

PRIOR RACIST ACTS AND THE CHARACTER EVIDENCE BAN IN HATE CRIME PROSECUTIONS*

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The killing of unarmed African American Ahmaud Arbery and others ignited a wave of public outrage and refocused attention on race and the criminal justice system. During the recent federal hate crimes proceedings for Arbery's death, the prosecution introduced evidence relating to the alleged past racist acts of the defendants. This type of evidence may be seen as highly probative and desperately needed to do justice in hate crimes cases. On its face, however, such type of evidence appears to be inadmissible owing to the well-known—but little understood—evidentiary ban on character evidence prescribed in Federal Rule of Evidence 404(b) and its state and common law analogues. The present Article suggests there may be an escape from this conclusion that the evidence is inadmissible under the rule. Rule 404(b) is one of the most confused and controversial of the evidence rules. The clarifications we provide herein are sorely needed, particularly as respects evidence of racism. Attorneys and courts are increasingly being called upon to deal with the admissibility of a criminal defendant's prior racist acts because of intensifying public scrutiny of race cases and FBI statistics revealing there were more than eight thousand hate crime incidents in 2020. This Article addresses whether, when, and how past acts exhibiting racism—what we will call "racist character evidence"—may be admissible in hate crimes cases consistently with 404(b). We examine seven gateways through which such evidence may be offered, at least some of which provide, in our view, a permissible path to admissibility. We hope to generate a robust academic debate on admissibility of racist character evidence and to supply guidance to courts and attorneys involved in these and related cases.

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INTRODUCTION

A young African American man is out jogging one afternoon in a suburban Georgia neighborhood.¹ A neighborhood resident informs police that this African American male resembles the suspect in a number of local break-ins.² The neighborhood resident and his son, both armed, then pursue the African American male in a pickup truck, later joined by a third individual in the pursuit.³ The African American male is unarmed and is fatally shot after

1. Victor C. Romero, *Racism, Incorporated: Ramos v. Louisiana and Jogging While Black*, 30 S. CAL. INTERDISC. L.J. 101, 105 (2021); *Ahmaud Arbery: What You Need To Know About the Case*, BBC NEWS (Nov. 22, 2021), <https://www.bbc.com/news/world-us-canada-52623151> [<https://perma.cc/8A5Q-SU6M>] [hereinafter *What You Need To Know About the Case*]; Dakin Andone, *A Timeline of the Killing of Ahmaud Arbery and the Case Against 3 Men Accused of His Murder*, CNN, <https://www.cnn.com/2021/10/18/us/ahmaud-arbery-case-timeline/index.html> [<https://perma.cc/QN87-W45C>] (last updated Nov. 12, 2021, 10:22 PM); *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> [<https://perma.cc/U8FY-XSZF> (staff-uploaded, dark archive)] [hereinafter *Arbery Shooting*]. The story here presented is as recounted in various news sources cited in this Article.

2. *What You Need To Know About the Case*, *supra* note 1; *Arbery Shooting*, *supra* note 1; Andone, *supra* note 1.

3. Andone, *supra* note 1; *What You Need To Know About the Case*, *supra* note 1; *Arbery Shooting*, *supra* note 1; Press Release, U.S. Dep't of Just., Federal Judge Sentences Three Men Convicted of Racially Motivated Hate Crimes in Connection with the Killing of Ahmaud Arbery in Georgia

encountering the three individuals in pursuit.⁴ Camera footage is released, a wave of public outrage ensues, and concerns are raised about persistent racial inequality in the justice system.⁵ The young African American man was

(Aug. 8, 2022), <https://www.justice.gov/opa/pr/federal-judge-sentences-three-men-convicted-racially-motivated-hate-crimes-connection-killing> [<https://perma.cc/QR3R-3HJX>] [hereinafter DOJ Press Release]; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/A6LA-5K7J>] (staff-uploaded, dark archive)].

4. Romero, *supra* note 1, at 106–09; *What You Need To Know About the Case*, *supra* note 1; DOJ Press Release, *supra* note 3.

5. See *Arbery Shooting*, *supra* note 1 (“In early May, a graphic video of the fatal encounter had begun to circulate online. It galvanized an already growing chorus of voices calling for charges to be brought in the case.”); Andone, *supra* note 1 (“It wasn’t until a video of the shooting surfaced May 5, 2020, that the Black man’s death drew nationwide attention, prompting outrage and protests—harbingers of the demonstrations against racial injustice that would follow that summer after the May 25, 2020, murder of George Floyd in Minneapolis.”); Fausset, *supra* note 3 (“The slaying of Mr. Arbery was also captured on a videotape that was widely viewed by the public. And the trial of his accused killers also brought up issues of policing—although in this case, it involved questions about private citizens and their rights to detain people who they believe to be breaking the law.”); Elliott C. McLaughlin, Angela Barajas & Melissa Alonso, *Federal Judge Rejects Plea Deal on Hate Crime Charges in Ahmaud Arbery’s Killing over Sentencing Concerns*, CNN, <https://www.cnn.com/2022/01/31/us/travis-and-greg-mcmichael-plea-deal-ahmaud-arbery-federal-hate-crime-charges/index.html> [<https://perma.cc/4MEP-NGEQ>] (last updated Feb. 2, 2022, 10:08 PM) (“The McMichaels were arrested May 7, 2020, days after video of the shooting surfaced, and Bryan was taken into custody two weeks later. The subsequent trial drew national attention. The case dovetailed with the killings of three Black people—Breonna Taylor in Louisville, Kentucky, George Floyd in Minneapolis and Rayshard Brooks in Atlanta—reigniting concerns over racial injustice and prompting civil unrest nationwide.”); Char Adams, *They Almost Got Away With It: How a Leaked Video Led to Convictions in the Ahmaud Arbery Case*, NBC NEWS, <https://www.nbcnews.com/news/nbcblk/-almost-got-away-leaked-video-led-convictions-ahmaud-arbery-case-rcna6690> [<https://perma.cc/7VRJ-5BFV>] (last updated Nov. 24, 2021, 6:57 PM) (“After the verdict, social media platforms lit up with comments from users who said the case wouldn’t have gone to trial at all if the video hadn’t thrust the case into the national spotlight and sparked an outcry.”); Vidhaath Sripathi, Note, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER RACE & JUST. 207, 207–08 (2021) (“In the wake of the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery, the Black Lives Matter movement inspired a global reckoning over racial injustice and mobilized one of the largest civil rights actions in American history.”). Of course, concerns associated with bias in connection with criminal activity and the criminal justice system had been expressed prior to the Arbery killing. See, e.g., Tany Katerí Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence,”* 99 YALE L.J. 845, 845–46 (1990) (“Although there are no accurate data on the number of bias crimes committed each year, every national indicator shows that violence against individuals based on their race, ethnicity, and sexual orientation is increasing. Three thousand acts of bias-related violence were documented nationwide between 1980 and 1986 The pervasive recognition that racially motivated violence is on the rise has led the House of Representatives to direct the Justice Department to begin collecting and publishing statistics on the incidence of these crimes. Civil rights organizations have lobbied on behalf of bias crime victims for the maintenance of consistent and accurate statistics in order to persuade state prosecutors to treat the increase in bias crimes as a serious problem.”); Ronald J. Coleman, *Police Body Cameras: Go Big or Go Home?*, 68 BUFF. L. REV. 1353, 1359–60 (2020) [hereinafter Coleman, *Police Body Cameras*] (discussing deaths of Eric Garner and Michael Brown); Ronald J. Coleman, *Measuring Police Body Camera Infrastructure*, 62 SANTA CLARA L. REV. 273, 279–80 (2022) [hereinafter Coleman, *Body Camera Infrastructure*] (same); Note, *Combating Racial Violence: A Legislative*

Ahmaud Arbery and those in pursuit—George McMichael, Travis McMichael, and William “Roddie” Bryan—have since been convicted of several crimes in connection with Arbery’s death.⁶

One of the provisions under which the three defendants were convicted was 18 U.S.C. § 245(b)(2)(B), a federal hate crimes statute that provides:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to

Proposal, 101 HARV. L. REV. 1270, 1270 (1988) (“In the early morning of December 20, 1986, four black men were driving in the vicinity of Queens, New York, when their car broke down. Three of them walked north into Howard Beach to seek help, eventually arriving at a pizzeria. As they were leaving the pizzeria, a group of nine to twelve white males armed with baseball bats and sticks confronted them, taunting them with racial insults and epithets. The black men fled, but the white gang caught two of them and beat them severely. The two managed to flee, but the white gang again caught and beat them. After escaping once again, the two black men split up: one was killed by a passing car; the other, dazed and bruised, was found by the police. The Howard Beach incident highlights an alarming trend of increasing racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country.”); Gregory L. Padgett, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103, 103 (1984) (“Since mid-1979, hundreds of acts of racial and religious violence have occurred in nearly all parts of the country.”); Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 1–2 (2016) (“Nearly two decades ago, legal scholars began documenting how modern forms of racism are easily denied to exist but often play out systematically through facially neutral laws and policies.”); James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 659 (1991) (“Forty-eight [sic] incidents of violence, harassment, or intimidation of Arab-Americans occurred in the first month of Operation Desert Storm. These incidents are part of a pattern of hate crime activity which began in the 1980’s and continues to date.”).

6. Bill Hutchinson, *Ahmaud Arbery Death Trial Live Updates: 3 Found Guilty of Murder*, ABC NEWS, <https://abcnews.go.com/US/live-updates/ahmaud-arbery/?id=81313519> [<https://perma.cc/SC6L-FBK5>] (last updated Nov. 24, 2021, 3:05 PM) (“[Gregory] McMichael, his son Travis, and William ‘Roddie’ Bryan were all found guilty . . . of murdering Ahmaud Arbery.”); *Arbery Shooting*, *supra* note 1; Andone, *supra* note 1; DOJ Press Release, *supra* note 3 (“A federal judge in the Southern District of Georgia today sentenced Travis McMichael, 36, to life plus 10 years in prison; and his father Gregory McMichael, 66, to life plus seven years in prison; and William ‘Roddie’ Bryan, 52, to 35 years in prison, for committing federal hate crimes and other offenses in connection with the killing of Ahmaud Arbery . . .”); Russ Bynum, *Father, Son Get Life for Hate Crime in Ahmaud Arbery’s Death*, AP NEWS (Aug. 8, 2022, 7:43 PM), <https://apnews.com/article/ahmaud-arbery-crime-georgia-race-and-ethnicity-racial-injustice-803abd74a4b8c4bc08cdc2f39b1d1a19> [<https://perma.cc/E7EY-JPC6>] (“The white father and son who chased and killed Ahmaud Arbery in a Georgia neighborhood each received a second life prison sentence Monday—for committing federal hate crimes, months after getting their first for murder—at a hearing that brought a close to more than two years of criminal proceedings.”); Fausset, *supra* note 3 (“A jury had determined that the three white men . . . were motivated by racism when they chased Mr. Arbery . . . through their neighborhood. They were each convicted of a federal hate crime.”); Jackie Salo, *Ahmaud Arbery Trial Verdict: All Three Suspects Found Guilty of Murder*, N.Y. POST, <https://nypost.com/2021/11/24/travis-mcmichael-found-guilty-in-ahmaud-arbery-trial/> [<https://perma.cc/RX59-NPB9>] (last updated Nov. 24, 2021, 4:25 PM) (“President Joe Biden hailed the convictions in the case, saying the verdict ‘ensures that those who committed this horrible crime will be punished.’”); Liz Baker, *A Jury Finds Ahmaud Arbery’s 3 Killers Guilty of Federal Hate Crimes*, NPR, <https://www.npr.org/2022/02/22/1082225480/ahmaud-arbery-hate-crimes> [<https://perma.cc/G7D2-EHZH>] (last updated Feb. 22, 2022, 11:33 AM).

injure, intimidate or interfere with . . . any person *because of his race, color, religion or national origin* and because he is or has been . . . participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof; [shall be guilty of a crime].⁷

Federal law has several such hate crime provisions tailored to different situations and a number of states also have hate crimes statutes on the books.⁸ As with the hate crime statute at issue in the Arbery case, a typical hate crime statute might prohibit some type of wrongful act—such as, perhaps, willfully causing bodily injury—done “*because of*” the victim’s race, color, national origin, religion, or other protected class status.⁹

Thus, in hate crimes cases, the prosecution must generally prove racial motivation.¹⁰ A key means of proving racial motivation is offering evidence of a defendant’s past acts exhibiting racism—even those wholly unrelated to the present charge—such as a defendant having used racial epithets or slurs, expressed violent attitudes toward members of the race, fired or failed to hire members of the race, refused to rent property to members of the race, or otherwise made statements denigrating or reflecting inappropriate attitudes toward the race. Indeed, it has been aptly suggested that in a hate crime case “[w]here there is no circumstantial evidence of the accused’s racial motivation, such as insults hurled during an altercation, the prosecution will undoubtedly attempt to introduce evidence of the accused’s prior racist conduct” in order to establish the racial motivation.¹¹ For instance, in the federal hate crimes trial against the McMichaels and Bryan, the prosecution reportedly introduced evidence that, collectively, consisted of statements in oral and digital format reflecting alleged past acts of racism, including use of racial slurs, making of

7. See 18 U.S.C. § 245(b)(2)(B) (emphasis added); *United States v. McMichael*, No. 21-CR-22, 2022 WL 600196, at *2–4 (S.D. Ga. Feb. 22, 2022).

8. See, e.g., 18 U.S.C. § 249 (relating to causing or attempting to cause bodily injury in certain contexts); 42 U.S.C. § 3631 (relating to injury, intimidation, interference, or attempt to do so in connection with certain housing rights); 18 U.S.C. § 247 (concerning damage to religious property and obstructing free exercise of one’s religious beliefs); see also *Laws and Policies*, U.S. DEPT JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/R65E-X8LS>] (last updated July 21, 2023) (providing information on federal and state laws); Morsch, *supra* note 5, at 660.

9. See Morsch, *supra* note 5, at 664 (emphasis added); 18 U.S.C. § 249. For instance, the wording of the first part of 18 U.S.C. § 249 is very similar to this example. See 18 U.S.C. § 249 (“Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person [shall be guilty of a crime.]”).

10. Morsch, *supra* note 5, at 660.

11. *Id.* at 669.

racist comments, or holding of inappropriate views or violent tendencies toward African Americans.¹²

Although evidence of past racist acts may be highly probative on the issue of whether a crime really was a *hate* crime, does use of such evidence violate the traditional ban on character evidence? Subject to certain exceptions, Federal Rule of Evidence 404 sets out a limited prohibition on character evidence, which includes a prohibition on specific acts, like past crimes:

Rule 404 Character Evidence; Other Crimes, Wrongs or Acts

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait . . . [exceptions not relevant to our purposes are omitted here].

12. DOJ Press Release, *supra* note 3. Specifically, the evidence has been summarized by the Department of Justice as follows:

Evidence at trial revealed that the defendants had strongly held racist beliefs that led them to make assumptions and decisions about Arbery that they would not have made if Arbery were white.

Travis McMichael's social media comments and text messages to friends . . . showed that Travis harbored racial animus against Black people . . . [and] the social media comments also revealed that Travis had for many years associated Black people with criminality and had expressed a desire to see Black people—particularly those he viewed as criminals—harmed or killed.

Witnesses testified at trial about deeply racist comments Gregory McMichael had made to people he barely knew. One witness testified about a brief encounter she had with Gregory in a professional capacity, during which she commented that it was 'too bad' that Julian Bond, a Black Georgia civil rights leader, had recently passed away; Gregory angrily responded that he wished Bond had 'been put in the ground years ago' and that Bond and 'those Blacks' were 'nothing but trouble.' . . . Gregory then went on a five-minute rant about Black people.

When [William] Bryan learned, just four days before the shooting, that his daughter was dating a Black man, [he] referred to the boyfriend as a [racial slur] and a [racial slur]. In other messages on social media, Bryan also referred to other Black people using racial slurs. When the police spoke to Bryan about Arbery's death, he admitted that he had never seen or heard anything about Arbery before; when he saw a Black man being chased, his 'instinct' told him that the man must be a thief, or maybe had shot someone.

Id.

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident . . . [advance notice provisions omitted here].¹³

Rule 404 means that, whether demonstrated by witness opinion, reputation, or specific acts (including past crimes or wrongful acts), character evidence is generally inadmissible when used to show an individual acted in conformity with their purported character.¹⁴ For instance, pursuant to Rule 404 or a related state rule, a court might exclude an assortment of evidence against a defendant—such as miscellaneous violent acts by the defendant, witness opinions she is violent, or testimony she has a violent reputation—offered to suggest the defendant had a character for violence if that character were then used to suggest the defendant assaulted and battered a victim on a given occasion charged in the present indictment.¹⁵ Rule 404's character evidence ban is extremely confused, however, and its contours are hotly debated.¹⁶ In fact,

13. FED. R. EVID. 404. Rules 412–415 also provide special rules relating to sexual offense or child molestation cases. FED. R. EVID. 412–415. In this Article, we generally refer to the Federal Rules of Evidence; however, since many states have evidence rules modeled on the Federal Rules of Evidence, our discussion is also largely relevant to analogous state rules. See Edward J. Imwinkelried, *Admitting Evidence of an Accused's Uncharged Misconduct Under the Doctrine of Objective Chances: Before a Judge May Consider Evidence of an Uncharged Incident To Decide Whether There Has Been a Suspicious Coincidence, Must the Accused Claim That the Incident Was an Accident?*, 99 DENV. L. REV. 1, 3–4 (2021) [hereinafter Imwinkelried, *Admitting Evidence of an Accused's Uncharged Misconduct*] (“Forty-four states have evidence codes largely modeled on the Federal Rules of Evidence. All of these jurisdictions have a version of Rule 404(b) identical or substantially similar to Federal Rule 404(b).”); Emily Holtzman, Note, *Balancing Act: Admissibility of Propensity Evidence Under Article I, Section 18(C) of the Missouri Constitution*, 84 MO. L. REV. 1135, 1137 (2019) (noting codification by many states of “rules against propensity evidence”).

14. See FED. R. EVID. 404; *infra* Part I; see also Jennifer Y. Schuster, Comment, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 947 (1988) (“Character evidence exists in three forms: First, testimony of a witness' personal opinion of the defendant; second, testimony regarding the defendant's reputation; and third, testimony regarding the defendant's past conduct.”).

15. Thus, for example, testimony was improper that a fraud and stolen property defendant “conduct[s] her affairs like a rat or snake” who is “capable of anything, even murder.” *United States v. Whittington*, 26 F.3d 456, 465–66 (4th Cir. 1994) (agreeing that testimony referring to defendant as such was improperly elicited).

16. See, e.g., Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 779–80 (2013) (“[T]he character rule has become porous with exceptions and unpredictable in application. Although the rule still keeps out completely unrelated evidence of an accused's bad

Rule 404(b), which prohibits past acts, has even been referred to as “perhaps the most controversial of the Federal Rules of Evidence.”¹⁷

One deeply important but highly challenging question is whether and how past acts evidencing racism—what we will refer to as “racist character evidence”—can be admissible in hate crimes cases consistent with Rule 404(b). Racism appears to be character, and character used to show conformity is generally forbidden by the rule. Existing authority is in hopeless disarray. It seems to be somewhat uniform in recognizing the proposition that such evidence should be admitted in hate crimes cases—or in allied cases, such as discrimination cases, where motivation may also be critical—but coherent

character, the many broad exceptions have reduced what is ‘completely unrelated’ to a small and shrinking subset of the whole. The character rule has been engaged in a losing battle. It lacks a simple and powerful message that clearly defines its purpose and helps to defend its turf against political pressure to diminish it.”); Dora W. Klein, “*Rule of Inclusion*” *Confusion*, 58 SAN DIEGO L. REV. 379, 380–89 (2021) [hereinafter Klein, *Rule of Inclusion*]; Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused’s Uncharged Misconduct*, 50 N.M. L. REV. 1, 1 (2020) [hereinafter Imwinkelried, *Defending the Doctrine*] (stating that “[i]n federal practice, Rule 404(b) generates more published opinions than any other provision in the Federal Rules”).

17. Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 709 (2018) [hereinafter Klein, *(Mis)application of Rule 404(b)*] (describing Federal Rule of Evidence 404(b)); Imwinkelried, *Defending the Doctrine*, *supra* note 16, at 1 (noting “[t]hat description [of Rule 404(b)] is accurate”); see also G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 960 (2022) (“Rule 404 is one of the more controversial evidentiary rules.”); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 182–83 (1998) (“Decisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence, and bad acts evidence plays a central role in many negligence, harassment, and discrimination cases.”); Jeffrey Bellin, *The Evidence Rules That Convict the Innocent*, 106 CORNELL L. REV. 305, 343 (2021) (“Some of the most heated controversies in the modern evidence landscape involve evidence of uncharged crimes admitted under Federal Rule of Evidence 404(b)”); Klein, *Rule of Inclusion*, *supra* note 16, at 381 (“[M]any of the federal circuit courts of appeals have overlaid the rules regarding character evidence—particularly Rule 404(b)—with unnecessary interpretive heuristics, leading to evidentiary decisions that are contrary to the purpose of the rules.”); Edward J. Imwinkelried, *The Evidentiary Issue Crystallized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused’s Uncharged Misconduct Under the Doctrine of Objective Chances To Prove Identity*, 48 SW. L. REV. 1, 2 (2019) (“In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases.”); Antonia M. Kopeć, Comment, *They Did It Before, They Must Have Done It Again; The Seventh Circuit’s Propensity To Use a New Analysis of 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1069 (2016) (“[Rule 404(b)] has come under much criticism by courts and legal scholars.”); James Stone, *Past-Acts Evidence in Excessive Force Litigation*, 100 WASH. U. L. REV. 569, 572–73 (2022) (“[H]ighly prejudicial information about plaintiffs—including past drug use, criminal records or acts, gang affiliation, and encounters with police—often makes it into trial under Rule 404(b), even when its relevance is attenuated.”); Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct To Prove Mens Rea: The Doctrines Which Threaten To Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 577 (1990) (“Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.”).

analysis about how to square this with the character ban is woefully lacking.¹⁸ For instance, while Rule 404(b), similar to evidence law in most states, prohibits use of past acts evidencing character to show an act in conformity with that character, it also allows past acts to show other things, such as intent or motive.¹⁹ Most of the decisions seem to believe that this licensing of motive or intent allows into evidence the prior or subsequent racist acts we are concerned with in this Article.²⁰ However, the difficulty is this: racism seems to be character as we have noted; and, in these cases, the intent or motive generally follows from the previous racist act evidence *only* if the factfinder first infers racist character from it.²¹ The evidence therefore implicates both the permissible and the impermissible purpose under the rule.²² Is this acceptable under Rule 404(b)?²³ On its face, the rule seems to say the two purposes are either/or. They seem mutually exclusive, and inconsistent with each other.

The goal of this Article is to identify and discuss seven primary gateways through which racist character evidence may be admissible consistent with Rule 404(b) in hate crimes cases. Part I will provide background on character evidence. Then, Part II will present our gateways for admission of racist character evidence. We hope that this Article will generate a robust academic debate on admissibility of racist character evidence under Federal Rule of

18. See Morsch, *supra* note 5, at 670–71 (stating “the Rules of Evidence limit the ability of prosecutors to introduce evidence of the accused’s racist character even though such evidence directly corroborates the accused’s racist motive”); *United States v. Franklin*, 704 F.2d 1183, 1187–88 (10th Cir. 1983) (finding no abuse of discretion where trial court had admitted evidence of defendant’s prior assault on interracial couple as probative of motive in race-related offense); see also *United States v. Ebens*, 800 F.2d 1422, 1432–33 (6th Cir. 1986) (finding it reversible error when the government “introduced . . . testimony for the purpose of showing that [a defendant] generally was possessed of a bigoted mind and that he therefore possessed the requisite intent” for a race-related crime); Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1097 (2005) (“By basing the legality of an employer’s action solely on why she acted a certain way, discrimination law expects a plaintiff to prove that his employer harbored certain motives, intentions, or attitudes, and then show that the employer acted as a consequence of those same traits. Yet as far as the law (as opposed to, for example, a psychiatrist) is concerned, the discriminatory employer will generally have no motive to discriminate beyond whatever irrational motives derive directly from discriminatory animus. No more than semantics, therefore, differentiates this sort of ‘motive’ from that directly inferable from an individual’s character propensities.”); *Fudali v. Napolitano*, 283 F.R.D. 400, 403 (N.D. Ill. 2012) (“The cases are basically uniform in holding as a general principle that discriminatory intent or the pretextual nature of an employment related decision may be proven by ‘other acts’ of discrimination or retaliation.”); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1286 (11th Cir. 2008) (“The ‘me too’ evidence was admissible, under Rule 404(b), to prove the intent of Bagby Elevator to discriminate and retaliate. We have upheld the admission of coworker testimony in a sexual harassment context under Rule 404(b) to prove the defendant’s ‘motive, . . . intent, . . . [or] plan’ to discriminate against the plaintiff.”).

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

20. See *infra* Parts I–II.

21. See *infra* Part II.

22. See *infra* Parts I–II.

23. See *infra* Part II.

Evidence 404(b) and state analogues, and also provide guidance to courts and attorneys involved in relevant cases.

I. BACKGROUND ON CHARACTER EVIDENCE

Imagine that a hypothetical defendant, Roy, is on trial for driving under the influence. The prosecution hopes to introduce witness testimony to show that Roy has been stopped for driving under the influence in the past, has been known to regularly get drunk and use controlled substances at parties and events, and has a general reputation for being reckless and an addict. The prosecutor hopes that evidence showing Roy's character traits and propensities will make the jury more likely to find that Roy acted in conformity with these traits and propensities in connection with the current driving under the influence charges. Roy's attorney of course disagrees, arguing that the character evidence is highly prejudicial and tells the jury little about whether Roy was actually intoxicated on the day in question. If the State's evidence rules mirror federal evidence rules, should the judge admit the character evidence?

It may seem logical that, all else equal, an individual exhibiting past propensity or character to do something, or a pattern of having done something, is more likely to have done that thing on an occasion in question.²⁴ Such propensity, character, or pattern might be demonstrated by, for example, introducing prior specific instances of like conduct, opinion testimony of witnesses who know the defendant, or evidence of the defendant's reputation.²⁵ The persuasiveness of this evidence may, logically speaking, vary depending on its quality and how similar the past pattern or propensity is to the act currently at issue.²⁶

Individuals do not, however, necessarily act in conformity with general predispositions, character, or past patterns, and introduction of propensity or character evidence raises the specter of overemphasis on the inference—and other unfairness or prejudice—that may be very difficult and time-consuming

24. See PAUL F. ROTHSTEIN, DAVID CRUMP & RONALD J. COLEMAN, EVIDENCE IN A NUTSHELL 143 (7th ed. 2022); see also Hillel J. Bavli, *An Aggregation Theory of Character Evidence*, 51 J. LEGAL STUD. 39, 39 (2022) [hereinafter Bavli, *Aggregation Theory of Character Evidence*] (“People instinctively—and logically—make predictions and estimations on the basis of prior behavior. If an employee frequently arrives late to work, an employer is likely to incorporate this conduct into her expectations for the employee’s punctuality on a particular occasion. Similarly, evidence that a robbery suspect has committed robbery in the past logically informs our judgment regarding the likelihood that he committed the act in question.”).

25. ROTHSTEIN ET AL., *supra* note 24, at 143–44.

26. *Id.* at 144 (“Instances of, or a reputation for, parking violations may not be particularly persuasive on the issue of credibility or the issue of whether the defendant committed the rape charged. . . . [but] [i]nstances of, or a reputation for, lying or sex crimes, might be.”).

to overcome, if at all, by other evidence and instructions to the factfinder.²⁷ An individual might possess a violent or peaceful character, but evidence of such character is of low probative value when used to show conformity on a given day. The evidence cannot guarantee a person will always act in conformity with their general character and it may be impossible, difficult, or time-consuming to make this totally clear to a jury.²⁸ Further, such evidence may also invite an improper finding of guilt simply because jurors do not “like” the defendant after hearing of her past wrongs.²⁹ A jury may overemphasize the inference she did something because she had previously done so, or punish her not for the crime for which she is charged but for prior undesirable conduct.³⁰ The evidence could

27. See PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE, at r. 404 (2023 ed.), Westlaw FEDRLSEV [hereinafter ROTHSTEIN, FEDERAL RULES]; see also Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 742 (2008) [hereinafter Imwinkelried, *Reshaping the “Grotesque” Doctrine*] (“A large number of psychological studies have found that there is little consistency between a person’s general character and his or her conduct on a particular occasion. Other studies tend to show that nevertheless, lay jurors tend to trust character as a basis for predicting or forecasting conduct.”). Jury instructions, for instance, may be ineffective or may raise other issues in the character evidence context. See, e.g., Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL’Y 241, 263 (2017) (“[T]here are several reasons to question the effectiveness of jury instructions for addressing the problems of character evidence.”); Dora W. Klein, “*Obviate!*”: *Addressing Magical Thinking About Limiting Instructions and Character Evidence*, 82 U. PITT. L. REV. 135, 149 (2020) [hereinafter Klein, *Magical Thinking About Limiting Instructions*] (noting: “[S]everal problems exist with using limiting instructions to diminish the risk of unfair prejudice from other-acts evidence.”); Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 335–36 (2020) (“Research indicates that implicit bias permeates multiple aspects of the criminal legal system, including the selection of jurors, jurors’ interpretation of instructions on character evidence, and disproportionate conviction of Black defendants. Even instructions like character evidence, which are seemingly neutral, are at worst not immune to the implicit racial bias of jurors. The color-blind rationale of jury instructions on flight, character evidence, and defendants’ interest in the outcome of a case allows the personal stereotypes and prejudices against racial minorities that jurors may hold to enter the courtroom completely unchecked.”); Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1, 9 (2021) [hereinafter Brown, *The Content*] (“There is abundant research that these limiting instructions do not work, and might actually backfire by drawing attention to the very thing that is meant to be ignored. If a witness is described as a ‘junkie’ or a ‘racist,’ the jury is almost certainly going to infer something negative about the kind of person the witness is. This is going to happen regardless of any instruction that the evidence only be used for purposes of assessing impeachment, for example.”).

28. See ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt.

29. *Id.*

30. See ROTHSTEIN ET AL., *supra* note 24, at 144–45 (noting also: “[T]he desirability of encouraging reform and rehabilitation by letting people know that it is not futile to change their ways—that they can live down past derelictions and that they will not be unnecessarily dogged by them the rest of their lives.”); Edward J. Imwinkelried, *Using a Contextual Construction To Resolve the Dispute over the Meaning of the Term “Plan” in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005, 1006–07 (1995) [hereinafter Imwinkelried, *Contextual Construction*] (“There is a twofold rationale for the prohibition. To begin with, if the prosecutor could invite the jury to advert consciously to the question of the accused’s character, there would be a risk that at a subconscious level the jurors might convict the accused to punish him or her for uncharged misconduct rather than because the evidence proves the accused’s guilt of the charged offense beyond a reasonable doubt. The only proper basis for a

risk misleading or confusing the jury.³¹ It could sidetrack the trial into a trial about whether the other wrongs occurred or not, rather than a trial about whether the officially charged conduct occurred.³² If, in a murder trial, the prosecution introduces evidence that defendant committed a prior unrelated offense, this could divert jury attention from the specific facts related to the currently charged murder, focusing them instead on the other offense and allowing them to decide the case based on inferences from that.³³ In addition, certain more general policy dangers outside the courtroom might occur if character evidence were broadly permitted. For example, police might relax investigatory diligence and tend merely to round up former offenders for every new crime, or offenders may begin to feel it is futile to attempt reforming

conviction is the jury's conclusion that the prosecution has established the accused's commission of the charged crime beyond such doubt. Furthermore, there is the danger that the jury would overvalue the accused's character as a predictor of conduct on the charged occasion. Psychologists disagree over the question of whether a person's character has substantial predictive value in determining the person's conduct in a specific situation, but it seems clear that laypersons ascribe great weight to assumptions about character in forecasting an individual's conduct. These twin rationales account for the first sentence of Rule 404(b.); Marsha Griggs, *Race, Rules, and Disregarded Reality*, 82 OHIO ST. L.J. 931, 939 (2021) ("If permitted, reasonable jurors could use information about a defendant's past acts or reputation as presumptively determinative of the defendant's role or responsibility for the claimed offense."); Aaron Diaz, Comment, *Restoring the Presumption of Innocence: Protecting a Defendant's Right to a Fair Trial by Closing the Door on 404(b) Evidence*, 51 ST. MARY'S L.J. 1001, 1008 (2020) ("Our inherent nature to judge people by their good or bad attributes exemplifies the danger of using character evidence in trials because we assume individuals are unlikely to deviate from their routine behavior."); see also Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1021 (2023) [hereinafter Bavli, *Conduit for Implicit Bias*] ("It is fitting that the word *character* has its origin in the Greek word *kharassein*, meaning to engrave or stamp: the image of one's character is as much a creation of the observer as a creation of the observed. In spite of this, courts routinely invite jurors to make judgments based on their perceptions regarding an individual's character. Courts thereby sanction judgments that are based on the subjective prior beliefs and prejudices of jurors rather than on the evidence in a case. Consequently, courts invite jurors to rely on their priors—including their implicit biases—regarding an individual's race, sex, appearance, accent, education, economic status, and other background characteristics when determining a verdict." (emphasis added)); Frank, *supra* note 5, at 2 ("Despite the purported protections of the Evidence Rules' propensity ban, the inability to effectively manage the racial bias triggers associated with the admission of uncharged act evidence under Rule 404(b) presents real problems for non-White defendants."); Michael D. Cicchini, *A Clean Record as Character Evidence*, 90 MISS. L.J. 315, 318 (2021) ("[I]f a defendant is to be convicted at all, it must be 'for what he did' on the day of the alleged crime, 'not for who he is.'"); Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) To Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 776 (2018) [hereinafter Capra & Richter, *Character Assassination*] ("Fundamental to the adversary system is the principle that a person should be convicted for what she has done and not for who she is.").

31. See ROTHSTEIN ET AL., *supra* note 24, at 144–46; see also Andrew Guthrie Ferguson, *Digital Habit Evidence*, 72 DUKE L.J. 723, 734–35 (2023) ("Character evidence was . . . disfavored because personal feelings about good or bad character can distract fact-finders from the actual evidence or testimony."); Fareed Nassor Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 144 (2019) ("[C]haracter evidence can confuse or distract the jury.").

32. See ROTHSTEIN ET AL., *supra* note 24, at 144–45. Among other things, this could also inordinately lengthen the trial. See *id.*

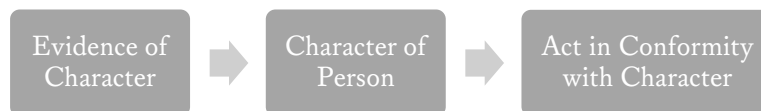
33. See ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. I.

themselves.³⁴ Unfairness may accrue to certain under-advantaged groups. Owing to concerns such as these, the common law and Federal Rule of Evidence 404 circumscribe use of character evidence.³⁵

A. Rule 404's Limited Prohibition on Character Evidence

Federal Rule of Evidence 404 offers a limited ban on admission of character evidence.³⁶ In essence, introduction of character evidence (in whatever form, e.g. a witness's opinion of, or testimony about the reputation of, an individual, or about specific past acts or conduct of the individual) is generally proscribed when used to prove the character of an individual, if such character is then used to prove or help establish an act or conduct of the individual that is in conformity with that character.³⁷ This generally prohibited chain of character inference is set out in Figure 1.

Figure 1: Rule 404's Generally Prohibited Inference Chain³⁸



34. See Paul F. Rothstein, *Comment: The Doctrine of Chances, Brides of the Bath and a Reply to Sean Sullivan*, 14 L. PROBABILITY & RISK 51, 65 (2015) [hereinafter Rothstein, *Comment: The Doctrine of Chances*]; see also Brown, *The Content*, *supra* note 27, at 3–4.

35. See, e.g., ROTHSTEIN ET AL., *supra* note 24, at 144–47; see also Reyes v. Mo. Pac. R.R. Co., 589 F.2d 791, 795 (5th Cir. 1979) (“A principle purpose behind the exclusion of character evidence . . . is the prejudicial effect that it can have on the trier of fact.”); United States v. Simpson, 992 F.2d 1224, 1229 (D.C. Cir. 1993) (“[T]he only purpose the [prosecution’s] question could have served was to demonstrate [the defendant’s] criminal propensities. The rule against the admission of such evidence is so well established that a violation of it will nearly always qualify as an obvious error.”).

36. See FED. R. EVID. 404.

37. See *id.*; ROTHSTEIN ET AL., *supra* note 24, at 146–47; see also Aníbal Rosario-Lebrón, *Evidence’s #MeToo Moment*, 74 U. MIA. L. REV. 1, 23 n.34 (2019); Sripathi, *supra* note 5, at 219 (“The character evidence rules come from [Federal Rule of Evidence] 404, which prohibits the use of evidence of a defendant’s character to prove that they had the propensity to commit the charged crime.”); Kate M. Fox, Note, *It’s the Circle of Strife: Combatting Backlash and Workplace Animus Towards Women After the #MeToo Movement*, 82 U. PITT. L. REV. 207, 230 n.144 (2020). In determining admissibility, it is therefore necessary to understand the purposes for which a piece of evidence is proffered. See Reyes, 589 F.2d at 794; see also United States v. Vasquez, 267 F.3d 79, 86 (2d Cir. 2001) (“As we concluded earlier, however, the government offered this [challenged] testimony to rebut an impression created during cross-examination . . . , not as character evidence under Rule 404.”).

38. The figures in this Article build upon or are derived from—at least in some part—a similar chart in *Evidence in a Nutshell*. See ROTHSTEIN ET AL., *supra* note 24, at 147; see also Reyes, 589 F.2d at 794 (“If the evidence is introduced for the purpose of showing that a person acted in accordance with his character on a given occasion, then the evidence is inadmissible unless it falls within one of the exceptions noted in Rule 404.”). The arrows in this Article’s figures denote that the prior link in the chain is used to prove the next link in the chain. See ROTHSTEIN ET AL., *supra* note 24, at 147.

The limited ban applies for the reasons previously mentioned.³⁹

Rule 404 thus generally offers enhanced protection against character evidence beyond that afforded all evidence under Rule 403.⁴⁰ Federal Rule of Evidence 403 entitles the court to exclude otherwise relevant evidence when “its probative value is substantially outweighed” by the danger of certain counterweights: “[U]nfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁴¹ Although Rule 403 permits exclusion of relevant evidence on the basis of prejudice or other counterweights, the balancing is tipped in favor of admissibility.⁴² In directing that evidence is admissible except where its probativity is “substantially outweighed” by a counterweight, Rule 403 makes clear that even a large amount of prejudice might not be sufficient to exclude evidence if it is sufficiently probative.⁴³ Evidence that is equally probative as prejudicial would be admissible under Rule 403, and even where prejudice outweighs probative value, the evidence would be admissible so long as prejudice does not *substantially* outweigh probative value.⁴⁴ Rule 403 also states that the court “may” exclude the evidence, implying broad discretion for the trial judge and a considerable range of allowable decisions.⁴⁵ This means that Rule 403 acts as more of a general guideline rather than as a categorical rule.⁴⁶

39. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt.

