages from the congressional hearings on the proposed rules.[191] Those hearings included testimony that revisions

180. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 220.
181. *Id.* § 5192, at 177.
182. MODEL CODE OF EVIDENCE Rule 9 (1942); 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5191, at 174 n.13.
183. *See* UNIF. R. EVID. 7 (1953).
184. *Id. See also* 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5192, at 178.
185. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5192, at 177.
186. FED. R. EVID. 402.
187. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 220.
188. *Id.*
189. *Id.* at 221.
190. *Id.* at 222.
191. *Id.* at 222-23.

of evidentiary doctrines "by judicial decision will in all probability be prevented,"[192] and that the rules "exclude the possibility of further judicially created" doctrines.[193] Thus, rule 402 was intended, at least in part, to preclude the power of the courts to change the rule.

The draftsmen of many state codes patterned after the Federal Rules adopted the same construction of rule 402. For example, the draftsmen of the Vermont Rules of Evidence expressly recognized Congress' construction of rule 402 and stated in the note to their rule 402 that the rule was designed to eliminate prior decisional law.[194] In other states, when the draftsmen did not want their codes to preclude common-law evidentiary development, the draftsmen explicitly indicated their intent. For example, the Minnesota Supreme Court expressly reserved the common-law power to revise evidence law in its order promulgating the rules.[195] The New York draftsmen similarly included a provision in the text of their version of rule 402 that attempted to preserve the common-law power to a limited extent.[196] Finally, the Oregon draftsmen specifically included the expression, "decisional law," in their adaptation of rule 402.[197] The courts' renaissance of the common-law allocation of the burden to the proponent of uncharged misconduct evidence consequently would infringe rule 402.[198]

More fundamentally, the courts' revival of the common-law rule would tend to thwart the codification effort. Rule 402's antecedent, uniform rule 7, was hailed as "the keystone" of the Uniform Rules of Evidence.[199] Like uniform rule 7, rule 402

192. *Id.* at 222 n.17.

193. *Id.* at 222-23 n.21.

194. VT. R. EVID. 402 reporter's note; 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 152 n.17 (Supp. 1985).

195. P. THOMPSON, MINNESOTA PRACTICE: EVIDENCE 5 (1979); 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 152 n.17 (Supp. 1985).

196. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 152 n.9 (Supp. 1985).

197. *Id.* at 129 n.121, 152 n.9.

198. *See* United States v. Grajeda, 570 F.2d 872, 874 (9th Cir. 1978) (given rule 402, courts are no longer "free to establish rules of evidence independent of the Federal Rules"); United States v. Jacobs, 547 F.2d 772, 777 (2d Cir. 1976), *cert. dismissed*, 436 U.S. 31 (1978) (explaining that "the obvious purpose of the catchall clause" in rule 402 "was to bar common law rules of evidence"); State v. Heiner, 683 P.2d 629, 634 (Wyo. 1984) (rule 402 precluded trial judge from excluding relevant evidence because of the unfair manner in which the evidence had been obtained).

199. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5192, at 177 (quoting N.J. SUP. CT. COMM. ON EVIDENCE, REPORT 10 (1953)).

functions as the centerpiece of the Federal Rules.[200] Rule 402 is at the core of the federal codification effort.[201] Admittedly, in some respects, the Federal Rules of Evidence are an incomplete code.[202] For example, the rules direct the courts to continue the common-law development of the presumption and privilege doctrines.[203] In all other areas, however, the rules purport to be a self-contained, comprehensive code. Ideally, a codification should "furnish answers to most and perhaps all the questions likely to arise in connection with its matter."[204] By barring common-law exclusionary rules, rule 402 helps ensure that the courts will seek the answers to evidentiary questions by reference to the rules themselves. When the courts look elsewhere and revive common-law rules, the courts not only are violating rule 402; but they also are subverting the rules as a code. If the rules are to succeed as a code, the courts must follow rule 402's directive to reject exclusionary rules based solely on common-law traditions.[205]

