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A Series of Unfortunate Events: The Admissibility of "Other Fires" Evidence in Arson Cases

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The law is occasionally at odds with common-sense logic. One example is the prohibition on character evidence in the context of serial arsonists. American evidence law bans evidence of other fires offered to prove a defendant acted consistent with a character trait—pyromania—as to a criminally charged fire. Still, Federal Rule of Evidence 404(b) permits the admission of similar fact evidence for non-character reasons, such as motive or lack of accident. One theory of relevance not explicitly enumerated in Rule 404(b) is at the heart of this Article. Namely, the doctrine of chances posits that evidence that a defendant was involved in a series of unusual events is admissible to show the objective improbability that the defendant could be the repeated innocent victim of unfortunate events. In an arson case, the government would thus ask the jury to conclude that the charged fire is so objectively unlikely to have been the product of an accident that it must have been arson. This Article outlines the current scheme of character evidence law, examines the basic analytical underpinnings of the doctrine of chances, studies the practical challenges of its application, and explores whether an exception to the Federal Rules of Evidence for other fires evidence in pyromania cases is warranted.

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A Series of Unfortunate Events:[1] The Admissibility of "Other Fires" Evidence in Arson Cases

C.J. WILLIAMS[*] & DASHA TERNAVSKA[**]

I. INTRODUCTION

Imagine a man to whom occurred a series of unfortunate events. When he served as a small town volunteer firefighter as a teenager, his car twice caught on fire, and his parents' house burned down—the apparent result of accidents. Misfortunes followed him as an adult. Over the next two decades, he suffered another half-dozen car fires and a dozen structure fires where he, or people he knew, worked or lived. On one of these occasions, this man pled guilty to reckless use of fire, admitting that he accidently dropped a match he was using to see his way on a dark and cluttered porch. On another occasion, he pled guilty to third degree arson for setting cups on fire in a break room of a business where he worked.

Now, imagine this thirty-nine-year-old man is charged with starting three more fires within an eighteen-month period: one in a house where he stayed; a second in his ex-girlfriend's house; and a third in his apartment. The man denies criminal liability, asserting that each of the three fires with which he is charged started accidentally.[2]

Common sense would lead one to conclude there is little chance this

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[1] "A Series of Unfortunate Events" is the title of the children's book series by Daniel Handler (under the nom de plume Lemony Snicket), relating the adventures of three orphaned children who overcome a series of unfortunate events. LEMONY SNICKET, A SERIES OF UNFORTUNATE EVENTS (1999). The seemingly random, unlucky occurrences that befall the children are, of course, the intentional result of an evil villain. In the 2004 movie based on the series, the son, Klaus Baudelaire, perceptively advises his sister: "Violet, nothing happens by coincidence." LEMONY SNICKET'S A SERIES OF UNFORTUNATE EVENTS (Paramount Pictures 2004).

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[2] This hypothetical reflects the essential facts of a real case the authors prosecuted, in which we litigated the admissibility of the defendant's involvement with other fires. It was that case that raised our interest in this topic.

man was the victim of three more accidental fires, given his history.[3] Logic leads one to reason that the odds are that the defendant is a pyromaniac.[4] In the criminal justice system, jurors are generally charged with using their common sense in determining whether a defendant is guilty of the crime charged.[5] It follows, therefore, that a jury should be permitted to know of the other fires in order to use common sense to determine whether the defendant was an innocent victim of three fires, or whether he intentionally started those fires.

The character evidence rule,[6] deemed a "pillar of Anglo-American evidence law,"[7] however, presents a challenge here. Namely, the rule bars admission of character evidence generally,[8] as well as of evidence of other "crimes, wrongs, or other acts" committed by a criminal defendant if introduced to prove he acted consistent with a character trait.[9] In other

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[3] This common sense is reflected in cultural aphorisms. "The man who wins the lottery once is envied; the one who wins it twice is investigated." United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991). Another one of them, "where there's smoke, there's fire," seems particularly apt to the subject of this Article. JOHN LYLY, EUPHUES 141 (Morris William Croll & Harry Clemons eds., George Routledge & Sons Ltd. 1916) (1580) ("[T]here can no great smoke arise but there must be some fire . . . ."). There are other similar observations. "Once is happenstance. Twice is coincidence. The third time, it's enemy action." IAN FLEMING, GOLDFINGER 123 (1959). "A leopard can't/doesn't change its spots." CAMBRIDGE IDIOMS DICTIONARY 236 (2d ed. 2006). What all these sayings reflect is a common-sense understanding that evidence of a pattern of events suggests design and not accident. The more unusual the events, the more likely they are the result of human conduct, not coincidence.

[4] Pyromania is defined as "an irresistible impulse to start fires." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 960 (1991).