40. As a general matter, of course, Rule 403 may not override Rule 404’s limited ban on character evidence, but evidence admissible pursuant to Rule 404 must still be able to pass muster under Rule 403. FED. R. EVID. 403; ROTHSTEIN ET AL., *supra* note 24, at 102–07 (“[Rule 403] also, as a general matter, can override *permissions* to introduce evidence given in other rules, although not *exclusions*. Hence, it can override other rules but only in one direction.”); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. II.A.ii.; *United States v. Gomez*, 763 F.3d 845, 856–57 (7th Cir. 2014) (“[E]ven if other-act evidence is relevant without relying on a propensity inference, it may be excluded under Rule 403, which applies ‘with full force’ in this context, and gives the district court discretion to exclude relevant evidence if its probative value is ‘substantially outweighed by a danger of . . . unfair prejudice.’ Other-act evidence raises special concerns about unfair prejudice because it almost always carries some risk that the jury will draw the forbidden propensity inference.” (first quoting *United States v. Miller*, 673 F.3d 688, 696 (7th Cir. 2012); and then quoting FED. R. EVID. 403)).

41. FED. R. EVID. 403; ROTHSTEIN ET AL., *supra* note 24, at 105–06 (“[Federal Rule of Evidence] 403 allows the judge to exclude evidence in a particular case, even though there is no specific rule of exclusion, based on a conclusion that the probative value (relevance) of the evidence is ‘substantially outweighed’ by the listed counterweights.”).

42. ROTHSTEIN ET AL., *supra* note 24, at 106.

43. *Id.* at 106 (“Rule [403] directs the judge to admit an item of evidence that has probative value unless that value is ‘substantially outweighed’—not just outweighed, but ‘substantially’ so—by the contrary factors.”).

44. *Id.* at 106–07.

45. *Id.* at 107.

46. *See id.*; *see also United States v. Gomez*, 763 F.3d 845, 857 (7th Cir. 2014) (“Because each case is unique, Rule 403 balancing is a highly context-specific inquiry; there are few categorical rules.”).

In contrast, Rule 404 grants much stronger protection against character evidence specifically.⁴⁷ Rule 404 does not explicitly contemplate balancing, let alone balancing weighted in favor of admissibility.⁴⁸ The character evidence ban in Rule 404 also does not use the word “may,” and instead simply declares other-acts evidence “is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”⁴⁹ This means that, aside from in specifically permitted circumstances under Rule 404, Rule 404 may be seen as a categorical rule requiring exclusion of character evidence used to show conformity.⁵⁰

Rule 404 is bifurcated into two subparts: Rule 404(a) concerning general “character” and “character trait” evidence, and Rule 404(b) concerning “other crime, wrong, or act” evidence used to prove character or other things.⁵¹ Rule

47. See FED. R. EVID. 403–404. It should be noted, however, that a trial judge has broad discretion under Rule 404(b). See, e.g., *United States v. Williams*, 796 F.3d 951, 958 (8th Cir. 2015) (“We review the district court’s admission of evidence of past crimes under Federal Rule of Evidence 404(b) for abuse of discretion, and we will not reverse unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.”).

48. See FED. R. EVID. 404; see also Bavli, *Conduit for Implicit Bias*, *supra* note 30, at 1023 (“Rule 404 replaces Rule 403’s ordinary balancing analysis for character evidence: it ‘reflects the judgment of Congress that as a matter of law the probative value of propensity evidence is substantially outweighed by the risk it poses of unfair prejudice, juror confusion, and waste of time.’”); Klein, *Magical Thinking About Limiting Instructions*, *supra* note 27, at 148 (“[The Rule 403] balancing test is arguably ill-suited to giving fair consideration to the importance of a criminal defendant’s interest in the exclusion of other-acts evidence, particularly evidence of a prior conviction.”). We are talking here about the character prohibition. Rule 403 cannot be used to overcome the prohibition and to confer *admissibility* on such prohibited evidence. But to the extent Rule 404 provides exceptions to the ban, or otherwise permits evidence, the permitted evidence can be *excluded* on particular facts by the discretionary balancing provided in Rule 403. FED. R. EVID. 403–404; ROTHSTEIN ET AL., *supra* note 24, at 102–07.

49. FED. R. EVID. 404. The word “may” is used in connection with the permitted uses contained in Rule 404(b)(2), but this only implies evidence “may” be admitted not than it “may” be excluded, as would be the case under Rule 403. See *id.*

50. See ROTHSTEIN ET AL., *supra* note 24, at 107–08 (discussing the rules in article IV of the Federal Rules of Evidence subsequent to Rule 403) (“[T]hey resolve the balance definitively only for evidence they exclude. As to this evidence, the ban is stated as categorical. No balancing can render the evidence admissible on the facts of any case.”). This stronger protection might be especially important in the case of racist character evidence, which is particularly likely to be prejudicial and to invite inappropriate jury inferences. See, e.g., Morsch, *supra* note 5, at 670 (“Courts are especially careful in admitting evidence of the accused’s racist character because of the inherently prejudicial nature of such evidence.”); see also *United States v. Heuser-Whitaker*, No. 19-4837, 2022 WL 2914727, at *3 (4th Cir. July 25, 2022) (“And we have clearly recognized that ‘[t]estimony concerning racial remarks is certain to be emotionally charged.’” (quoting *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1134 (4th Cir. 1988))). Again, we are talking here about the character prohibition. Rule 403 cannot be used to overcome the prohibition and to confer *admissibility* on such prohibited evidence. But to the extent Rule 404 provides exceptions to the ban, or otherwise permits evidence, the permitted evidence can be *excluded* on particular facts by the discretionary balancing provided in Rule 403.

51. FED. R. EVID. 404.

405 sets out the mechanisms for proving character in the exceptional instances where it is permitted: reputation, opinion, and specific instances of conduct.⁵²

B. *Rule 404(a), Reputation and Opinion*

Rule 404(a)(1) generally prohibits introduction of “[e]vidence of a person’s character or character trait” in order “to prove that on a particular occasion the person acted in accordance with the character or trait” with some exceptions (in Rule 404(a)(2)).⁵³ Rule 404(a) normally concerns the opinion and reputation forms of character evidence.⁵⁴ In the hypothetical case against Roy for driving under the influence, for instance, Rule 404(a)(1) might mean that the prosecution is unable to introduce evidence of Roy’s reputation for intoxication in order to show that he was intoxicated on the day he was pulled over by law enforcement.

Certain exceptions exist to Rule 404(a)(1)’s general prohibition on character evidence.⁵⁵ First, Rule 404(a)(2)(A) provides that in a criminal case “a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.”⁵⁶ Pursuant to this exception, a criminal defendant might seek to support her argument for innocence by introducing evidence of her good character (sometimes referred to as “good guy” evidence).⁵⁷ This principle may be called “character of the accused” or, since it is a special dispensation for a criminal defendant, the “mercy” rule.⁵⁸ If the defendant offers evidence under this exception, the

52. FED. R. EVID. 405. Specifically, Rule 405 states:

When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct. . . . When a person’s character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person’s conduct.

Id.

53. FED. R. EVID. 404(a); *see also* Catherine Ross Dunham, *Reputation Evidence in the Age of Instagram*, 93 TEMP. L. REV. 575, 577–78 (2021); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian (!?) Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 641–42 (1991) (“Subject to exceptions, qualifications, and evasions, we do not allow a jury to learn that a person has acted in a given way at a time not the subject of the present litigation if the only probative value of the evidence is that it increases the probability that he acted in a similar way at a material time.”).

54. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. I.

55. *See* FED. R. EVID. 404(a)(2)–(3) (reflecting exceptions for victims or defendants in criminal cases and for witnesses).

56. FED. R. EVID. 404(a)(2)(A).

57. ROTHSTEIN ET AL., *supra* note 24, at 154.

58. *See id.* at 154–55; *see also* United States v. Green, 180 F.3d 216, 224 (5th Cir. 1999) (“In the light of [the defendant police officer]’s witnesses’ testimony that he was their mentor, a ‘good cop’, and that they looked up to him for his style of policing, the court did *not* abuse its discretion in ruling that

prosecution may seek to rebut it by offering pertinent evidence of the defendant's bad character (so-called "bad guy" evidence) or by calling into question the "good guy" witness's credibility through questioning.⁵⁹ Second, Rule 404(a)(2)(B) and (C) provide that in a criminal case:

(B) subject to the limitations in Rule 412 [relating to sexual offenses], a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

- (i) offer evidence to rebut it; and
- (ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.⁶⁰

This exception allows the defense an opportunity to evidence the victim's "bad" character, so long as it concerns a "pertinent" trait.⁶¹ Whether or not a trait is "pertinent" would generally be decided by the defensive issues raised in the case and the nature of the relevant offense.⁶² If the defense introduces such evidence regarding the victim, the prosecution may seek to rebut it or show that the

the Government was entitled to rebut that testimony with evidence that others in the law enforcement community disagreed.").

59. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. I.A. Specifically, on cross-examination, the prosecution may ask the witness: "Have you *heard* that the defendant did X [a wrong, not necessarily a conviction or crime, directly relevant to the character trait testified to by the witness]?" See ROTHSTEIN ET AL., *supra* note 24, at 157; see also FED. R. EVID. 405 advisory committee's note ("According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question."). Or, that question may be phrased as "Did you *know* that . . ." ROTHSTEIN ET AL., *supra* note 24, at 157; see also FED. R. EVID. 405 advisory committee's note ("The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions."). Of course, the prosecution retains the right to impeach the defendant's "good guy" witness in other permissible ways, such as pursuant to Rules 607–609 and Rule 613. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. I.A.

60. FED. R. EVID. 404(a)(2)(B)–(C); see also FED. R. EVID. 412.

61. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. I.B.

62. *Id.* ("The most obvious example would be where, in support of an argument of self-defense, a defendant in an assault case shows the violent character of the victim, but there are other situations encompassed. For example, in a bribery case, it might include evidence that a public official, who the prosecution claims is the victim of extortion, has a reputation for soliciting bribes. Of course, allowing the defense to show evidence of this nature runs the risk of persuading the jury that the victim deserved what he got, regardless of the defendant's culpability. The potential unfair prejudice, however, seems to be counterbalanced by the probity of such evidence if the question of a defense is truly at issue.").

defendant had the same trait.⁶³ Where the defense advances evidence of the victim as first aggressor in a homicide case, special provision is made for admission of rebuttal evidence relating to the victim's peacefulness.⁶⁴ Third, Rule 404(a)(3) provides that "[e]vidence of a witness's character may be admitted under Rules 607, 608, and 609" (rules related to impeaching or attacking the credibility of a witness).⁶⁵ This exception (or clarification) is important, insofar as it makes clear that even where a witness is a party, character evidence utilized for witness impeachment is subject to the normal impeachment rules (rather than Rules 404 or 405).⁶⁶

These three exceptions are perhaps justified because in each instance the evidence's probative value is arguably increased while the risk of prejudice is arguably reduced, or because admitting the evidence is otherwise deemed fair under the circumstances.⁶⁷ The proper form of proof in connection with these exceptions is largely confined to opinion or reputation evidence.⁶⁸

C. Rule 404(b), Specific Instances and the MOIPPKIAL Factors

In contrast to Rule 404(a), Rule 404(b) concerns evidence of specific instances of conduct.⁶⁹ Rule 404(b)(1) generally prohibits use of "[e]vidence of any other crime, wrong, or act . . . to prove a person's character" for purposes of showing "that on a particular occasion the person acted in accordance with the character."⁷⁰ In the hypothetical case against Roy for driving under the

63. ROTHSTEIN ET AL., *supra* note 24, at 159–62 ("Thus, if the defendant claims the victim had a violent character, the prosecutor now can show that the defendant also had this trait.").

64. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. I.B. (noting this may apply "even if the evidence that the victim was the first aggressor was not in the form of a character showing concerning the victim (for example, it might be simply an eyewitness to the attack who testifies the victim was the first aggressor)").

65. FED. R. EVID. 404(a)(3); *see also* FED. R. EVID. 607–609.

66. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. I.C.

67. *Id.* at r. 404 cmt. pt. I.

68. *Id.* This is because Rule 405 in part imposes a form-of-evidence limit on evidence admissible under Rule 404(a)(2). *See id.*; FED. R. EVID. 405.

69. *See* ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.; *see also* Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 42 ("Rule 404(b) includes a particularly important application of the ban on character evidence in 404(a)."); James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 213 (2019) ("FRE 404(b) addresses the admissibility of a particular type of character evidence . . ."); Klein, *(Mis)application of Rule 404(b)*, *supra* note 17, at 712 ("Rule 404(b) exists because common-law judges feared that juries would over-value character evidence.").

70. FED. R. EVID. 404(b)(1); *see also* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 566–67 (1997) ("This well-established Rule operates notwithstanding the clear probative value of prior act evidence. Whether something has happened before is usually relevant to an inference that it might happen again."). Again, there are situations where this general prohibition is inapplicable, which we will discuss further *infra*. *See* FED. R. EVID. 404(b)(2); *see also* Reyes v. Mo. Pac. R.R. Co., 589 F.2d 791, 794 (5th Cir. 1979) (noting "exceptions" in Rule 404). The risks associated with character evidence described above—such as prejudice or

influence, for instance, Rule 404(b) might mean that the prosecution is unable to introduce evidence of Roy's past drug- or alcohol-related offenses to show that Roy was similarly intoxicated on the day he was pulled over by law enforcement.

Rule 404(b) also sets out permissible uses of specific instances evidence.⁷¹ Specifically, this provision provides other-acts evidence:

may be admissible for another purpose [one other than the prohibited purposes in (b)(1), showing character to show an act in conformity with it], such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.⁷²

confusion—may be especially acute in the specific instances context. *See, e.g.*, Imwinkelried, *Defending the Doctrine*, *supra* note 16, at 2 (“Testimony about an accused’s other crimes can be so prejudicial that it is ‘often virtually decisive of the whole case.’” (quoting P.B. Carter, *The Admissibility of Evidence of Similar Facts*, 70 *LAW Q. REV.* 214, 215 (1954))); James DeCleene, Comment, *A Prosecutor’s Guide to Character Evidence: When Is Uncharged Possession Evidence Probative of a Defendant’s Intent To Distribute?*, 98 *MARQ. L. REV.* 1383, 1384 (2015) (“[Rule 404(b)] itself can often be confusing in application and requires jurors to undertake extremely complicated analyses.”); Capra & Richter, *Character Assassination*, *supra* note 30, at 772 (“Proof of a criminal defendant’s past crimes has a dramatic effect on a jury, almost guaranteeing conviction.”); Deena Greenberg, Note, *Closing Pandora’s Box: Limiting the Use of 404(b) To Introduce Prior Convictions in Drug Prosecutions*, 50 *HARV. C.R.-C.L. L. REV.* 519, 521 (2015) (“The introduction of prior convictions has a significant effect on whether a defendant is convicted The introduction of prior convictions raises additional concerns when considering how convictions through guilty pleas are procured. Guilty pleas represent 97% of federal drug convictions and 90% of all federal drug cases.”); Edward J. Imwinkelried, *Criminal Minds: The Need To Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence To Prove Intent*, 45 *HOFSTRA L. REV.* 851, 852–53 (2017) [hereinafter Imwinkelried, *Criminal Minds*] (“Prosecutors frequently offer uncharged misconduct under Rule 404(b)(2) because they appreciate that its introduction can have a devastating impact on the defense.”); Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 *FLA. L. REV.* 347, 349–50 (2018) (presenting empirical study); Sean D. Thomas, Note, *Will Rule 404(b) Ever Be Predictable?*, 121 *W. VA. L. REV.* 295, 299 (2018) (discussing empirical research).

71. FED. R. EVID. 404(b)(2); Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 42 (“Rule 404(b)(2) provides that other-acts evidence may be admissible for nonpropensity purposes . . .”).

72. FED. R. EVID. 404(b)(2); Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 *U. RICH. L. REV.* 419, 422 (2006) [hereinafter Imwinkelried, *An Evidentiary Paradox*]. Note that if the defense concedes the only fact that other-acts evidence seeks to prove, it may be inadmissible. *See Old Chief v. United States*, 519 U.S. 172, 174–78 (1997) (finding district court abused its discretion in admitting evidence of prior conviction to establish defendant was a felon where defendant conceded the prior conviction); *see also* ROTHSTEIN ET AL., *supra* note 24, at 177–79 (“The [*Old Chief*] Court . . . seemed to suggest a general proposition that a concession or alternative evidence can in appropriate circumstances preclude prosecution proof that entails some prejudice along with its probative value. An exception mentioned by the Court would be where the prosecution’s proof would add something legitimate to the picture (or add persuasive power) that would be lacking if only the concession (or alternative evidence) were accepted, such as telling the full story better The present authors would add that the additional ‘something’ added by the prosecution’s evidence would have to be not only legitimate, but also, under Rule 403, sufficient to outweigh the risk of prejudice introduced by the prosecution’s evidence.”).

The provision is unclear as to whether “another purpose” can mean “another purpose *in addition to*” the (b)(1) prohibited purpose or is meant to confine the permission to “another purpose *instead of*” the (b)(1) prohibited purpose.⁷³ The difference in result between these two views would be manifest where the factfinder, to reach a permitted purpose (such as motive or intent), must first conclude the evidence shows a character and that an act conformed with that character.⁷⁴

We may refer to the enumerated permitted uses (“motive, opportunity, intent . . .”) as the “MOIPPKIAL Factors” for purposes of this Article.⁷⁵ Such factors are nonexhaustive and meant to enumerate situations where the offered evidence is highly probative in advancing an argument for defendant’s guilt.⁷⁶ Once it is demonstrated that relevant evidence is proffered for one of the MOIPPKIAL Factors—or for any other relevant purpose aside from showing character to show conformity—Rule 404(b) on its own would not necessitate the evidence’s exclusion, at least if establishing the MOIPPKIAL Factor does not require the factfinder to indulge the prohibited character inference on the

73. By “*in addition to*” we mean the permitted chain of inference sought to be drawn from the piece of evidence includes the prohibited inference (act to prove character to prove action in conformity with character), which then in turn leads to another, that “additional” conclusion (the permitted purpose, say “motive”). We do not mean that if the goal of one chain of inference is the unpermitted purpose, and another wholly independent chain of inference from the same piece of evidence leads to a permitted purpose, the evidence qualifies as permitted under the “purpose in addition to the prohibited purpose” view. Where there are these two chains possible, the jury would be instructed that the prohibited purpose chain is not permissible, but the other chain is permissible, or, if this instruction is deemed futile or inadequate, the evidence might be excluded entirely.

74. Interestingly, the racist character evidence we are examining in this Article may be just this type of case. It is clear that the “purpose” for such racist character evidence would require the factfinder to infer racism, which does at least *seem* to be character, but does it also require an inference *from that character of racism* that there was conformity with that character on the particular occasion charged? Or does that inference (the connection between the character of racism and a charged act) arise from other evidence? Either way, is it forbidden by the rule? Or is the latter not what the rule intends to prohibit? And is racism, as discussed in this Article, really “character”? We will revisit and explore these issues in Part II.

75. See ROTHSTEIN ET AL., *supra* note 24, at 162 n.2; FED. R. EVID. 404(b)(2) (“This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”).