The current dispute over the revival of the common-law burden on uncharged misconduct evidence poses a threat to the future success of the Federal Rules. The courts may succumb to the temptation to slight rule 402 and revive the common-law tradition. This danger is far from hypothetical. The history of other American evidence codes teaches that the controversy over uncharged misconduct evidence is the very sort of issue that can be the undoing of a code.[206] For example, Kansas adopted the uniform Rules of Evidence, including rule 402's antecedent, uniform rule 7. Kansas' version of Uniform rule 45, however, is peculiar. While uniform rule 45, like rule 403, permits the judge to exclude relevant evidence on the basis of "undue prejudice,"[207] Kansas' version of uniform rule 45 omits any reference to prejudice.[208]

200. 1 D. LOUISELL & C. MUELLER, *supra* note 83, § 111, at 867.

201. The armed services have adopted Military Rules of Evidence patterned after the Federal Rules of Evidence. *See* 1 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 402[07], at 402-28. The drafters' analysis of the new Military Rules declares that "Rule 402 is potentially the most important of the new rules." *Id.* at 402-29.

202. Younger, *Introduction: Symposium: The Federal Rules of Evidence*, 12 HOFSTRA L. REV. 251, 252 (1984).

203. *See* FED. R. EVID. 301, 501.

204. Younger, *supra* note 202, at 252.

205. 1 D. LOUISELL & C. MUELLER, *supra* note 83, § 114, at 879-80.

206. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199.

207. UNIF. R. EVID. 45 (1953).

208. KAN. STAT. ANN. § 60-445 (1983).

Nevertheless, in *State v. Davis*,[209] the Kansas Supreme Court held that the court retained the common-law power to exclude relevant evidence on the ground of prejudice.[210] The issue presented in *Davis* was the admissibility of uncharged misconduct evidence. In justifying its decision to refer to the common law, the Kansas Supreme Court stressed the prejudicial character of uncharged misconduct evidence.[211]

The propensity of courts to slight the intent of an evidence code in order to reach a desirable result is also evident in the controversy over scientific evidence. Many courts assume that scientific evidence can have a very prejudicial impact on lay jurors.[212] This assumption is one of the primary rationales for the so-called *Frye* rule, requiring the proponent of scientific evidence to establish that the technique generally is accepted in the relevant scientific field.[213] Like the common-law burden on uncharged misconduct evidence, the *Frye* rule is a judicial creation. The rule is nowhere codified in the Model Code, the Uniform Rules, or the Federal Rules. Thus, there is a powerful argument that the rule is no longer good law in a jurisdiction that has enacted any of those evidence codes.[214] In several such jurisdictions, however, courts have continued to apply *Frye*.[215] Like the *Davis* court, the courts upholding *Frye* emphasize the potential prejudice generated by novel scientific evidence.[216]

209. 213 Kan. 54, 515 P.2d 802 (1973).

210. *Id.* at 59, 515 P.2d at 806. *See* 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 223 n.23.

211. 213 Kan. at 58-59, 515 P.2d at 806.

212. *See generally* Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 562-63 (1983) (citing and quoting People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (Mathematics is "a veritable sorcerer in our computerized society" and "threatens to cast a spell" over the lay juror); People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (recognizing "misleading aura of certainty which often envelops a new scientific process"); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (recognizing "mystic infallibility" of scientific testimony)).

213. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). *See generally* Imwinkelried, *supra* note 212.

214. Imwinkelried, *supra* note 212, at 557-59.

215. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century later*, 80 COLUM. L. REV. 1197, 1230 n.257 (1980) (citing People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976); State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (Law Div. 1968), *aff'd*, 56 N.J. 16, 264 A.2d 209 (1970)).

216. People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976). *See also* Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1032 (5th Cir. 1984) (evidence at issue was based on "voice stress analysis," a kind of polygraph testing that measures psychological stress in the voice).