[5] Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1138 (1993) (explaining that the doctrine of chances "asks the jurors to do what the pattern jury instructions in many jurisdictions direct them to do, namely, employ their common sense and knowledge of the ways of the world to assess the relative plausibility of competing versions of the disputed events").

[6] The rule is codified in the federal system at Federal Rule of Evidence 404(a) ("Rule 404(a)"). This Article primarily will focus on the Federal Rules of Evidence and federal case law. Generally speaking, however, the vast majority of states have adopted rules of evidence based on the Federal Rules, and, therefore, this discussion will be relevant to state practitioners as well. *See* RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 16–17 (5th ed. 2002) (noting that forty-one states have adopted rules of evidence based on the federal model). Likewise, although this Article focuses on application of the doctrine of chances in criminal arson cases, the doctrine would be equally applicable in civil arson cases. For example, the doctrine would apply where an insured sues an insurance company that has refused coverage, claiming arson by the insured.

[7] Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape:* People v. Ewoldt *Reconsidered*, 29 U.C. DAVIS L. REV. 355, 357 (1996) (citing 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1213 (Peter Tillers revisor, 1983)).

[8] FED. R. EVID. 404(a).

[9] FED. R. EVID. 404(b). To be sure, application of Rule 404(b) of the Federal Rules of Evidence ("Rule 404(b)") is not limited to criminal cases or against criminal defendants. *See, e.g.*, Huddleston v. United States, 485 U.S. 681, 685 (1988) (stating Rule 404(b) "applies in both civil and criminal cases"); United States v. Johnson, 729 F.3d 710, 716–17 (7th Cir. 2013) (discussing the use of Rule

words, it is deemed unfair for a jury to reason the defendant guilty of the charged crime simply because he committed similar crimes in the past.[10] Thus, although evidence of other fires is logically relevant, prosecutors cannot use it to show the defendant's propensity to start fires.

On the other hand, similar fact evidence[11] is admissible as long as it is not admitted for the purpose of showing propensity. Rule 404(b) provides a non-exhaustive list of non-character reasons for which similar fact evidence may be admissible.[12] The government may present evidence of other crimes or wrongs, for example, to show that the defendant had the motive or intent to commit the crime, or to prove that the crime was not an

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404(b) evidence by a criminal defendant against a third party). As will be shown later, it is not uncommon in arson cases for criminal defendants to seek admission of evidence, pursuant to Rule 404(b), of another person connected to the scene of the arson having a history of other fires. *See infra* Part II.A (discussing the general character evidence rules and characterizing Rule 404(b) as a rule of inclusion).

[10] 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 192, at 1857, 1859 (Peter Tillers revisor, 1983) (stating that it "has long been accepted in our law . . . [t]hat the doing of one act is in itself no evidence that the same or a like act was again done by the same person").

[11] One problem with this area of evidence is the lack of precision in the language used by the courts and practitioners when referring to evidence offered pursuant to Rule 404(b). *See* Cammack, *supra* note 7, at 360 n.23 (criticizing the use of the terms "uncharged misconduct," "prior bad acts," "other acts," and "extrinsic acts" to refer to evidence of other events evidence). Courts and lawyers often use these phrases imprecisely to refer to evidence of acts, other than the one charged, offered into evidence to prove something other than propensity. *Id.* at 359–60. These phrases are imprecise for several reasons. First, the event need not occur before the charged conduct to be logically relevant. Second, the event can, but need not, constitute a crime, wrong, or "misconduct" to be relevant. Third, the event need not be an "act" committed by the person to be relevant. As will be explained in greater detail below, under the doctrine of chances, the repeated occurrence of an unusual event in connection to a person is relevant without evidence the person committed an "act" to cause the event. *See infra* Part IV.B.2 (applying the doctrine of chances to arson and arguing that the similar fire will have more probative value if it is very similar, in facts and circumstances, to the charged fire). Professor Imwinkelried is a prolific author on the subject of similar fact evidence and the doctrine of chances. It appears he has written more on the topic than any other scholar and, for that reason, the authors of this Article have relied heavily on his valuable insights and observations. Professor Imwinkelried generally uses the term "similar fact evidence" in his many articles on the subject. *See* Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as a Theory of Admissibility for Similar Fact Evidence*, 22 ANGLO-AM. L. REV. 73, 79–80 (1993) (discussing similar fact evidence and its role in the doctrine of chances as well as its relative admissibility). The authors have chosen to follow his lead in using this more precise language.