76. ROTHSTEIN ET AL., *supra* note 24, at 163–64 (“[T]he list of proper purposes is merely illustrative and not exclusive, and this is supported by the entire grammatical structure of the rule and the words ‘such as’ that introduce the list . . .”). We use the word “guilt” for expositive purposes but realize the rule applies to civil cases as well and to subordinate factual issues (other than ultimate guilt or liability) in both civil and criminal cases.

way.⁷⁷ Because Rule 404(b) seems to have such a broad range of permissible purposes and evidence, it is referred to by some as an “inclusionary” rule.⁷⁸

For a famous illustration of how past acts evidence might be admissible pursuant to factors such as those enumerated in Rule 404(b), consider the English “Brides of the Bath” case.⁷⁹ In that case, three of defendant’s wives drowned in a bathtub, each of whom had some wealth and left inheritance to the defendant.⁸⁰ Only one of the drownings was charged against defendant.⁸¹ In the trial, the judge admitted evidence relating to the other drownings to help prove “design” in connection with the present charge.⁸² This concept of “design” might be considered akin to “plan” under current Rule 404(b), but other MOIPPKIAL Factors seemingly applicable in a “Brides of the Bath” fact pattern might include knowledge, intent, motive, lack of accident, or absence of mistake.⁸³

Another illustrative example is *Jones v. State*.⁸⁴ In *Jones*, a woman stood accused of theft after having allegedly rubbed her body against the victim in a

77. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II (noting, for instance, “the counterweights of Rule 403, weighted in favor of admissibility” would still apply); ROTHSTEIN ET AL., *supra* note 24, at 164 (“Specific acts (other crimes, wrongs, or acts) are authorized (unless barred by another rule, e.g., Rule 403) for *any* relevant or material purpose other than the purpose specifically and expressly prohibited by the rule.”).

78. ROTHSTEIN ET AL., *supra* note 24, at 164; Capra & Richter, *Character Assassination*, *supra* note 30, at 772 (“Notwithstanding its origins as part of a rule with an exclusionary purpose, Rule 404(b) has been characterized by many federal circuit courts as a rule of inclusion. Treating the Rule as one of inclusion, federal courts routinely admit other-acts evidence, especially in drug cases This occurs even when the relevance of the defendant’s uncharged acts depends on the defendant’s propensity to behave in certain ways and even when the defendant has not contested elements of the charged offense that the other-acts evidence would be used to prove.”); Klein, *Rule of Inclusion*, *supra* note 16, at 381 (“[M]any of the federal circuit courts of appeals have issued opinions implying or even explicitly asserting that the ‘inclusive’ structure of Rule 404(b) creates a ‘presumption of admissibility’”); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II (“This is not to say, however, that the exceptions consume the general inadmissibility prescribed by the rule”). The rule applies to “bad” as well as “good” acts, although it may be more common for “bad” acts to be offered. *See id.*; *see also* ROTHSTEIN ET AL., *supra* note 24, at 165 (“Rule 404(b) is not exclusively confined to criminal cases, nor to conduct of parties, nor to bad conduct, nor does it require that convictions be the form of the evidence where bad conduct is offered.”).

79. *Rex v. Smith* (1915) 11 Crim. App. 229 (UK).

80. *See id.* at 229; Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1260 (1995) [hereinafter Rothstein, *Intellectual Coherence*]; Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 43–44 (discussing *Smith*).

81. *See Smith*, 11 Crim. App. at 229.

82. *Id.* at 237; Rothstein, *Intellectual Coherence*, *supra* note 80, at 1261.

83. Rothstein, *Intellectual Coherence*, *supra* note 80, at 1261; ROTHSTEIN ET AL., *supra* note 24, at 166. It should be noted, in a “Brides of the Bath” scenario, no actual conviction for the prior drownings is necessary. ROTHSTEIN ET AL., *supra* note 24, at 166 (“Any current admissible evidence (for example, witness testimony) of the other bathtub deaths will do. The evidence thereof need only convince the jury that they happened, not beyond a reasonable doubt. No formal proof of defendant’s connection with them is needed, since a jury could infer that from the occurrences themselves.”).

84. 376 S.W.2d 842 (Tex. Crim. App. 1964).

sexual fashion in order to facilitate picking his pocket.⁸⁵ Evidence of the accused's involvement in prior incidents where she allegedly engaged in similar physical contact with men in order to steal from them in a similar fashion was admitted into evidence over the objection that such evidence was immaterial, irrelevant, and highly prejudicial.⁸⁶ The evidence was held admissible to show intent, motive, malice, identity, or common scheme or plan, several of which proper purposes are now incorporated into Rule 404(b)'s MOIPPKIAL Factors.⁸⁷

There is marked overlap among the different MOIPPKIAL Factors, and they are nonexhaustive, so we will explore some additional illustrative cases.⁸⁸ We will divide the cases we discuss into two types: (1) those, like “Brides of the

85. *Id.* at 842–43.

86. *Id.* at 843.

87. *Id.* at 843–44 (“The two collateral offenses show more than a similarity in results. They show a common plan and systematic course of action. The peculiar way in which the other business men lost their money upon the same course of conduct by the [accused] was a circumstance that was available to the state to prove the [accused's] guilt of theft from the person of [the victim]. The evidence showed system, not merely systematic crime, and the court did not err in admitting it for the limited purposes stated.”). Even “rap lyrics” have been discussed as character evidence in the context of Rule 404(b). See Sripathi, *supra* note 5, at 219 (“Rap lyrics enter the courtroom through the character evidence rules . . . Prosecutors aiming to use a defendant's rap lyrics against him or her typically utilize the exception granted under 404(b)(2) to argue that the lyrics demonstrate prior knowledge or intent to commit the charged crime.”); Reyna Araibi, Note, “*Every Rhyme I Write*”: *Rap Music as Evidence in Criminal Trials*, 62 ARIZ. L. REV. 805, 830 (2020) (“[R]ap lyrics are often admitted as other acts evidence under Federal Rule of Evidence 404(b)(2).”); Luke Walls, Note, *Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics To Prove Defendants' Character*, 48 SW. L. REV. 173, 176 (2019) (“One means of introducing these lyrics as evidence has been as admissible character evidence under Rule 404(b).”); Christian A. LoBealeo, Recent Development, *United States v. Sims: The Fifth Circuit's Failure To Protect “Rap on Trial” Under Rule 404(b)*, 96 TUL. L. REV. 1003, 1011 (2022) (“Lyrics or acts with sufficient specificity to the crime charged may fall under the exception to character evidence found in FRE 404(b)(2).”).

88. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. II.B. (“For example, prior or subsequent very similar crimes committed with a similar modus operandi to the offense the criminal defendant is charged with could come in under ‘plan’ (which often means similar blueprint rather than part of an overarching plan formed at one time, although both are permissible uses of ‘plan’ as used in the rule), or could come in under ‘motive,’ ‘intent,’ ‘identity,’ or ‘absence of mistake or accident.’ ‘Opportunity’ or ‘preparation’ may also apply. ‘Plan’ and ‘identity’ seem to be frequently used for this situation, among others. ‘Pattern’ is another word for it, although it is not expressly included on the [MOIPPKIAL] list of permissible purposes. But the list is not exhaustive.”). Since the MOIPPKIAL Factors are nonexhaustive, for instance, in a given case, it may be possible to argue that “relationship” also constitutes a factor. See, e.g., *United States v. Guerrero*, 169 F.3d 933, 943–44 (5th Cir. 1999) (“The Government contends that the evidence regarding [one individual's] involvement in the robberies and [the convicted individual's] connection to him was admissible because it completes the story of the crime. Pursuant to Rule 404(b), our court has approved such extrinsic evidence . . . And, our court has approved the admission of evidence regarding the defendant's relationship with another person where it was relevant in allowing the jury to determine whether the defendant committed the crime charged.”); *United States v. Procopio*, 88 F.3d 21, 29 (1st Cir. 1996) (discussing “criminal association”); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. subsec. II.B.viii. We will not necessarily treat all these factors; rather, we will discuss an illustrative set of propensity-required and nonpropensity cases.

Bath” and *Jones* just above, where the theory of relevance involved requires the factfinder to find that there was a propensity and that the individual acted in accord with it (i.e., propensity-required cases); and (2) those where no such propensity reasoning is required (i.e., no propensity cases).⁸⁹ Since the propensity-required cases involve propensity with conformity reasoning, such cases could be construed to involve both a permitted and prohibited purpose under Rule 404(b).⁹⁰

1. Propensity-Required Cases

Certain MOIPPKIAL Factors cases require propensity reasoning, and so seemingly involve both permitted and impermissible purposes under Rule 404(b). We will consider a number of propensity-required cases here.

A leading example relating to the knowledge and intent factors is *Hammann v. Hartford Accident & Indemnity Co.*⁹¹ In *Hammann*, Bruce Hammann pursued an action for recovery under an insurance policy relating to fire damage to a barn.⁹² The fire had been initially observed a short time after Hammann’s return from the barn.⁹³ Hammann claimed that lightning started the fire, but defendant company presented evidence suggesting it was incendiary and started through use of an accelerant.⁹⁴ Defendant was also permitted to admit evidence of several past fires occurring on property belonging to Hammann resulting in insurance recoveries.⁹⁵ Hammann contended such evidence was prejudicial and irrelevant—essentially that it was impermissible character evidence—but defendant argued it was properly admitted pursuant to Rule 404(b).⁹⁶ The appellate court found that the evidence was properly admitted for several reasons, including that the jury was instructed to consider the fires as only bearing on Hammann’s motive and that defendant insurance company had asserted incendiarism as a defense, which required evidence relating to Hammann’s knowledge or intent.⁹⁷ This theory of relevance required the

89. The determination of which of these two is involved in a case does not depend on which of the MOIPPKIAL Factors is involved. Rather, it depends on how the other wrongful act is relevant on the facts of the particular case. Many of the individual MOIPPKIAL Factors can embrace either of the two kinds of cases.

90. That is, both of them in the single permitted chain of reasoning. We will examine ways of reconciling this in Part II.

91. 620 F.2d 588, 588 (6th Cir. 1980). Although this was a civil case, the character rules relevant to our discussion generally apply alike to civil and criminal cases.

92. *Id.*

93. *Id.*

94. *Id.* at 588–89.

95. *Id.* at 589 (“At least six other fires had occurred on various tracts of property belonging to the plaintiff over the years. Four of them resulted in insurance recoveries. The trial judge excluded evidence of fires which did not result in any recovery. Also excluded was any evidence of the circumstances surrounding the four fires yielding insurance recoveries.”).

96. *Id.*

97. *Id.*

factfinder to find there was a propensity on Hammann's part that he acted in accord with.

Another illustrative intent case is *United States v. Beechum*,⁹⁸ in which a substitute letter carrier, Orange Jell Beechum, had been convicted for possessing a silver dollar known to have been stolen from the mail.⁹⁹ Beechum claimed he intended to turn in the silver dollar.¹⁰⁰ To establish Beechum's intentional and unlawful possession of the silver dollar, the prosecution introduced two credit cards into evidence that had been found in his possession.¹⁰¹ These two credit cards were not issued to Beechum, neither was signed, and separate evidence indicated that such cards had previously been mailed to addresses on routes serviced by Beechum.¹⁰² Of Rule 404(b), the court stated:

The rule follows the venerable principle that evidence of extrinsic offenses should not be admitted solely to demonstrate the defendant's bad character. Even though such evidence is relevant, because a man of bad character is more likely to commit a crime than one not, the principle prohibits such evidence because it is inherently prejudicial. Without an issue other than mere character to which the extrinsic offenses are relevant, the probative value of those offenses is deemed insufficient in all cases to outweigh the inherent prejudice. Where, however, the extrinsic offense evidence is relevant to an issue such as intent, it may well be that the evidence has probative force that is not substantially outweighed by its inherent prejudice. If this is so, the evidence may be admissible.¹⁰³

The court found that "a straightforward application of the Federal Rules of Evidence call[ed] for admission of the cards," noting that the credit card evidence was relevant to Beechum's intent.¹⁰⁴ But again, the theory of relevance required the factfinder to find there was a propensity that was acted in accord with.

In *Huddleston v. United States*,¹⁰⁵ a case illustrative of the knowledge factor, Guy Rufus Huddleston had been charged with crimes relating to possessing and

98. 582 F.2d 898 (5th Cir. 1978).

99. *See id.* at 903; *see also* DeCleene, *supra* note 70, at 1394–400 (discussing *Beechum*).

100. *Beechum*, 582 F.2d at 908.

101. *Id.* at 903.

102. *Id.*

103. *Id.* at 910; *see also* Jane Kelly, *The Power of the Prior Conviction*, 97 N.Y.U. L. REV. 902, 905 (2022) ("[A] defendant's prior convictions can be used against them to prove their intent to commit the charged crime . . .").

104. *Beechum*, 582 F.2d at 910, 916 (concluding that the credit card evidence also met Rule 403's requirements).

105. 485 U.S. 681 (1988).

selling stolen video tapes.¹⁰⁶ It was not disputed that the tapes were stolen, only that Huddleston knew they were.¹⁰⁷ The prosecution was permitted to admit similar acts evidence relating to Huddleston's prior sales of purportedly stolen televisions and appliances.¹⁰⁸ The jury was informed that the past acts evidence was only to be used in establishing Huddleston's knowledge and not in proving Huddleston's character, and introduction of the evidence was not overturned on appeal.¹⁰⁹ Similar to the prior two cases discussed here, propensity reasoning was required in *Huddleston*.

*United States v. Lindsay*¹¹⁰ is an analytically questionable but not atypical recent example of the plan factor.¹¹¹ In *Lindsay*, Michael Lindsay was on trial for sexual assault, and he had earlier been convicted of several crimes, including criminality involving illicit sexual contact abroad.¹¹² The trial court had admitted certain messages relating to that criminality showing Lindsay's sexual relations with other teenage girls under Rule 404(b) to show "plan," "opportunity," and "state of mind."¹¹³ The appellate court affirmed the conviction, stating that the messages did not reflect that Lindsay "must have had sex" with the victim, only that Lindsay was "more likely" to have.¹¹⁴ The court also noted:

When certain evidence may allow the jury to draw a propensity inference, but may also allow the jury to evaluate a legitimate purpose, . . . the mere fact of the potential propensity inference does not render the evidence inadmissible While there was a strong propensity inference that could have been drawn from the instant

106. *Id.* at 682.

107. *Id.* at 683–84.

108. *Id.*

109. *See id.* at 684, 690–92; *see also* Klein, *(Mis)application of Rule 404(b)*, *supra* note 17, at 713–16 (discussing *Huddleston*); Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1908–09 (2019) (same); Capra & Richter, *Character Assassination*, *supra* note 30, at 777 ("In *Huddleston v. United States*, the Supreme Court outlined the proper methodology for determining the admissibility of evidence of a criminal defendant's other crimes, wrongs, or acts. The Court set out a four-part test, which has been utilized with some linguistic modifications across the federal circuit courts.>").

110. 931 F.3d 852 (9th Cir. 2019).

111. *See id.*; *see also* Imwinkelried, *Contextual Construction*, *supra* note 30, at 1007–08 ("Presented with proof of the accused's perpetration of proximate, similar crimes, some courts treat 'plan' as a magic incantation that has an 'open sesame' effect and clears the way for the admission of testimony about the uncharged crimes.>").

112. *Lindsay*, 931 F.3d at 856 (noting "Lindsay was convicted of travel with intent to engage in illicit sexual conduct, engaging in illicit sexual conduct abroad, attempted witness tampering, and obstruction of justice").

113. *Id.* at 857.

114. *Id.* at 868–69 ("[T]he district court admitted the messages to show the purpose of the list in Lindsay's notebook, which made it more likely that Lindsay had sex with [the victim].").

messages, the messages were not admissible or admitted for that purpose.¹¹⁵

The court plainly felt the permitted purposes were mutually exclusive of the prohibited propensity purpose. It also seems to have equated the term “propensity” with the term “character” under the rule, because it is “character” that the rule prohibits. That being so, it is strange that the decision did not recognize that the purpose the court allowed (drawing the “more likely” inference mentioned) is identical to the propensity purpose the court indicated would be improper.

*United States v. Wonderly*¹¹⁶ illustrates the “lack of accident” or “absence of mistake” factors.¹¹⁷ In *Wonderly*, Suzanne Wonderly appealed final judgment convicting her of certain particular wire fraud-related offenses, where the relevant scheme involved using misrepresentations and false documentation to take money from investors without, in many cases, ever paying it back.¹¹⁸ Wonderly asserted, among other things, that the district court had abused its discretion by admitting evidence of other somewhat similar wrongful acts—including testimony of two individuals relating to investments made following the dates that were charged in the indictment—used to show absence of accident or mistake.¹¹⁹ The appellate court determined that Wonderly had “described herself as the innocent messenger for” another defendant in the matter and that the challenged evidence was relevant to establish absence of mistake.¹²⁰ The court did not, however, address the fact that a seemingly permitted and impermissible propensity purpose was involved in the permitted chain of reasoning.

Similarly, in *United States v. Pelusio*,¹²¹ which will be our final case involving propensity reasoning, Michael and Thomas Pelusio had been convicted of offenses relating to receipt of ammunition and firearms.¹²² The case arose out of gang hostilities, and Michael and Thomas’s destruction of a window by shotgun blast in apparent retaliation for the killing of their brother.¹²³ Thomas had testified at trial that he was not aware the shotgun was in the car and that he would not have gotten into the car had he known of the gun’s

115. *Id.* at 868.

116. 70 F.3d 1020 (8th Cir. 1995).

117. *Id.* at 1023–24; FED. R. EVID. 404(b).

118. *Wonderly*, 70 F.3d at 1022–23.

119. *Id.* at 1023 (“Upon review of the government’s proffer of Rule 404(b) evidence, the district court held that the evidence now being challenged on appeal was admissible to prove absence of mistake or accident because defendant’s anticipated defense theory was that she acted in good faith as an intermediary for [the other defendant].”).

120. *Id.* at 1024.

121. 725 F.2d 161 (2d Cir. 1983).

122. *Id.* at 164.

123. *Id.*

presence.¹²⁴ The prosecutor, however, had cross-examined Thomas at trial regarding prior instances where he had been in a car with a shotgun.¹²⁵ On appeal, the court determined that the prior instances evidence was properly admitted both as credibility impeachment and to establish Thomas's "presence in the car with the shotgun was intentional and not a mistake or accident."¹²⁶

In each of these cases, the theory of relevance the court accepted clearly required the factfinder to find the party had a propensity that they acted in accord with, which Rule 404(b) seems to forbid. Courts appear to overlook this, or to regard the "propensity" as not "character" (only the latter of which technically is banned), or to feel that the permissible purposes in the rule are *exceptions* to the ban on the character-to-show-conformity purpose, rather than *purposes in contradistinction to, alternative to, and mutually exclusive of* the normally banned character-to-show-conformity purpose.¹²⁷

2. No Propensity Cases

The cases in Section I.C.1 are fairly typical of what courts are doing with Rule 404(b) and state evidence rules that are similar. As demonstrated above, the cases involve the dilemma that courts seem to allow ostensibly prohibited propensity reasoning if it logically brings the factfinder to find one of the MOIPPKIAL Factors. But there are some cases allowing evidence under the MOIPPKIAL Factors that do not present this ostensible dilemma because the chain of reasoning leading to those factors does not involve the tendency of humans to repeat—that is, they do not involve propensity. Such cases are not confined to any particular one of the MOIPPKIAL Factors, but can occur under almost any of them, depending on the particular facts. We will consider a number of such cases here.