The experience in California is instructive. The language of section 351 of the California Evidence Code is strikingly similar to that of rule 402. Section 351 states that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."[217] Section 351 also is similar to rule 402 in intent, since the draftsmen of the California Evidence Code intended to preclude the development of court-made exclusionary rules.[218] The California courts, however, frustrated that intent.[219] When they confronted prejudicial types of evidence such as scientific proof,[220] especially statistical evidence,[221] the California courts often disregarded section 351 and fashioned rules to block the admission of the evidence.[222] The rules were usually pre-existing common-law doctrines such as *Frye*.[223] To square the result with the California Evidence Code, the courts often asserted that the legislature certainly could have found more explicit language to overturn "a firmly established and fundamental common-law rule."[224] The above history of the Federal Rules, including congressional treatment of the business entry exception in rule 803(6), demonstrates that such assertions are spurious arguments for resurrecting common-law exclusionary rules. The history of the earlier state codes, however, indicates that courts often succumb to the temptation to use such arguments to bar dangerously prejudicial evidence. One distinguished commentator has predicted that, when faced with prejudicial evidence, "as appears to be the case in California, the [federal] courts will operate largely by ignoring" the mandate of rule 402.[225]

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217. CAL. EVID. CODE § 351 (West 1966 & Supp. 1984).

218. *See generally* 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 221.

219. *Id.* at 223.

220. *See* People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (evidence was produced by new technique of speaker identification by spectrographic analysis, commonly described as "voice print").

221. *See* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (testimony of college mathematics professor pertaining to mathematical theory of probability of persons with defendants' distinctive characteristics having committed robbery).

222. 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 224 (California courts have "exhibited disdain for the limitations of the code"). *See also* Graham, *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. L.A.L. REV. 279 (1971).

223. *See* People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

224. People v. Starr, 11 Cal. App. 3d 574, 89 Cal. Rptr. 906 (1970).

225. *Hearings, Rules of Evidence, supra* note 98, at 195, 199 (letter of Professor Kenneth W. Graham, Jr.).

V. CONCLUSION

At the outset of this article, we noted that many common law courts allocate to the prosecutor the burden of convincing the judge that the probative value of evidence of the defendant's uncharged misconduct outweighs any attendant dangers. Although there is authority that the common-law allocation survived the adoption of the Federal Rules of Evidence, the sounder reading of the rules is that the rules change the common-law doctrine. Rule 404(b) incorporates rule 403's balancing test, and rule 403 allocates to the defense the burden of showing that the prejudicial danger of evidence substantially outweighs its probative value. The common-law view, however, is preferable to the result under rule 404(b) as presently written. To bring rule 404(b) into alignment with rule 609 and to curb the severe prejudice created by admitting evidence of uncharged misconduct, Congress should amend rule 404(b). Congress should revise the rule to read:

> 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.[226] Before the judge admits evidence for such a purpose, the proponent of the evidence must persuade the judge that the probative value of the evidence outweighs the danger of unfair prejudice.[227]

It is vital that Congress adopt an amendment such as the one proposed. The importance of the dispute over the burden on uncharged misconduct evidence extends beyond rule 404(b). The dispute implicates the future of the Federal Rules of Evidence as an integral code. The experience of other American evidence codes indicates that if Congress remains silent, the courts will be tempted to revive the common-law allocation of the burden even at the expense of slighting rule 402. The courts, both federal and state, realize how prejudicial uncharged misconduct can be. In the past, many courts have disregarded statutes like rule 402 in order to curb the admission of what they perceived as prejudicial

226. To this point, the wording of the statute is identical to the current rule 404(b).

227. "The danger of unfair prejudice" is the expression Congress chose to include in rule 412(c)(3).

evidence. The danger that courts will disregard rule 402, and by so doing undermine the success of the Federal Rules as a self-contained code, is imminent.

The current controversy over the burden on uncharged misconduct is not an isolated instance. In a growing number of cases, courts are espousing exclusionary rules that are omitted from the text of the Federal Rules.[228] For example, some federal courts have restricted the use of pleadings as evidence[229] and barred testimony by attorneys involved in a case despite the lack of basis for such restrictions in the text of the rules.[230] Many courts also continue to enforce the *Frye* test for the admission of scientific evidence[231] despite both rule 402 and the liberal opinion provisions of article VII of the Federal Rules. On its face, rule 410, governing the admissibility of statements made during plea bargaining, excludes the statements only when they are offered "against the defendant."[232] At least one court, however, has employed the rule to bar such statements when the defense offered the statements against the prosecution.[233]