In *United States v. Peltier*,¹²⁸ a helpful example focused on motive, Leonard Peltier had been charged and convicted in connection with the murder of two federal agents.¹²⁹ The agents had been in vehicles following several individuals riding in a van.¹³⁰ After the van and the agents stopped, firing commenced and the agents were eventually killed.¹³¹ The government had largely circumstantial evidence against Peltier, including that he was allegedly in the van being followed and that there was an outstanding bench warrant against him for a prior crime (which suggested he had reason to have known he was being

124. *Id.* at 167.

125. *Id.*

126. *Id.* at 168.

127. We will revisit these issues *infra* Part II.

128. 585 F.2d 314 (8th Cir. 1978).

129. *Id.* at 320.

130. *Id.* at 318.

131. *Id.*

followed by the agents for that other warrant).¹³² Peltier contested the admissibility of evidence of the prior bench warrant.¹³³ The appellate court, however, agreed with the government that such evidence was admissible to show “motive,” since it helped demonstrate why Peltier had reacted with lethal force when followed by the agents.¹³⁴

*United States v. Fulmer*¹³⁵ is another “motive” example, which concerned an individual, Kevan Fulmer, convicted for having threatened a federal agent.¹³⁶ Fulmer had commented to the agent on allegedly illicit or inappropriate activities of certain of his family members.¹³⁷ The United States Attorney’s Office decided not to prosecute the case against Fulmer’s family members, and the federal agent transmitted that message to Fulmer.¹³⁸ Fulmer protested the decision and then later sent a purportedly threatening voicemail message to the agent.¹³⁹ At trial of Fulmer for the threat, the agent was permitted to testify as to several statements made by Fulmer and his family, including one suggesting “hard feelings” between Fulmer and his family and another suggesting that Fulmer’s allegations constituted “vengeance.”¹⁴⁰ Fulmer argued that introduction of these statements violated Rule 404(b), since the mentioned acts would tend to show propensity for bad acts, but the appellate court determined the evidence could go to Fulmer’s “motive” or “intent” to threaten the agent.¹⁴¹ Drawing the MOIPPKIAL Factors conclusion properly sought by the introduction of this evidence did not require the factfinder to find a propensity (as was required in the propensity-required MOIPPKIAL Factors cases above). This case was substantially like *Peltier* just above.

For another case illustrating MOIPPKIAL Factors without propensity (here, under the “preparation” factor), consider *United States v. Reed*.¹⁴² In *Reed*, Deonte Reed had been convicted of several crimes: “[C]onspiracy to interfere with commerce by robbery,” “conspiracy to possess cocaine with intent to distribute,” “possession of a firearm in furtherance of a drug trafficking crime,”

132. *Id.* at 319–21.

133. *Id.* at 321.

134. *Id.*

135. 108 F.3d 1486 (1st Cir. 1997).

136. *Id.* at 1489–90.

137. *Id.*

138. *Id.*

139. *Id.* at 1490.

140. *Id.* at 1501.

141. *Id.* at 1501–02 (“Whether Fulmer’s family relationship was strained, whether he had been restrained from seeing his family, whether he harbored ill feelings toward his former father-in-law and brother—all of these things are especially relevant to understanding Fulmer’s motivation in his pursuit of sanctions against his former family and perhaps the extent of his potential disappointment at the government’s failure to prosecute . . .”).

142. 459 F. App’x 644, 646 (9th Cir. 2011).

and “aiding and abetting.”¹⁴³ Evidence was admitted of a burglary where Reed had stolen “the gun he planned to use in this case.”¹⁴⁴ The appellate court found that such burglary was admissible pursuant to Rule 404(b) to show planning or preparation.¹⁴⁵ The gun enabled some of the charged crimes, without any necessity of invoking any propensity.

*United States v. Torres-Flores*¹⁴⁶ illustrates the same idea, this time under the “identity” factor of the MOIPPKIAL Factors.¹⁴⁷ In *Torres-Flores*, Mario Antonio Torres-Flores had been convicted for assaulting a border patrol agent.¹⁴⁸ The only disputed issue was the identity of the individual who fired the weapon at the agent.¹⁴⁹ The lower court had admitted, among other things, testimony that Torres-Flores was apprehended for certain unspecified offenses near the scene of the crime both before and after the agent assault in question.¹⁵⁰ The appellate court determined that such evidence was used in corroboration of Torres-Flores as the assailant, and found that the lower court had not abused its discretion by admitting the evidence.¹⁵¹ It showed location near the charged crime without resort to any propensity.

United States v. Covelli,¹⁵² the final case we will consider here, is illustrative of our current category of cases, this time under the “opportunity” factor in the MOIPPKIAL Factors.¹⁵³ In *Covelli*, three defendants, including Robert Covelli, were convicted of offenses arising out of a jewelry and coin shop robbery.¹⁵⁴ Witness testimony on Covelli’s past possession of a pistol was admitted to show, in part, “identity” and “opportunity” to commit the current crime, and the appellate court affirmed Covelli’s conviction.¹⁵⁵ This last case is more complex than the other no propensity cases discussed here, however, in that *Covelli* actually involves a propensity reasoning aspect as well.

In general, these no propensity MOIPPKIAL Factors cases avoid the seemingly problematic propensity reasoning. Moving beyond the MOIPPKIAL Factors, another area where character evidence may be admissible is where character is considered an essential element.

143. *Id.*

144. *Id.*

145. *Id.* at 646–47.

146. 827 F.2d 1031 (5th Cir. 1987).

147. *See id.* at 1031–32.

148. *Id.* at 1032.

149. *Id.*

150. *Id.* at 1033–34.

151. *Id.* at 1034.

152. 738 F.2d 847 (7th Cir. 1984).

153. *Id.* at 847–57.

154. *Id.* at 849.

155. *Id.* at 855–57.

D. *Rule 405 and Character as an Essential Element*

In certain instances, character or a character trait may constitute an essential element of a claim, charge, or defense.¹⁵⁶ As such, character is not used in the circumstantial way forbidden by Rule 404; that is, it is not used to show an act in accordance with the character, but is more directly in issue. In such circumstances, all forms of character evidence consistent with other rules may be used to evidence the character, including specific instances.¹⁵⁷ In connection with specific instances, Rule 405(b) provides:

When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may . . . be proved by relevant specific instances of the person's conduct.¹⁵⁸

For example, imagine Nora has engaged in character assassination of a business rival by making allegedly false claims about the rival. These false claims included that the rival had a bad character or reputation, perhaps in a certain respect. In a suit by the rival for defamation, both Nora and the rival may want to introduce evidence of the falsity or the truth of these allegations. Further, the rival may need to prove that Nora's statements injured the rival's character or reputation. Evidence on all this may be admissible.¹⁵⁹

United States v. Reed, discussed above, offers an illustrative example.¹⁶⁰ In *Reed*, Reed had been convicted of several offenses, and he objected to admission into evidence of his subsequent criminal activity.¹⁶¹ However, Reed had asserted an entrapment defense, which required the prosecution to prove, among other things, that "the defendant was predisposed to commit the crime before being contacted by government agents."¹⁶² Since predisposition is arguably character, certain proffered evidence regarding Reed's criminal behavior was deemed relevant.¹⁶³ The court held admissible "the character or reputation of the defendant, including any prior criminal record."¹⁶⁴ No abuse of discretion on that point was found.¹⁶⁵

It is also worth mentioning *Old Chief v. United States*¹⁶⁶ here. In *Old Chief*, the defendant, Old Chief, had been charged under the felon-in-possession

156. See FED. R. EVID. 405(b).

157. See *id.*; see also *United States v. Reed*, 459 F. App'x 644, 646 (9th Cir. 2011) ("When character of a person is an essential element of a charge or defense, the Federal Rules of Evidence allow proof to be made by specific instances of that person's conduct.").

158. FED. R. EVID. 405(b).

159. See ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 405 (referencing defamation example).

160. *Reed*, 459 F. App'x at 644.

161. *Id.* at 646.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 646–47.

166. 519 U.S. 172 (1997).

statute, which made it illegal for someone “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” to “possess in or affecting commerce, any firearm.”¹⁶⁷ The prior crime punishable for over a year for which Old Chief had been convicted was “assault causing serious bodily injury.”¹⁶⁸ Old Chief offered to stipulate to this prior conviction.¹⁶⁹ He argued this would be sufficient for the prior conviction element of the currently charged possession crime.¹⁷⁰ He did not want the nature or name of the conviction revealed.¹⁷¹ At trial, the prosecution introduced a record of Old Chief’s prior conviction.¹⁷² Although largely focused on Rule 403, in finding the lower court abused its discretion in admitting the record, the Court noted, among other things, there was no “cognizable difference between the evidentiary significance” of the stipulation and the prosecution’s record, but suggested there was inherent risk of prejudice in the prosecution’s record that was not present in the stipulation.¹⁷³ The prosecution was required to accept the stipulation rather than introduce the record of the conviction.¹⁷⁴

More importantly for our purposes than what has just been said about a stipulation in *Old Chief*, is the fact that *any* evidence—record of conviction or stipulation—of his prior conviction or felon status was permitted. Is this not evidence of character? Yes, but the character is not offered to prove a forbidden purpose. It is not circumstantial evidence to indicate conduct. So it is free of the character ban we have been talking about. It is introduced for a totally “other” purpose, which is permitted by the rules we have been addressing. Furthermore—although this is not necessary—the felon-in-possession statute makes the felon or former conviction issue in *Old Chief* an “essential element” of the crime charged, perhaps invoking Rule 405(b) or at least something like it. The statute necessarily requires showing someone is a felon (or has been convicted of a felony), who then later is in possession of a firearm, meaning that proof of felon status—via introduction of evidence of a past crime—is needed. Note though, as will be revisited in Part II, what must be essential for purposes of Rule 405 is someone’s “character” or “character trait.”¹⁷⁵

Notwithstanding a great deal of case law relating to the character evidence ban, many areas remain confused or unresolved, including how to treat racist character evidence in hate crimes cases. In the next part, we turn to that issue.

167. *See id.* (quoting 18 U.S.C. § 922(g)(1)). A crime punishable by more than one year is often termed a “felony” and one who committed it is termed a “felon.”

168. *Id.* at 175.

169. *Id.*

170. *Id.* at 175–76.

171. *Id.*

172. *Id.* at 177.

173. *Id.* at 191.

174. *Id.* at 191–92.

175. FED. R. EVID. 405; *infra* Part II.

II. GATEWAYS FOR ADMITTING RACIST CHARACTER EVIDENCE

Imagine that an African American person, Beale, has been killed by a white person, Sam. Suppose that Sam is charged under a hypothetical hate crime statute requiring the prosecution to prove that Sam killed Beale with a racial motivation. Let us say the statute reads as follows:

One who intentionally kills or causes bodily injury to another person because of that person's race, sex, sexual orientation, or national origin [shall be guilty of a hate crime attended by such and such enhanced penalty over and above what might otherwise be applicable].

There is no evidence of racism from the scene of the crime, such as utterance of a racial slur during the killing. The prosecution instead seeks to enter evidence of Sam's miscellaneous past acts—unrelated to the present charge—allegedly exhibiting racism. Specifically, the proffered evidence consists of Sam's prior in-person and electronic communications revealing that on multiple specific occasions Sam used racial slurs or epithets to describe African Americans, inappropriately fired or failed to hire African Americans, was unwilling to rent to African Americans, and otherwise expressed inappropriate stereotypes concerning African Americans. Will the court admit such evidence consistent with Federal Rule of Evidence 404(b)'s character evidence ban (or an identical state rule)? We will refer to this hypothetical throughout as the *original* Beale hypothetical to distinguish it from any variation on it we may temporarily make to make a point later.

On the face of it, this racist character evidence poses a significant character evidence problem under Rule 404(b) and similar state law. The very point of introducing this racist character evidence certainly *seems* to be that the prior acts are expressly being introduced to show that defendant Sam is a racist (which seems to be a character or character trait) in order to show he acted in accord with that racist propensity on the occasion of the charged killing of the victim, Beale. This seems squarely within the prohibition of Rule 404(b):

Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.¹⁷⁶

In other words, it seems to be offered for the forbidden chain of inference, which is set out in Figure 2.

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

Figure 2: Rule 404(b)'s Forbidden Inference Chain¹⁷⁷

And yet, this racist character evidence may be seen as powerful and desperately needed to do justice in hate crimes cases, particularly if there is no other evidence of racial motivation, such as on-the-scene utterances of racial epithets, or declarations (say to friends by defendant before or after the crime) of racist motivation for the crime. Is there a way our racist character evidence can be viewed as admissible notwithstanding the character evidence ban? In this part, we present seven primary gateways through which racist character evidence may be admissible consistent with Rule 404(b).¹⁷⁸

A. Gateway 1: No Propensity

Our first gateway through which racist character evidence may be admissible consistent with Rule 404(b) is where no propensity inference is involved. We will refer to this as the “No Propensity” gateway.

A good example of this gateway would be the *Peltier* case previously discussed.¹⁷⁹ Recall that Peltier had been convicted for murdering two FBI agents.¹⁸⁰ Peltier was in a van with others and had access to information suggesting he was being pursued by the FBI—there had been an outstanding

177. See *supra* note 38.

178. These gateways are predicated on several assumptions. First, whatever the merits of Rule 404 and related rules, we take such rules as a given in connection with our discussion of the gateways. See FED. R. EVID. 404. Possibilities for amendment have certainly been advanced, but we do not explore amendment in this Article. See, e.g., Capra & Richter, *Character Assassination*, *supra* note 30, at 802–18. Second, when we discuss admissibility, we mean only admissibility as concerns Rule 404(b). It is certainly possible that admissibility could be impacted by other rules. See, e.g., FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); FED. R. EVID. 413–415 (concerning child molestation or sexual assault cases). Third, we are focused in this Article on admissibility of racist character evidence in hate crimes cases requiring proof of racial motivation. Fourth, we take as a given that courts will generally admit racist character evidence in hate crimes cases requiring proof of racial motivation notwithstanding the prohibition in Rule 404(b), as that is what seems to generally be happening in practice. Accordingly, the focus of this Article is on exploring plausible theories through which courts may admit the evidence on a principled basis. Fifth, we present only a set of plausible primary gateways for admission of racist character evidence in hate crimes cases requiring proof of racial motivation. It is possible that other avenues exist. Sixth, we do not necessarily endorse each and every one of our gateways as an optimal solution, but we do see the gateways we present as the most plausible set of solutions.

179. *United States v. Peltier*, 585 F.2d 314, 321–28 (8th Cir. 1978); see *supra* Section I.C.2.

180. *Peltier*, 585 F.2d at 318.

arrest warrant for him relating to a prior crime.¹⁸¹ The government argued that evidence relating to Peltier's prior crime was admissible to prove motive (one of the MOIPPKIAL Factors), since it helped show why Peltier had reacted with deadly force, and the appellate court agreed.¹⁸²

In a situation such as *Peltier*, no propensity inference is required. The evidence simply helps demonstrate the perpetrator's motive for the crime: in this case, killing because he was being followed by the agents in connection with a prior crime. Since no propensity inference is involved, introduction of the evidence would not violate Rule 404, even on a broad reading of the rule.¹⁸³

Whatever else is embraced by Rule 404(b)(2), reasoning not involving any propensity is at least embraced.¹⁸⁴ There is some authority suggesting a wholly nonpropensity theory must be advanced to qualify for admission pursuant to Rule 404(b). For instance, in *United States v. Gomez*,¹⁸⁵ federal agents had suspected Nicolas Gomez of being involved in a drug distribution ring and finally brought this case prosecuting him for a particular drug deal.¹⁸⁶ When Gomez asserted that it was someone else rather than himself involved in that drug deal, the government tried to introduce cocaine found in the bedroom of Gomez when he was arrested.¹⁸⁷ Gomez objected based on Rule 404, but the court admitted the cocaine to prove Gomez's identity, and Gomez was convicted.¹⁸⁸ The appellate court determined that the trial court should not have admitted the evidence, finding, among other things, that overcoming an objection to introduction of other-acts evidence requires the proponent to establish the other act in question is "relevant to a specific purpose other than the person's character or propensity to behave in a certain way."¹⁸⁹ Similarly, the Advisory Committee's Note to the recent amendment to Rule 404(b) seemingly also pointed to the need for nonpropensity reasoning.¹⁹⁰

The No Propensity gateway would seemingly not work in our original Beale hypothetical, since that hypothetical involves propensity reasoning.

181. *Id.* at 319.

182. *Id.* at 321.

183. *See supra* Section I.C.2; *infra* Section II.A.

184. We think Rule 404(b) embraces more than that, as we will discuss *infra*.

185. 763 F.3d 845 (7th Cir. 2014).

186. *Id.* at 850.

187. *Id.*

188. *Id.*

189. *See id.* at 850–60 (noting that "the error was harmless, so we affirm the judgment"); *see also* Klein, *(Mis)application of Rule 404(b)*, *supra* note 17, at 753–54 (discussing *Gomez*); Klein, *Magical Thinking About Limiting Instructions*, *supra* note 27, at 136–38 (same).

190. FED. R. EVID. 404 advisory committee's note; ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II ("[T]he Advisory Committee's Note accompanying the amendment . . . states that the notice requirement requires articulating a relevant 'non-propensity purpose' for the offered evidence." (quoting FED. R. EVID. 404 advisory committee's note)). This language in the Advisory Committee's Note is apparently an oversight, however. *See infra* note 198.

Altering the original Beale hypothetical, however, suppose that Beale had been in possession of Sam's racist communications and was planning to publicly expose Sam as a racist. Sam is on trial for killing Beale and the prosecution's theory of the case is that Sam knew that Beale had the racist communications and killed Beale to keep his racism secret. In a situation such as this revised hypothetical, no propensity inference would be required, and the racist communications might be admissible under the No Propensity gateway.

B. *Gateway 2: Specific Propensity*

Our second gateway for racist character evidence is where the evidence relates to a specific propensity. We will refer to this as the "Specific Propensity" gateway.

The Federal Rules of Evidence do not define "character" or "propensity" for purposes of Rule 404, and succinctly and comprehensively defining such terms is difficult.¹⁹¹ "Propensity" may be considered "a person's tendency to act a certain way on multiple occasions."¹⁹² "Character," on the other hand, describes a particular type of propensity, and might be understood to refer to an individual's general tendency or disposition to act in accord with a given personal trait, such as dishonesty, untrustworthiness, or violence.¹⁹³ Character

191. See FED. R. EVID. 404; *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) (expressing "doubt that a fully satisfactory, comprehensive definition of 'character evidence' is possible"); Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 447 (2019) ("Despite its storied history and the dizzying, 'grotesque' array of rules surrounding its application, the Federal Rules of Evidence do not formally define character evidence."); Robert J. Sampson & L. Ash Smith, *Rethinking Criminal Propensity and Character: Cohort Inequalities and the Power of Social Change*, 50 CRIME & JUST. 13, 30 (2021) ("[T]he 'propensity rule' in criminal law—Rule 404(b) of the Federal Rules of Evidence—declines to define propensity at all, when it deems propensity-related evidence generally inadmissible at trial (with exceptions)."); see also *United States v. Whittington*, 26 F.3d 456, 465–66 (4th Cir. 1994); *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791, 794 (5th Cir. 1979) (finding that certain prior convictions were inadmissible to solely show that an individual had the character trait of drinking excessively and that he acted in accord with such character on the night in question by becoming intoxicated); *United States v. Wyers*, 546 F.2d 599, 603 (5th Cir. 1977) (determining testimony that defendant had informed police officer that defendant was from two different places and was unemployed was not character evidence); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt.; Steven Goode, *It's Time To Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 773–74 (2021) ("As has often been observed, courts, commentators, and rule drafters have devoted surprisingly little effort to defining character. Expressions of despair at the prospect of arriving at a clear definition seem to outnumber sustained efforts to produce one."); Marshall, *supra* note 18, at 1070 ("While the Federal Rules do not themselves define 'character,' courts and scholars have made attempts to describe this elusive concept.")

192. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 60. Propensity might logically be demonstrated by, among other things, repeated similar acts, another's opinion of an individual, or an individual's reputation in their community. *Id.*

193. *Id.* at 61 (describing character as "a propensity to repeat a general category of act, such as acts of violence, acts of dishonesty, etc."); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404, cmt. subsec. I.B; see also *Doe*, 149 F.3d at 638 (noting that "character trait refers to elements of one's disposition, such as honesty, temperance, or peacefulness") (internal quotation marks omitted).

denotes a general (rather than a specific) predisposition and one of a morally tinged—either good or bad—kind.¹⁹⁴

We understand Rule 404 to ban only evidence of “character,” meaning there remain other propensities—such as the tendency to do something very specific in a specific way—that Rule 404 would not necessarily ban.¹⁹⁵ For instance, to borrow from the “Brides of the Bath” fact pattern, a husband may have a specific propensity to intentionally drown his wives in the bathtub in order to profit from insurance or inheritance, but it would distort language to say that he has a character to do so.¹⁹⁶ Accordingly, evidence of the husband’s specific propensity to drown his wives might not be prohibited by Rule 404, but evidence of that same husband’s general propensity for violence used to show he drowned his wife might be (as, unlike the former, the latter constitutes character). A specific propensity would be what is being shown when the evidence introduced by the prosecutor to show the propensity is other similar wife drownings, as the prosecutor did in the actual case. A general propensity for violence (prohibited) would be what is being attempted to be shown if the prosecution had sought to prove the defendant purposely drowned the wife named in the indictment, by introducing random acts of violence of defendant, like unprovoked fighting with various and sundry people or perhaps even violence against other women or girlfriends. In other words, acts of violence that are not very similar to the charged crime. Admittedly there will be hard-to-decide cases on the cusp between the two.

While a more prohibitive, *Gomez*-style approach prohibiting all propensities could theoretically be desirable from a social policy perspective, we think the text and history of Rule 404 suggests otherwise.¹⁹⁷ In this regard, it is noteworthy that the Advisory Committee specifically rejected requiring articulation of nonpropensity reasoning in the text of the rule.¹⁹⁸ The text of

194. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

195. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61.

196. *See* *Rex v. Smith* (1915) 11 Crim. App. 229, 229–30 (UK); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II. Such a specific propensity might well fall within one or more of Rule 404(b)’s permitted purposes—i.e., within one or more of the MOIPPKIAL Factors. It may, for example, be used to show “motive,” with the evidence being used to prove motive by means of propensity, but not by means of character.

197. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II. The *Gomez*-style approach may also not be desirable from a social policy perspective in connection with the race cases we are dealing with in this Article.

198. *See* FED. R. EVID. 404(b); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II (“The Advisory Committee in drafting the 2020 amendment to Rule 404(b) considered but rejected incorporating this *Gomez* requirement into the rule’s text (as part of the criminal-case notice requirement) . . . The drafters ultimately required only that the proponent detail how the evidence tends to prove a permitted purpose. They rejected explicitly requiring a further showing (as required by *Gomez*) that the piece of evidence’s tendency to prove that purpose (in the particular case) does not depend (in reason or logic) on inferring propensity.”). Through perhaps inadvertence, the note

Rule 404 itself seemingly supports our interpretation, in that the text uses the word “character” as what is prohibited rather than “propensity.”¹⁹⁹

Our narrower definition of the Rule 404(b) ban is further supported by the primary rationales for banning character. The rule against character evidence guards against moral judgments and factfinder exaggeration of the low strength of a general tendency to prove a specific act.²⁰⁰ In contrast, a specific propensity has greater probative strength to prove a specific act, and therefore a specific propensity might be more likely to outweigh a tendency for the factfinder to decide based on moral grounds.²⁰¹

As we have previously discussed, many of Rule 404(b)’s permitted purposes—i.e., the MOIPPKIAL Factors—may also be understood to permit or require reasoning predicated upon specific propensities, in addition to whatever else they may also encompass as described in this Article.²⁰² For

accompanying the amendment does refer to permitted purposes as nonpropensity purposes. The Committee explicitly rejected requiring a showing of nonpropensity reasoning because, as said by the chairperson (a judge), certain properly admissible purposes under 404(b)(2) may be “bound up” with propensity reasoning (although maybe or maybe not character reasoning, we would add). See GEORGE FISHER, EVIDENCE 224–25 (4th ed. 2023). This could support both this, and possibly our next, gateway in our present Article. Litigators should still be aware of *Gomez* and related authority, and in certain courts, be prepared to articulate how their evidence is relevant without resort to propensity. See *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

199. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

200. See Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61 n.27 (“The reasons for banning the ‘character’ kind of propensity are that (1) its predictive or probative value is weak (because it is general, diffuse and not always followed), which weakness may not be recognized by the factfinder, and (2) it has a tendency to induce decision based on past derelictions rather than careful scrutiny of whether there is present guilt.”).

201. See *id.*; ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

202. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II. Character may also be contrasted with other recognized noncharacter propensities, such as routine practice of an entity or habit of an individual, or psychological illness or clearly diagnosable and recognized personality disorders. See *id.*; Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61 n.27; *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791, 794 (5th Cir. 1979) (“Rule 406 allows the introduction of evidence of the habit of a person for the purpose of proving that the person acted in conformity with his habit on a particular occasion Habit evidence is considered to be highly probative and therefore superior to character evidence because ‘the uniformity of one’s response to habit is far greater than the consistency with which one’s conduct conforms to character or disposition.’”); see also Ferguson, *supra* note 31, at 729 (“Long before the codification of ‘Habit; Routine Practices’ in Federal Rules of Evidence 406, courts were relying on the argument that particular human habits could be relevant evidence in criminal and civil cases.”); Teneille R. Brown, *Bad Habits: Character Evidence by Another Name*, 66 HOW. L.J. 139, 141–49 (2022) (discussing addiction). Like character, routine practice or habit reflects a propensity, but such propensity involves a very specific, somewhat involuntary, and more regular response to a specific repeated situation. See ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt.; see also *Reyes*, 589 F.2d at 794 (“Character and habit are close akin. Character is a generalized description of one’s disposition, or [of] one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness. ‘Habit,’ in modern usage, both lay and psychological, is more specific. It describes one’s regular response to a repeated specific situation. If we speak of character for care, we think of the

instance, admission of evidence of a specific propensity to drown wives for insurance or inheritance to show motive or lack of accident is seemingly contemplated by the MOIPPKIAL Factors.²⁰³ Other examples of MOIPPKIAL Factors cases involving propensity reasoning are discussed above in Section I.C.1.²⁰⁴

If a more prohibitive, *Gomez*-style, approach were taken, many uses of the MOIPPKIAL Factors would be undercut and only evidence not at all related

person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." (quoting EDWARD W. CLEARY, VAUGHN C. BALL, RALPH C. BARNHART, KENNETH S. BROUN, GEORGE E. DIX, ERNEST GELLHORN, ROBERT MEISENHOLDER, E.F. ROBERTS & JOHN W. STRONG, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 462-63 (2d ed. 1972))). For instance, the Fifth Circuit has found that "four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of 'habit' evidence." *Id.* at 795. Unlike character, neither routine nor habit need be morally tinged. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. Rule 406 governs routine and habit, seemingly recognizing such evidence as less prejudicial and more probative than character. *Id.*; *Hall v. Arthur*, 141 F.3d 844, 849 (8th Cir. 1998) (discussing neurosurgeon's testimony concerning certain information his patients knew or were informed of relating to their surgery) ("[W]hile the defendants objected to the introduction of the deposition evidence on relevance grounds, we believe that it was properly admitted under Fed. R. Evid. 406 as evidence of the routine practice of an organization."). *But see* *Rivera v. Union Pac. R.R. Co.*, 868 F. Supp. 294, 299 (D. Colo. 1994) ("Union Pacific [Railroad Company] suggests since it had established a routine practice of servicing locomotives in North Platte, including inspection to ensure each locomotive was free of all stumbling hazards, it was not possible for there to have been anything on the floor of the locomotive as Rivera alleges. This *post hoc, ergo propter hoc* reasoning has been rejected by this court . . . Federal Rule of Evidence 406 relating to 'habit and custom' may be used to establish a regular response to a repeated situation, it may not be used to show 'character.' . . . Thus, Defendant may not use the rule to show it was its 'habit' to be non-negligent."); *Levin v. United States*, 338 F.2d 265, 270-72 (D.C. Cir. 1964) (finding it was not reversible error to exclude evidence purportedly relating to defendant's "habit of being home on the Sabbath") ("[I]t is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances.' It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 520 (3d ed. 1940))). As noted, another example of noncharacter propensity might be documented psychological illness. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61 n.27; Rothstein, *Intellectual Coherence*, *supra* note 80, at 1265 n.23 ("Yet another type of propensity might be a documented clinical psychological illness, predilection, or personality trait as testified to by a properly qualified expert. The law is unclear regarding this point."). Habit, routine, and documented psychological illness are not treated in the present Article. We note, however, that it might be interesting to further consider in some future article the possible applicability of habit to the subject of the present Article. In certain instances, might there be a sufficient degree of similarity between past and present acts, sufficient similarity among stimuli and reactions to stimuli, and sufficient involuntariness, for habit to apply?

203. See *Rex v. Smith* (1915) 11 Crim. App. 229, 229-30 (UK); FED. R. EVID. 404(b).

204. See *supra* Section I.C.1.

to the human tendency to repeat would remain.²⁰⁵ For example, the evidence in the “Brides of the Bath” and *Jones* body-rub-and-theft cases would not be admitted, nor more generally would evidence of other acts to show similar modus operandi or blueprint under the auspices of “identity” or “plan.”²⁰⁶ Similarly, Rule 404(b) would not be usable in many cases where the offeror of the evidence relies on the similarity of the wrongs, since that normally involves the establishment of a specific propensity that then was manifest again.²⁰⁷ In effect, the cases involving propensity reasoning above in Section I.C.1 and other similar cases would be called into question, and Rule 404(b) might be confined to instances in which the charged act was committed due to the other act, such as where proffered evidence seeks to show an individual shot federal agents because the charged individual thought the agents were pursuing him in connection with other criminal activity, as reflected in *Peltier*.²⁰⁸ Other permissible examples under a *Gomez*-style approach might include where a defendant steals tools in a first crime (the evidential crime) to safe crack in a second crime (the charged crime), steals a computer in a first crime to hack other commercial computers in a second crime (both of these examples constituting one use of the “plan” rubric), or learns to do something in a first crime and then uses that skill in a second crime (perhaps a use of the “opportunity” or “preparation” rubric).²⁰⁹ This would be an extremely limited scope of use for the MOIPPKIAL Factors.²¹⁰ It seems to us unlikely that the rule is meant to be so restricted, although as we indicated earlier, such restriction might be desirable as a matter of social policy, at least in cases other than the hate crime cases we are dealing with here.²¹¹

205. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

206. *Id.*

207. *Id.* (“The 404(b)(2) gateway, then, would normally be confined to other acts whose probative value is not dependent on similarity to the charged one.”).

208. *See* *United States v. Peltier*, 585 F.2d 314, 318–21 (8th Cir. 1978); ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II.

209. In some of these cases, the first event in the sequence of events could be seen not as an “other” crime, but as part of the same crime, i.e., the first event could be considered “intrinsic” rather than “extrinsic.”

210. ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II (“Acceptable use of [Rule 404(b)] might also include cases where a skill, knowledge or opportunity is acquired from one crime that enables commission of another (although even that might conceivably be construed to involve propensity).”).

211. It is possible that our specific propensity versus character distinction already helps explain much of the case law. *See id.*; *see also* *State v. Lamure*, 846 P.2d 1070, 1079 (N.M. Ct. App. 1992) (Hartz, J., concurring) (“[Paul F. Rothstein’s] definition of ‘character’ is apparently based on the observation that judicial decisions tend to admit evidence of non-character propensities pursuant to the second sentence of Subsection B. These decisions can then be rationalized on the ground that evidence of non-character propensity is more likely to be probative and less likely to lead to unfair prejudice than is evidence of character. Professor Rothstein’s discussion of the admissibility of propensity or character evidence has been described as ‘[a] valiant effort to make general sense out of general

One challenge with our approach is that it may not always be easy to determine whether a given tendency or trait is prohibited as character or permissible as a specific propensity.²¹² In making the determination in a given case, it is helpful to keep the purposes of the ban on character evidence in mind: (1) to encourage inadmissibility of evidence with weak probative value; and (2) to reduce the risk of a factfinder deciding a case based on past bad acts.²¹³ In the case of racism in particular, we think that evidence seeking to show an individual is racist in general would be considered character.²¹⁴ On the other hand, a propensity for hitting African American male coworkers with a car might be considered a specific propensity.

A good example of this gateway might be derived from the “Brides of the Bath” case.²¹⁵ Evidence of a propensity to kill one’s wife in the bathtub for inheritance used to show that an individual killed a recent wife in the bathtub for inheritance would not violate Rule 404, since this would involve only a specific propensity. In contrast, if the prosecution had sought to introduce evidence of prior robberies for purposes of proving that the husband was violent, and that he therefore killed his wife in the bathtub, this would call for the prohibited character inference and might more easily violate Rule 404.

The Specific Propensity gateway will seemingly not work in our original Beale hypothetical, since racism appears to be character rather than a specific propensity. However, altering that hypothetical, suppose the evidence proffered against Sam was not unrelated communications suggesting Sam was racist but instead communications suggesting that Sam had previously killed

nonsense.’ In my view adoption of his approach would lead to greater judicial candor and a sounder analysis of the critical factors arguing for or against admissibility.” (quoting 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 1156 n.2 (Tillers rev. 1983)).

212. See Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61; ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 404 cmt. pt. II (noting the specific propensity versus character distinction “is one of generality versus specificity, and there is somewhat of a continuum between”); *see also* United States v. Gomez, 763 F.3d 845, 854 (7th Cir. 2014) (“For example, one permissible purpose for the introduction of other-act evidence is to prove a defendant’s identity through a ‘distinctive manner of operation, or *modus operandi*.’ A prior act will be relevant to this purpose when it ‘bears a singular strong resemblance to the pattern of the offense charged with the similarities between the two crimes sufficiently idiosyncratic to permit an inference of pattern.’ Sometimes the prior bad act may be too dissimilar to be relevant to show a distinctive pattern, leaving only the forbidden propensity inference.” (quoting United States v. Simpson, 479 F.3d 492, 497–98 (7th Cir. 2007), *abrogated in part on other grounds* by United States v. Boone, 628 F.3d 927, 933 (7th Cir. 2010))).

213. See Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 61 n.27 (“The decision as to what is character propensity and what is specific or other propensity should be made in individual cases with the . . . purposes of the character ban in mind.”). Of course, even with these guideposts, it would still be necessary to determine where on a specificity-generality continuum a propensity would be sufficiently probative and nonprejudicial such that it is admissible. *See id.* at 64 (noting also the related question of when similarity between acts becomes sufficient such that evidence is admissible rather than just relevant).

214. In this context, a character for racism would seem general and morally tinged.

215. *See* Rex v. Smith (1915) 11 Crim. App. 229, 229–30 (UK).

three African American individuals in the exact same way and under the exact same circumstances as when Sam killed Beale. In such a situation, the evidence involved would prove the specific propensity of killing African American individuals in a highly specific way (rather than proving the general character of racism) and might be admissible under the Specific Propensity gateway.

C. Gateway 3: *Something Additional*

Our third gateway through which racist character evidence may be admitted under Rule 404(b) arises where the evidence's avowed purpose involves an impermissible character inference *in order* to show something additional. We will refer to this as the "Something Additional" gateway.

This gateway arises where the prohibited character inference is present, but the evidence moves through the prohibited inference to reach something additional, such as one of the MOIPPKIAL Factors. The distinction is between "mediate" and "ultimate." If the prohibited purpose (i.e., showing an act in conformity with the evidenced character) is merely a mediate proposition, it is permitted. If it is the ultimate proposition, it is prohibited.

There is a debate as to whether Rule 404(b)(2)'s permitted purposes—i.e., the MOIPPKIAL Factors—are best understood as exceptions to the Rule 404(b)(1) other-acts character evidence ban or as clarifications of it.²¹⁶ If, for example, 404(b)(2)'s permission of evidence of "motive" or "intent" or "plan" is an *exception* to the ban, then if the chain of inference sought by the evidence includes showing character to show an act in conformity (banned by the prohibitive clause if we stop there) but this act in conformity is in turn done as a necessary logical linear step to demonstrate "motive" (motive being a permitted catchword in the permissive clause), then the ban is avoided and the chain is permitted.²¹⁷ In other words, when the permissive clause says the

216. See Bavli, *Conduit for Implicit Bias*, *supra* note 30, at 1023–28 (discussing this issue). Recall that Rule 404(b)(1) prohibits "[e]vidence of any other crime, wrong, or act" when used "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). Rule 404(b)(2) then permits such other-acts evidence for another purpose, such as for proving one of the MOIPPKIAL Factors. FED. R. EVID. 404(b)(2); Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 42.

217. Rule 404(b)(2) is sometimes discussed as an exception to Rule 404(b)(1). See, e.g., *United States v. Sterling*, 738 F.3d 228, 237 (11th Cir. 2013) ("Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose, 'such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'"); see also Hillel J. Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 132 (2022) [hereinafter Bavli, *Objective-Chance*] ("[C]ourts commonly admit other-acts evidence whose relevance requires character-based propensity reasoning, so long as this evidence is offered for a purpose provided for in Rule 404(b)(2). A court may exclude a defendant's prior drug-trafficking offense as evidence that, because the defendant has committed a drug-trafficking offense in

character evidence is “admissible for *another* purpose” (than the prohibited purpose of showing character to show conformity therewith), the word “another” means “another in addition to” as well as “another instead of.”²¹⁸

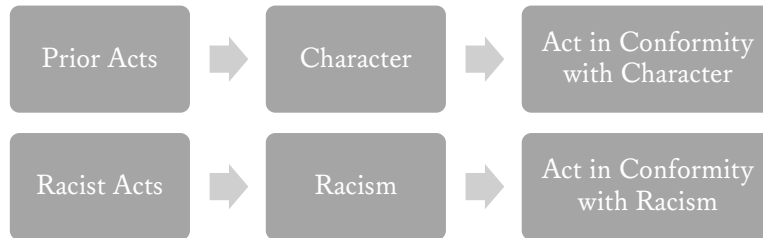
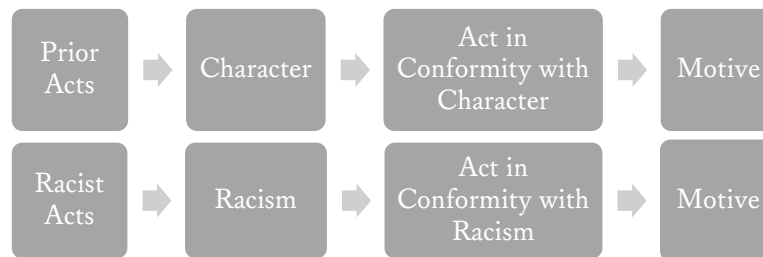
If, on the other hand, the permissive purposes are not exceptions to the banned purposes, but rather are merely a clarification of the banned purposes—i.e., merely illustrating the ban by listing purposes that are not the banned purpose but are totally different than and in contradistinction to the banned purpose—then the banned purpose and the permitted purposes are totally opposite of each other and the permitted purposes must not be reached through a chain of reasoning that includes the banned purpose (showing character to show an act in conformity).²¹⁹ Thus, under this view, if motive, intent, or plan is being shown through a chain of reasoning dependent on a showing of character to show an act in conformity with the character as an earlier link in the chain, then the evidence is impermissible.