All the proposed exclusionary rules espoused in these cases are well intentioned. The prevailing wisdom is that the encouragement of plea bargaining is in the interest of the criminal justice system, and it serves that interest to exclude the prosecutor's statements as well as those by the defendant.[234] Similarly, the exclusion of testimony by attorney-witnesses creates an incentive for attorneys to comply with the rules of legal ethics that generally forbid such testimony.[235] As in the case of the courts attempting to restrict the admission of uncharged misconduct, many courts upholding *Frye* believe that they are protecting the defendant from excessively prejudicial evidence. Moreover, in many in-

228. 22 C. WRIGHT & K. GRAHAM, *supra* note 194, § 5199, at 152.

229. *See* Garman v. Griffin, 666 F.2d 1156 (8th Cir. 1981); 22 C. WRIGHT & K. GRAHAM, *supra* note 196, § 5199, at 153, n.36.

230. *See* United States v. Johnston, 664 F.2d 152 (7th Cir. 1981); 22 C. WRIGHT & K. GRAHAM, *supra* note 96, § 5199, at 153 n.36.

231. Giannelli, *supra* note 215, at 1228-31.

232. FED. R. EVID. 410.

233. United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976).

234. *Id.* at 107 (defendants properly prevented from introducing evidence as to plea bargaining despite their contention that such evidence would tend to show lengths to which Government had gone to obtain evidence needed to prosecute defendants).

235. TRIAL EVIDENCE COMM., SECT. OF LITIGATION, A.B.A., EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 84 (1983) ("No provision excludes a statement made, in any phase of negotiation, by a prosecutor-officer.").

stances, including the *Frye* rule and the burden on uncharged misconduct evidence, the exclusionary rules being espoused are supported by long lines of common-law authority.

These well intentioned proposals, however, miss an essential point. They refuse to come to grips with the problem of reconciling the proposed doctrine with the history, intent, and text of rule 402. It is not enough that there are legitimate, even compelling, policy arguments favoring the proposal. It is not even enough that the proposed doctrine is a veritable fixture in the common law of evidence. If an item of evidence satisfies the definition of relevance in rule 401, there are only two evidentiary routes to excluding the evidence.[236] The opponent may invoke a general exclusionary rule based on the Constitution, a statute, or a rule of the Supreme Court, or the opponent may invite the judge to apply rule 403 on an ad hoc basis to the specific item of evidence proffered. If the evidence is logically relevant, however, and if the opponent cannot successfully use either route to exclude the evidence, rule 402 requires that the evidence must be admitted. The rule forbids the judge from creating a new common-law exclusionary rule of general applicability.

We ask a great deal of courts when we expect them to enforce statutes that overturn court-created doctrines and deprive them of their traditional power to formulate evidentiary rules. It is particularly tempting for them to usurp a statute when the statute seems to sanction the admission of such prejudicial evidence as uncharged misconduct. Rule 404(b) should be amended to reinstate the common-law burden protecting the defendant against dangerous uncharged misconduct evidence, and it should be amended immediately. Evidence such as uncharged misconduct creates an acute risk that the courts will disregard rule 402 to reach the expedient result. In slighting rule 402, the courts will be undermining the codification effort itself. Rule 402 is "potentially the most important" of the Federal Rules of Evidence.[237]

236. Of course, there may be a non-evidentiary doctrine that leads to the exclusion of the evidence. For example, a constitutional rule may require exclusion. Thus, the fourth amendment may necessitate barring a witness' testimony if the police would never have discovered the witness' identity but for a fourth amendment violation. United States v. Ceccolini, 435 U.S. 268 (1978). Similarly, civil procedure doctrines may authorize the exclusion of the evidence. For example, the trial judge could exclude a witness' testimony as a discovery sanction if the witness violated a discovery order to disclose the names of all witnesses. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981). Our focus in this article is with evidence law proper.

237. 1 J. WEINSTEIN & M. BERGER, *supra* note 93, ¶ 402[07], at 402-22 (quoting the drafters' analysis of Military Rule of Evidence 402).

Congress must intervene before the courts start down the slippery slope of circumventing rule 402 in order to restrict the admission of prejudicial uncharged misconduct.