Graphically, under the exception theory, which we think Rule 404(b)(2) embraces (as well as the clarification theory, depending on the case), Figures 3 and 4 reflect the unpermitted and permitted chains of inference, respectively. Within each of these two figures, the first inference chain presented shows a generalized character evidence chain and the second shows an equivalent chain as applied to the racist character evidence context specifically.

the past, he is more likely to have committed the offense with which he is currently charged; however, the court may well admit the evidence to prove, at least superficially, knowledge, intent, or identity—even if the evidence relies on the same reasoning.”); *State v. Lamure*, 846 P.2d 1070, 1074–75 (N.M. Ct. App. 1992) (stating, in connection with similar state rule, “[e]ven assuming that the [evidence] could be said to prove [d]efendant’s character or that he acted in conformity with this character, the evidence was not offered for that purpose” and finding the defendant’s acts “highly relevant and within one or more of the exceptions to the rule”). However, viewing 404(b)(2) as an exception has also been criticized. *See* Bavli, *Objective-Chance*, *supra* note 217, at 131 (“Understanding 404(b)(2) as providing for exceptions to 404(b)(1) would allow this provision to altogether swallow the rule against other-acts character evidence. After all, it is simple to articulate even the most prejudicial forms of character evidence—the precise type of evidence that is intended to be excluded by Rule 404—into a permissible use under 404(b)(2) if this provision is understood as an exception rather than a clarification.”).

218. Provided it is in the same chain of inference. Support for our Something Additional gateway (detailed in this section) may be drawn from the previously referenced comment of the Advisory Committee Chair and the resulting action concerning the text of the rule. *See supra* note 198.

219. The clarification view of Rule 404(b)(2) also has support. *See* Bavli, *Objective-Chance*, *supra* note 217, at 131 (arguing for an “understanding [of] Rule 404(b)(2) as a clarification of Rule 404(b)(1)—rather than as providing for exceptions to Rule 404(b)(1)”; Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 42 (“[Rule 404(b)(2)] is generally interpreted as a clarification rather than an exception: 404(a)(1) and 404(b)(1) prohibit character-based propensity reasoning but not other-acts evidence offered for nonpropensity purposes.”). It might be argued that if (b)(2), the permitted purposes, are only illustrations of how (b)(1), the banned purposes, operates, then it is unnecessary because then (b)(2) says nothing more than what is inherent in (b)(1). Nevertheless, illustrations or clarifications do serve some explicatory purpose.

Figure 3: Impermissible Chain of Inference²²⁰Figure 4: Permissible Something Additional Chain of Inference²²¹

We believe the permitted purposes in Rule 404(b)(2) encompass, in appropriate cases, both exceptions to, and clarifications of, the other-acts evidence prohibition in Rule 404(b)(1). As reflected in Figure 4, where the evidence is proving something additional and beyond conformity with character—in this case motive—the evidence may be admissible. Accordingly, in our original Beale hate crime hypothetical, evidence of Sam’s communications reflecting unrelated past acts of racism could be admissible under the Something Additional gateway, even if the evidence must pass through the impermissible character inference in order to reach the permissible purpose of proving racial motivation.²²² Further support for our Something Additional gateway approach may be drawn from the “act” versus “mental state” and “character” versus “character trait” distinctions we will draw in connection with our fourth and fifth gateways below.²²³

This does not, however, mean the jury can then use the racist character evidence chain in Figure 3 to prove the element in the indictment that the attack

220. See *supra* note 38.

221. See *supra* note 38.

222. That is, the evidence would be admissible in our original Beale hypothetical to prove the racist character evidence chain in Figure 4.

223. See *infra* Sections II.D, II.E.

on the victim occurred.²²⁴ That would plainly be prohibited. To ensure that is not done, the jury should be instructed to *first* find whether the attack occurred, based on *other evidence*. Only after finding the attack occurred should they consider this racist character evidence to establish whether or not there was the racial motive accompanying the attack on the victim.²²⁵

Admittedly, there is considerable danger the jury will use the evidence for the purpose that has been forbidden to them. To safeguard against jury use of the evidence for that impermissible purpose, the trial could be bifurcated. In phase one, the jury would determine if the attack occurred. Only other, less controversial evidence would be admitted during this phase. If the jury finds the attack occurred, then the proceedings progress to phase two of the trial.

224. Evidence offered for mixed purposes raises the danger of inappropriate jury reasoning. *See United States v. Gomez*, 763 F.3d 845, 855 (7th Cir. 2014) (“[Rule 404(b)] is straightforward enough, but confusion arises because admissibility is keyed to the *purpose* for which the evidence is offered, and other-act evidence is usually capable of being used for multiple purposes, one of which is propensity.”); Imwinkelried, *Criminal Minds*, *supra* note 70, at 853 (“Suppose, for example, that the accused is charged with an armed robbery committed on March 1. When the perpetrator fled the scene, he dropped a pistol with a certain serial number. The prosecutor has evidence that on February 1, the accused stole that very pistol from a gun store. At the armed robbery trial, Rule 404(b)(2) would enable the prosecutor to introduce testimony about the February 1 theft for the purpose of identifying the accused as the perpetrator of the March 1 charged offense. In this situation, the prosecutor is not arguing simplistically that the earlier, uncharged theft shows the accused is a criminal and, therefore, more likely to have committed the charged robbery; rather, the prosecutor is relying on the non-character theory that by virtue of the prior theft, the accused gained possession of a unique, one-of-a-kind instrumentality found at the scene of the charged robbery. It is true that here the evidence has dual relevance: It is probative on a forbidden character theory as well as a legitimate non-character theory.”). We also recognize that this gateway could be attacked as weakening the protection of the character evidence ban. *See Gomez*, 763 F.3d at 855 (“Because other-act evidence can serve several purposes at once, evidentiary disputes under Rule 404(b) often raise the following question: Does a permissible ultimate purpose (say, proof of the defendant’s knowledge or intent) cleanse an impermissible subsidiary purpose (propensity)? On the surface the rule seems to permit this. But if subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant’s knowledge, intent, or identity (or some other plausible nonpropensity purpose), then the bar against propensity evidence would be virtually meaningless.”).

225. *See Imwinkelried, Criminal Minds, supra* note 70, at 853 (“[I]n most cases of dual relevance, the judge admits the evidence and gives the jury a limiting instruction under Rule 105.”). In the “Brides of the Bath” case, for instance, it has been reported:

Mr. Justice Scrutton admitted the evidence, but told the jury that they must not use it for the purpose of saying ‘[The defendant] is a man of bad character, and therefore is very likely to have murdered [the victim].’ It was admissible only for the purpose of helping the jury to draw an inference as to whether the death of [the victim] was accidental or designed by [the defendant]—in other words, as evidence to show whether [the defendant] had a system of murdering women with whom he went through the form of marriage in order to obtain their money.

GEORGE FISHER, EVIDENCE 196 (3d ed. 2012) (quoting *The Brides Case. Prisoner on Trial at the Old Bailey: The Death of Miss Mundy*, TIMES (London), June 23, 1915, at 5). Such instruction is similar to what judges might customarily give in cases involving the MOIPPKIAL Factors, even when clearly the jury must reason through the prohibited inference to get to the permitted MOIPPKIAL Factors inference.

Only during phase two would the racist character evidence under discussion in this Article be admitted, with the jury then deciding if there was racial motivation.²²⁶ If the trial were not bifurcated, then a court might consider only admitting the racist character evidence if there is no or little other evidence of racial motivation for this attack (such as racist remarks by defendant at the scene, or defendant admitting racial motivations specifically connected with the attack to friends and acquaintances afterwards).

One particular concern with the Something Additional gateway is that the Figure 4 chain of reasoning could be problematically applied to contexts outside racism and hate crimes.²²⁷ For instance, adapting facts from the “Brides of the Bath” case, suppose that the prosecution were introducing evidence of prior violent robberies for purposes of proving that the husband was violent, and that he therefore had the motive to drown his wife, as opposed to it being an accident.²²⁸ In that hypothetical case, an impermissible character inference might be involved, but the evidence would be used to show something additional (in that hypothetical case, “motive” or “lack of accident”), and so it could be argued that under our theory, this would not violate Rule 404(b). We think this is a misconstruction of our theory. In this “Brides of the Bath” variant, “motive” is being used as a subterfuge for proving the act of the husband. “Motive” has no independent function in the case. It is merely evidence that he did it. It is not an independent element of the offense, the way it is in the hate crime case. Or, as another example, consider a typical murder case where violence was the character in question, and murder was defined as killing with “intent to kill” or “inflict great bodily injury.”²²⁹ Adapting the Figure 4 reasoning chain from the racism to the general violence context could be seen to license more problematic character reasoning and use of miscellaneous former acts of violence and proof of violent character in less desirable ways. We feel, however, that the racism and general violence contexts are sufficiently distinguishable. First, we think racism is arguably more specific than violence. Second, evidencing violence may not be as necessary in many general criminal cases as evidencing racism is in the context of hate crimes requiring proof of racial motivation. Finally, instituting safeguards might be more challenging in the violence and general criminal context than in the racism and hate crimes context specifically.

226. It is also important to distinguish the situation where intent is so bound up with the charged act that proving intent would really just be proving the charged act (our impermissible Figure 3) from the situation where a separate and additional inference is involved (our permissible Figure 4).

227. Consideration of the applicability of our presented gateways outside the racism and hate crimes context is outside the scope of this Article.

228. See *Rex v. Smith* (1915) 11 Crim. App. 229, 229–30 (UK).

229. See Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 *YALE L.J.* 537, 548–49 (1934) (discussing various formulations).

We therefore do not believe recognition of the Something Additional gateway in the hate crimes context disproportionately increases the likelihood of its reasoning being undesirably applied elsewhere, and we suggest use of the Rule 403 probativity versus counterweights balancing to further mitigate any residual such risk.

D. Gateway 4: Mental State

Our fourth gateway through which racist character evidence may be admissible arises when the evidence is used to prove a mental state. We will refer to this as the “Mental State” gateway.

The prohibition in Rule 404(b) is against using character to show “that the person *acted* in accordance with the character.”²³⁰ Thus, the prohibition is of showing an *act*, not a motive or other state of mind.²³¹ This means that, aside from discrete situations where proving the intent is actually proving the act, proving mental states falls outside the Rule 404(b) prohibition.

For instance, imagine Catherine is on trial for murder after having allegedly shot someone who had interfered with her business dealings. The hypothetical murder statute prohibits: (1) killing another person (an act), with (2) “intent to kill or inflict great bodily injury” (a mental state).²³² Catherine claims the gun went off accidentally in her hands. The prosecution has evidence that Catherine intentionally murdered before when individuals interfered with her business dealings. The prosecution plans to use these past acts to show Catherine had a character to purposely kill when people interfered with her business (assuming such propensity is general enough to be character or that the rule is interpreted to mean any propensity), and that therefore she killed in conformity on the presently charged occasion, and that therefore she had the motive and intent to kill (i.e., it was no accident). Figure 5 graphically represents this chain of inference.

Figure 5: Sample Permissible Mental State Chain of Inference²³³



230. FED. R. EVID. 404(b)(1) (emphasis added).

231. This also further supports our Something Additional gateway. See *supra* Section II.C.

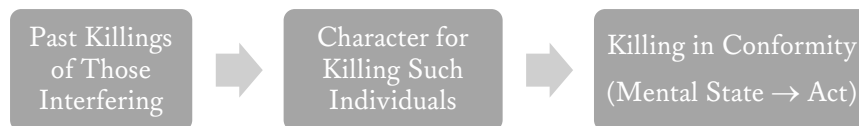
232. See Perkins, *supra* note 229, at 548–49 (discussing various formulations).

233. See *supra* note 38.

The Figure 5 chain of inference would be permissible consistent with Rule 404(b) under our Mental State gateway.²³⁴ The prosecution would, of course, still need to prove the act (i.e., the killing itself) through a means other than the past acts evidence (e.g., either through admission or additional evidence) and safeguards would still need to be in place (e.g., jury instructions or bifurcation).

This Mental State gateway would not be available where proving the mental state is really being used to prove the act itself, because in that circumstance the evidence would be going to the prohibited purpose of proving the charged act. For instance, in the Catherine hypothetical, imagine Catherine's defense was that someone else shot the victim. The prosecution planned to use Catherine's past killings of those who interfered with her business to prove she had a character to purposely kill those who interfered with her business (assuming this propensity would be considered sufficiently general to be character or that the rule was interpreted to mean any propensity), to therefore prove she intentionally killed on the currently charged occasion. Figure 6 graphically represents this chain.

Figure 6: Sample Impermissible Mental State Chain of Inference²³⁵



The “Killing in Conformity” block in Figure 6 really consists of two inferences: an initial one proving the intent (mental state), which is then used to prove the killing (act). Where intent or motive is too bound up in the chain's final inference (i.e., where it can be seen to come before the charged act in the chain of inference), the chain is faulty because character would then be used to prove the charged act, which is impermissible under Rule 404(b), even if done in more than one step. The Figure 6 chain of inference is really just a disguised means of proving the act.

In connection with the original Beale hypothetical, a court seemingly could admit Sam's past acts on a Mental State gateway theory with appropriate safeguards. Ideally using a bifurcated trial approach, other evidence would need to prove the act of killing—such as forensic evidence and testimony as to Sam's presence at the scene of the crime and ballistics and fingerprints showing it was his gun—and then the Mental State gateway could be used to admit Sam's past acts of racism *only* for purposes of proving racial motivation for Beale's killing.

234. See FED. R. EVID. 404(b). It is also analogous to the Figure 4 permissible chain of inference discussed in connection with the Something Additional gateway. See *supra* Section II.C.

235. See *supra* note 38.

E. *Gateway 5: Character Trait*

Our fifth gateway through which racist character evidence may be admissible is where racism is deemed a “character trait.” We will refer to this as the “Character Trait” gateway.

It is possible that Rule 404(b) draws a distinction between “character” and “character trait” that might be useful in seeking to render evidence of previous racism admissible. Rule 404(a) (which is addressed to character evidence other than the specific acts evidence addressed by Rule 404(b)) states the character prohibition this way:

Evidence of a person’s character *or character trait* is not admissible to prove that on a particular occasion the person acted in accordance with the character *or trait*.²³⁶

Rule 404(b) states the prohibition relating to other acts differently:

Evidence of any other crime, wrong or act is not admissible to prove a person’s *character* in order to show that on a particular occasion the person acted in accordance with the *character*.²³⁷

It is noteworthy that 404(a) bans “character or character trait,” but 404(b) bans only “character” and makes no reference to “traits” of character. This seems a purposeful, not accidental, distinction. It is possible to view “character” as *very* general (a propensity to violence, or to do crooked or bad things of many kinds in general) and a “character trait” as a slightly more specific subset of character (e.g., badness or violence of a certain kind, e.g., racism), but not so specific that we would call it “specific propensity” above, which contemplates propensity so specific that it is totally out of the character realm—it is neither character nor character trait.

It follows from this distinction between character and character traits in the rule that specific past acts and events to show racism to show that a particular act on a more current occasion was done for a racist motivation may not be banned at all by the rule. Accordingly, Sam’s past acts in the original Beale hypothetical case might be admissible under the Character Trait gateway. The evidence is of past acts, so it is governed by 404(b), not (a), and the racist propensity it demonstrates is not a racist *character*, but a racist character *trait*, and is thus not banned by (b). Perhaps the drafters purposely made the distinction to avoid the conundrum that many of the permissible purposes under (b) do seem to involve *traits* of character, and they sought to avoid confusion as to whether they would also be in the prohibitive clause of the rule,

236. FED. R. EVID. 404(a)(1) (emphasis added).

237. FED. R. EVID. 404(b)(1) (emphasis added).

so they narrowed the prohibitive clause to eliminate mere traits of character rather than character itself.²³⁸

F. *Gateway 6: Doctrine of Chances*

Our sixth gateway through which racist character evidence may be admissible arises under the doctrine of chances. We will refer to this as the “Doctrine of Chances” gateway.

The so-called “doctrine of chances” is a probability doctrine claiming to resolve a perceived logical contradiction in evidence law raised by Rule 404(b).²³⁹ As previously described, on the one hand, Rule 404(b) purportedly bans specific instances character evidence inviting the factfinder to determine that an individual acted in conformity with such specific instances on a given

238. One must be cautious about adopting an absolute proposition that character *traits*, as distinct from general character, are *admissible* under Rule 404(b). There are a number of reasons for this caution. First, Rule 403 would still exert some constraints akin to those that constrain evidence of general character, and for similar reasons. Second, while 404(b) does not expressly constrain character *traits* (as opposed to *character*), there is an argument that 404(a)(1) (that expressly constrains both *character* and *character traits*) is a general constraint not limited (like the exceptions in the other subsections of 404(a)) to the opinion and reputation form of evidence, but also applies to specific act evidence, the subject of 404(b). But then that makes 404(b)(1)'s prohibition (applicable to specific acts) redundant and unnecessary, and also incomplete as not prohibiting the entire class (character plus traits of character) that should be prohibited under this theory. Is 404(b)(1) (the prohibition as it relates to specific acts) just a reminder of what is already prohibited in 404(a)(1), but not a completely stated reminder (because it omits to mention traits), but rather just a summary reminder? This all seems very unlikely. The prohibition in 404(b)(1) is more likely meant to define the scope of the prohibition for the specific act form of evidence, not a reprise of what is already provided by 404(a)(1). Third, if character *trait* (as distinct from *character*) is construed to embrace too general a category, then the gateway may be open too wide (although Rule 403 would probably still close it down). While some may view violence to be a *trait* of character, one is not necessarily bound by that level of generality for “traits” in this context. Even language in the original advisory committee notes talking about a “violent trait” (in speaking generally about the whole area) does not have to necessarily define the level for our purposes. That may just have been a loose or convenient manner of expression. Nor, for similar reasons, is one necessarily bound by the use of “trait” in the 404(a) exceptions when they talk about a “trait” of “peacefulness.” That level of generality arguably may be regarded as too high for a “character trait” as opposed to “character.” We do not at the present time in this Article purport to provide a general definition of “traits of character” as distinct from character more broadly.

239. See Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 51; see also Imwinkelried, *Defending the Doctrine*, *supra* note 16, at 2 (“In the past three decades, one purportedly non-character theory, the doctrine of objective chances, has become increasingly prominent.”); Imwinkelried, *Admitting Evidence of an Accused’s Uncharged Misconduct*, *supra* note 13, at 8 (“The doctrine of objective chances has a long lineage in English case law; the doctrine traces back well more than a century.”); Imwinkelried, *An Evidentiary Paradox*, *supra* note 72, at 423 (“When the doctrine of chances initially made its advent in American case law in the 1970s, its advocates were attorneys representing the prosecution and plaintiffs. The character evidence prohibition was firmly entrenched at common law and in evidence statutes; and in order to satisfy the prohibition, those attorneys seized on the doctrine of chances and urged the courts to accept it as a non-character theory.”); Goode, *supra* note 191, at 751 (“The doctrine, which traces its origins to Wigmore’s early writing and the famous Brides in the Bath case, is enjoying a renaissance.”).

occasion.²⁴⁰ On the other hand, however, Rule 404(b) expressly permits admission of arguably very similar specific instances evidence—potentially requiring propensity reasoning by the factfinder—pursuant to the nonexhaustive set of MOIPPKIAL Factors.²⁴¹ The doctrine of chances purports to reconcile the perceived contradiction Rule 404(b) raises by resorting to probabilities rather than propensity inference.²⁴²

In essence, the doctrine suggests that the probative value or relevance of one event in proving another varies based on the odds of the two occurring together by chance.²⁴³ For an example, consider facts similar to the “Brides of the Bath” case, in which evidence of an individual’s past drowning of his wives is utilized in a present case against him for drowning his most recent wife.²⁴⁴ It

240. See *supra* Part I; Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 51 (“[T]he law of Evidence purports to ban evidence which invites the fact-finder to reason that because a criminal defendant was involved in certain other or former events, he has a propensity to engage in such acts and therefore engaged in the similar act charged in the indictment.”).

241. See *supra* Part I; Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 51–52 (discussing certain examples of evidence seemingly admissible under the MOIPPKIAL Factors or similar rubrics that “plainly seems . . . to depend on propensity reasoning for its probative value”).

242. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 52.

243. See *id.*; see also Imwinkelried, *Admitting Evidence of an Accused’s Uncharged Misconduct*, *supra* note 13, at 8 (“The argument here is . . . from the point of view of the doctrine of chances,[] the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B’s gun whistling past his head, he is willing to accept B’s bad aim or B’s accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B’s bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small.” (quoting 1 JOHN HENRY WIGMORE, *TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 611–12 (2d ed. 1923))); Imwinkelried, *Defending the Doctrine*, *supra* note 16, at 2 (“In the 1959 Ian Fleming novel, *Goldfinger*, the archvillain restates Dean Wigmore’s insight [relating to the doctrine of chances] in vernacular terms: ‘Once is happenstance. Twice is coincidence. The third time it’s enemy action.’”); Sean P. Sullivan, *Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances*, 14 L. PROBABILITY & RISK 27, 28 (2015) (“Though the foundational applications defy concise summary, the argument for admissibility usually involves (1) an improbable event, (2) realized repeatedly, (3) for which the theory to be opposed is that either accident or random chance explains the occurrence of some subset of the events in question. Under these circumstances, the doctrine of chances stands for the proposition that evidence of extrinsic events may be admissible to disprove the theory of repeated accident or random chance on the intrinsic events.”). There is not always agreement as to how such odds should be calculated, of course. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 52.

244. See *Rex v. Smith* (1915) 11 Crim. App. 229, 229–30 (UK); see also Bavli, *Aggregation Theory of Character Evidence*, *supra* note 24, at 44 (noting the *Smith* “case is often cited for the doctrine of objective chances (or the doctrine of chances)”; Imwinkelried, *An Evidentiary Paradox*, *supra* note 72, at 434 (“One of the seminal English decisions on the doctrine is the celebrated case of *Rex v. Smith*.”); Gunner Briscoe, *The Doctrine of Chance: Probabilistically Inferring Design*, 44 OKLA. CITY U. L. REV. 335, 339 (2020) (referring to *Smith* as the “most famous example” of the doctrine).

could theoretically be considered impermissible under Rule 404 or state analogues to enter evidence suggesting that the man who previously drowned his wives has a propensity for drowning wives and that he therefore drowned the most recent wife on the date in question. The doctrine of chances, however, would suggest that the same evidence of past drowning events could be admissible to reflect the extremely low probability of random chance accident explaining bathtub drowning befalling several of the same person's wives. Put differently, the extrinsic events (past drownings of wives in the bathtub) logically increases the chances of the intrinsic act (the current purposeful drowning by the husband) due to the low probability that all such acts would occur together just by accidental chance occurrence.²⁴⁵ In this way, the doctrine could, in theory, be seen to obviate the need for propensity reasoning in several contexts and help resolve Rule 404's apparent contradiction.²⁴⁶

It is unclear that the doctrine of chances as currently theorized fully eliminates propensity-type reasoning and avoids the character evidence ban.²⁴⁷

245. See Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 52 (“[T]he doctrine describes a reasoning process whereby the occurrence of the extrinsic event can logically increase the chances of guilt of the intrinsic one without the logical necessity of assuming defendant had a propensity to do such acts.”); see also *United States v. Danzey*, 594 F.2d 905, 912 (2d Cir. 1979) (“[S]imilar acts are admitted to prove intent on the basis that from the point of view of the doctrine of chances, the element of innocence is eliminated by multiplying instances of the same result. That is to say, ‘similar results do not usually occur through abnormal causes’; and the recurrence of a similar result in the form of an unlawful act tends to negative accident, inadvertence, duress, good faith, self-defense, or other innocent mental state and tends to establish to at least some extent the presence of criminal intent.” (emphasis omitted)).

246. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 52–53 (“Eliminating propensity in the reasoning process is important because, as noted, Evidence law at least as interpreted in a number of jurisdictions generally seems to at least pay lip service to (or perhaps more than lip service to) the notion that evidence dependent on propensity is banned.”).

247. For instance, imagine Kaleb is accused of murdering a business rival with his car and that the prosecution seeks to enter evidence suggesting Kaleb may have previously killed a business rival with his car (the extrinsic act) to help prove Kaleb killed the current rival with his car (the intrinsic act) via a probabilistic theory like the doctrine of chances. Logically, the jury would be asked to answer two questions: (1) what are the chances that Kaleb is innocent of the present killing where one of his prior rivals was killed in similar circumstances?; and (2) what are the chances Kaleb purposely killed the present rival where a prior of his rivals was killed in similar circumstances? See *id.* at 55. If the jury reasons that the probability of (2) is greater than that of (1), the jury might be entitled to find the evidence of the prior killing is evidence of guilt as to the present killing. *Id.* at 56. In the absence of actual empirical evidence on these questions, however, the jury is still likely to engage in certain propensity-type reasoning in assigning the relevant probabilities it must compare. See *id.* at 58 (“While people can come up with other names for the propensity, at bottom it is a propensity.”); see also Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1491 n.152 (1996) (finding it “difficult to respond to Professor Rothstein’s observation that what underlies the doctrine of chances is a propensity based reasoning that innocent people act differently than guilty people”); Wesley M. Oliver, *Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances*, 93 WASH. U. L. REV. 1131, 1139 n.50 (2016) (recognizing “[t]here is some debate about whether the doctrine of chances actually involves propensity”). The notion that the doctrine of chances

Even if it does, it would be ill-suited to admitting evidence of miscellaneous past racist acts in contexts like our original Beale hypothetical because under nearly any interpretation the doctrine of chances requires a number of almost identical acts such that their “innocent” occurrence (here, occurrence without racial motivation) would be an absolutely *phenomenal* coincidence.²⁴⁸ In an appropriate case (such as a modern-day “Brides of the Bath” case), a court favorable to the doctrine of chances might consider admitting a series of past acts—all extremely similar to each other and to the charged act—under a Doctrine of Chances gateway theory, and in fact some language in the “Brides of the Bath” case suggests this as a grounds for the reception of the evidence there.²⁴⁹ At least some modern courts might entertain a doctrine of chances-related theory for admitting other-acts evidence in appropriate cases.²⁵⁰

Concerning the original Beale hypothetical, the Doctrine of Chances gateway would only potentially apply if Sam’s other acts made the chances astronomically high against a nonracist motivation on the charged occasion—e.g., if there were a number of past killings of African Americans that had nothing else in common and little other explanation, so that it was highly

necessarily involves propensity is supported by the previously referenced comment of the Advisory Committee Chair. *See supra* note 198. She gave as an example of permissible purposes being “bound up” with propensity, the doctrine of chances. It may be that the definition of propensity adopted impacts the degree to which a theory such as the doctrine of chances can reduce reliance on propensity. The doctrine of chances also leaves several other important issues unresolved, although the theories we present in this Article do not necessarily resolve such issues either and our theories may also be attacked on certain similar grounds. First, it is unclear precisely when the chances of randomness explaining the intrinsic event would be sufficiently low as to allay concerns of unfair prejudice. Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 53. Even highly relevant evidence may be deemed inadmissible under Rule 404 pursuant to concerns of prejudice. *Id.* Is there a point where risk of prejudice should outweigh probative value? *Id.* at 65. Would there need to be a threshold number of extrinsic events per intrinsic event or should there be a specific degree of similarity between the extrinsic and intrinsic events? *Id.* at 64. Second, many jurors may not be effectively able to determine fine points of complex probabilities. *Id.* Jurors may also find themselves inadvertently being influenced by past wrongs or falling prey to propensity reasoning even with evidence admitted pursuant to a nonpropensity theory and with a relevant limiting instruction. *Id.* at 65. Third, from the perspective of incentives, the doctrine of chances may make it more challenging to incentivize unlawful actors to reform. *Id.* For example, returning to a “Brides of the Bath” fact pattern, if someone was believed to have previously killed in circumstances similar to the present circumstances, would such person simply expect that they would be rounded up as a “usual suspect” by the police and then assumed guilty by way of probabilities? *See Smith*, 11 Crim. App. at 229; Rothstein, *Comment: The Doctrine of Chances*, *supra* note 34, at 65; *see also Brown, The Content*, *supra* note 27, at 3–4 (“The [character evidence] ban exemplifies a libertarian spirit of autonomy and rehabilitation: yes, you did bad things before, but there is hope. You can still be reformed.”). Lastly, at a minimum, the doctrine may be misused or misapplied as a justification for admitting otherwise excludable character evidence, which leads to legal uncertainty and incorrect outcomes. Bavli, *Objective-Chance*, *supra* note 217, at 143.

248. *See, e.g.,* Bavli, *Objective-Chance*, *supra* note 217, at 141–42.

249. *See Smith*, 11 Crim. App. at 229.

250. *See, e.g.,* Imwinkelried, *Defending the Doctrine*, *supra* note 16, at 2–3, 9–12; Bavli, *Objective-Chance*, *supra* note 217, at 132; Imwinkelried, *Admitting Evidence of an Accused’s Uncharged Misconduct*, *supra* note 13, at 3–19.

improbable that the killings were done by Sam without racial motivation. In such a case and in a sympathetic jurisdiction, a court may admit the evidence under the Doctrine of Chances gateway.

G. *Gateway 7: Essential Element*

Our seventh gateway through which racist character evidence may be admissible arises under the essential element analysis in Rule 405. We will refer to this as the “Essential Element” gateway.

Recall that Rule 405(b) provides that when an individual’s character trait or character “is an essential element of a charge, claim, or defense,” the trait or character may “be proved by relevant specific instances of the person’s conduct.”²⁵¹ In essence, Rule 405(b) recognizes that evidence of an individual’s character may be admissible when character has been placed directly and explicitly at issue by the law governing a claim, charge, or defense involved in the case.²⁵²

Typically cited as an example of this situation are cases where a defendant is charged with being a felon in possession of a firearm.²⁵³ This statutory crime typically requires as definitional elements of the crime that the prosecution prove: (1) that the defendant was a felon (that is, the defendant had been convicted of something that may be defined as a felony); and (2) that the defendant possessed a firearm. The requirement of proving this felony status or prior conviction is often conceived of (rightly or wrongly) as requiring proof of character.

It seems at first glance that Rule 405 would allow admission of past acts of racism in cases where there is no other evidence of racial motivation on the charged occasion. After all, such past acts would seemingly be “essential” in such cases to prove the required motive, because on the particular facts, there would be no other way to do so. While this is a seductive argument—and perhaps a good policy rationale to find a means to admit into evidence past acts of racism in the hate crimes context—and while it involves reasoning somewhat akin to that behind Rule 405(b), it seriously misconstrues the language of that rule. “Essential” in the rule does not mean “no other evidence in the particular case” of a statutory or legal definitional element that conceptually could be

251. FED. R. EVID. 405(b).

252. See ROTHSTEIN, FEDERAL RULES, *supra* note 27, at r. 405 cmt. (“It would not make sense to exclude in such cases.”); *supra* Section I.D.

253. See 18 U.S.C. § 922(g)(1) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); see also *Old Chief v. United States*, 519 U.S. 172, 174 (1997) (discussing crime); Section I.D (discussing *Old Chief*).

proved by other evidence if it were available. It means the thing is an essential thing only if it *is* that definitional element itself. Thus, racial motivation (not the other act evidence of racial motivation) would be the essential element of the hate crime. But Rule 405(b) says “character” must be an essential element, not motive. If racist character were conceptually the only way motivation could *ever* be proved then, arguably, character may be an essential element in this sense. Racial motivation can, however, conceptually be proved another way (e.g., by introducing racial statements at the time of the killing, or admissions or bragging about motivation on the occasion of the killing expressed later to friends, or advance announcement to them beforehand of a racial motivation for the upcoming crime). Though there may not be another way to prove racial motivation in a particular case if no other such evidence exists, the rule does not mean “essential” in the particular case; it means essential as an element in the definition the crime.²⁵⁴ Evidence of past racist acts in a case like our original Beale hypothetical would not be “essential” in the sense required by 405(b) because there would conceptually be other ways to prove motive; but, even if it were essential, that evidence would not itself be “character” (the thing required to be essential by Rule 405(b)) and would only be *evidence of character*.

In a case where there is no other evidence of racial motivation, however, a court might feel (mistakenly in our view) that this makes racist character evidence an “essential element” within or akin to what is meant to be admissible under 405(b). Although we see this as a misconstruction of the rule, this may be another gateway to admissibility. Accordingly, if the original Beale hypothetical were heard in an appropriate court and if there were no other evidence on point aside from Sam’s past acts of racism, the court may admit the racist character evidence under the Essential Element gateway.

CONCLUSION

In the famous *Michelson v. United States*²⁵⁵ case, Justice Jackson seemingly referred to the law surrounding character evidence as a “grotesque structure.”²⁵⁶

254. The rule intentionally confines use of specific instances evidence to situations where “character” is in issue. See FED. R. EVID. 405 advisory committee’s note (“Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.”).

255. 335 U.S. 469 (1948).

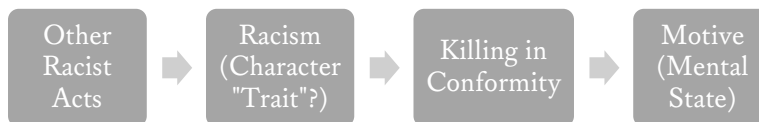
256. *Id.* at 487 (discussing character evidence and stating that “[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice”); Imwinkelried, *Reshaping the “Grotesque” Doctrine*, *supra* note 27, at 741 n.1 (quoting Justice Jackson in *Michelson*).

Even if character evidence rules are currently confused and imperfect, we think greater clarity is possible at least in the context of racist character evidence and hate crimes.

The goal of this Article was to identify and discuss seven primary gateways through which racist character evidence might be admissible consistent with Rule 404(b) in hate crimes cases. Past acts of racism are often highly probative in hate crimes cases requiring proof of racial motivation, and this racist character evidence will likely be necessary in many such cases. As a practical matter, then, we assume courts will continue to admit such evidence notwithstanding the character evidence ban.

So what is the most plausible approach for admitting racist character evidence consistent with the character evidence ban? Where the prior instances of racism are varied (i.e., generally different from each other, combining instances of failure to hire or rent with use of racial slurs or epithets), are dissimilar from the charged offense and unrelated to it, and there is no other evidence of racial motivation aside from the proffered prior instances evidence (e.g., there were no racial slurs uttered during the killing), we think the gateway we have termed the Something Additional gateway is generally the most plausible approach, as potentially buttressed by the Character Trait and Mental State gateway theories.²⁵⁷ On the Character Trait gateway point, as previously noted, a court could consider racism a sufficiently specific propensity such that it is deemed a “character trait,” even though it would seemingly fall short of being a specific propensity.²⁵⁸ On the Mental State gateway point, the mental state (motive) would come after the act in the inferential chain, which would avoid impermissibly proving the act. Specifically, the permitted chain of inference in our most plausible solution would be as set out in Figure 7.

Figure 7: Most Plausible Approach Chain of Inference²⁵⁹



As previously discussed in connection with the Something Additional gateway, the risks associated with our most plausible approach should be mitigated where possible.²⁶⁰ First, it may be that Figure 7-type reasoning could be inappropriately applied outside the racism and hate crimes context, such as

257. See *supra* Section II.C (discussing Something Additional gateway); Section II.D (discussing Mental State gateway); Section II.E (discussing Character Trait gateway).

258. See *supra* Sections II.E, II.B (discussing Specific Propensity gateway).

259. See *supra* note 38.

260. See *supra* Section II.C.

to character for “violence” in a murder case. As previously noted, we feel that the racism and violence situations are sufficiently distinct such that the risk can be mitigated, and that the Rule 403 probativity versus counterweights balancing could be used to further control this risk. Second, our most plausible approach must be accompanied by safeguards to prevent inappropriate “bad person” reasoning by the jury even in the racism and hate crimes context.²⁶¹ Specifically, safeguards must be in place to prevent the Figure 7 chain of reasoning being used to simply show the killing itself as opposed to the motive (i.e., to prevent the factfinder from stopping before the final block in the Figure 7 chain). For instance, Rule 403 should be utilized to ensure the Figure 7 chain would only be used if it were necessary (i.e., only if there were no other evidence of racial motivation, such as utterance of a racial slur at the scene of the crime).²⁶² Similarly, the factfinder should be required to first find on other evidence that the killing occurred before considering evidence using the Figure 7 chain. This could be enforced by giving a jury instruction or, better yet, by bifurcating the trial.²⁶³ Safeguards such as these are essential to the proper working of our most plausible approach.

In actual practice, most courts seem to admit other bad acts evidence in hate crimes cases and cases generally whenever the bad acts fit the exception or the clarification theory described above under our Something Additional gateway, unless the judge deems the evidence too prejudicial under Rule 403 or its analogue. At least in the context of our hate crimes cases, we think that approach is acceptable, but it must be carefully safeguarded as described. The permissible purposes (MOIPPKIAL Factors) rule, 404(b)(2), is perhaps unknowingly being construed by most courts to embrace both theories, acting as though either one will do the trick.

In the wake of a verdict relating to Ahmaud Arbery’s death, President Biden suggested his administration would “continue to do the hard work to ensure that equal justice under law is not just a phrase emblazoned in stone above the Supreme Court, but a reality for all Americans.”²⁶⁴ With FBI statistics suggesting there were more than eight thousand hate crime incidents in 2020 and with public attention acutely focused on race in the criminal justice system, we suspect that attorneys and courts will be increasingly called upon to

261. See *supra* Section II.C.

262. See FED. R. EVID. 403.

263. We understand that jury instructions are imperfect. See, e.g., Hunt, *supra* note 27, at 263; Klein, *Magical Thinking About Limiting Instructions*, *supra* note 27, at 149; Johnson, *supra* note 27, at 335–36; Brown, *The Content*, *supra* note 27, at 9. However, they are used and may offer at least some degree of protection. See Imwinkelried, *Criminal Minds*, *supra* note 70, at 853.

264. Presidential Statement on the Verdict in the Ahmaud Arbery Murder Trial in Brunswick, Georgia, 2021 DAILY COMP. PRES. DOC. 998 (Nov. 24, 2021).

determine admissibility of racist character evidence.²⁶⁵ We hope that this Article is helpful to such legal actors and to future academics studying race and the character evidence rules.

265. See *2020 Hate Crime Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/hatecrimes/2020-hate-crime-statistics> [<https://perma.cc/ZU9S-WC6A>] (last updated Mar. 30, 2023) ("The 2020 hate crimes data, submitted by 15,138 law enforcement agencies, provide information about the offenses, victims, offenders, and locations of hate crimes. Of these agencies who submitted incident reports, there were 8,263 hate crime incidents involving 11,129 offenses."); Coleman, *Police Body Cameras*, *supra* note 5, at 1354; Coleman, *Body Camera Infrastructure*, *supra* note 5, at 275–76.