[12] FED. R. EVID. 404(b); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 596 n.47 (1985) ("The second sentence of Rule 404(b) merely contains a suggestive, nonexhaustive list of traditionally applied theories of relevance that do not capitalize upon the prohibited inference designated in the first sentence of the rule."); Jeffrey R. White, *Evidence of Other Crimes, Wrongs, or Acts Under Federal Rule of Evidence 404(b): Some Unanswered Questions*, 1 ASS'N TRIAL LAW. AM. CRIM. REP. 13, 14 (1978) (relating that, during its debates on Rule 404(b), the House Judiciary Committee rejected an amendment that would have limited admissibility of evidence to the specific list of categories); *see also* Imwinkelried, *supra* note 5, at 1136 (stating that "the insertion of 'such as' immediately preceding the list [in Rule 404(b)] indicates that the list is illustrative rather than exhaustive").

accident or a mistake.[13] It follows that in an arson case the government could argue that the evidence of a defendant's other fires is admissible for these and other relevant reasons, as long as it is not offered to prove the defendant acted consistent with his character.

The doctrine of chances is one such permissible theory of relevance not explicitly enumerated in Rule 404(b) that supports admission of evidence of other fires. The doctrine of chances posits that evidence that a defendant was involved in a series of unusual events is admissible to demonstrate the objective improbability that the defendant could be the repeated innocent victim of unfortunate events.[14] Pursuant to the doctrine of chances, in other words, a jury in an arson trial should be permitted to know the defendant was connected to other fires, in order to judge the likelihood of the charged fire being a product of an accident or chance. This analytical sequence does not call upon the jury to use propensity reasoning. The fact finder need not reason that the defendant is guilty because he acted consistent with his bad character. Rather, the government is asking the jury to conclude that the charged conduct is so objectively unlikely to have been the product of an accident that it must have been intentional.

Application of the doctrine of chances is more difficult in practice than in theory. In an arson case, for example, the following practical challenges arise. How many other fires must there be for the evidence to be admissible pursuant to the doctrine of chances? Further, is evidence that the defendant was involved in a single other fire sufficient, or must the government have evidence of the defendant's involvement in multiple other fires? How similar must the other fires be? In other words, must the government demonstrate that each fire was started using the same method or that each incident involved the burning of a similar item? Must the government present statistical evidence regarding the probability of both accidental and intentional fires? Should the government have to provide expert testimony on the probability of an average person having a house fire in his or her life? What role do other causal factors play, such as whether the defendant smokes? What degree of evidence must the government have? Should the

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[13] FED. R. EVID. 404(b).

[14] *See* 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 241 (James H. Chadbourn ed., 1979) (defining the doctrine of chances as "the instinctive recognition of th[e] 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"); *see also* D.W. Elliott, *The Young Person's Guide to Similar Fact Evidence—I*, 1983 CRIM. L. REV. 284, 289 (describing the doctrine of chances as the concept that, when the number of unfortunate events suffered by a person exceeds the ordinary incidence of such unfortunate events, the extraordinary coincidence is some evidence of criminal agency); Michelle Byers, Note, *What Are the Odds: Applying the Doctrine of Chances to Domestic-Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 569 (2012) (describing the doctrine of chances as reasoning by process of elimination).

government only be able to present evidence the defendant was convicted of committing prior arsons, or would a showing of a history of residences or cars catching on fire suffice without proof that the defendant was responsible? What role should psychiatry play in the analysis? In other words, while character is generally thought to be a poor predictor of future behavior, can that be said to be true with someone deemed to be a pyromaniac—a person with a psychological attraction to starting fires? These and other considerations make it difficult for trial courts to make reasoned decisions regarding the admissibility of a defendant's involvement in other fires.

The goal of this Article is to wrestle with these and other questions in applying the doctrine of chances to arson cases. Why the focus on arson cases? Arson fires are a significant problem in the United States.[15] Intentionally set fires are the second leading cause of all nonresidential fires and a significant cause of residential, vehicle, and other fires.[16] Arson fires cause more than one billion dollars in property loss every year in America.[17] Moreover, arson is the leading cause of both fatal fires and dollar loss in nonresidential structures in the United States.[18] Consequently, it is important to know the admissibility of other fire evidence in arson cases.

Part II of this Article reviews the background of the character evidence rules, including the general prohibition against admission of character evidence and the exceptions that permit admission of similar fact evidence. Part III explores the doctrine of chances, in particular its application to arson cases. The Article next proposes an analytical approach regarding the admissibility of other fire evidence in arson cases.[19] The final portion of the Article addresses whether there should be an exception to the Federal Rules of Evidence permitting admission of other fire evidence in arson cases where there is evidence the defendant is a pyromaniac, concluding such an exception is unwarranted.[20]

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[15] U.S. FIRE ADMIN., FIRE IN THE UNITED STATES 2003–2007, at 6 (15th ed., 2009), https://www.usfa.fema.gov/downloads/pdf/statistics/fa_325.pdf [https://perma.cc/44KE-FZCE] ("Intentional fires are still a large problem in the United States, especially to outside and nonresidential properties . . . .").

[16] *Id.* at 51–57.

[17] *Intentionally Set Fires*, TOPICAL FIRE REP. SERIES (Fed. Emergency Mgmt. Agency), Nov. 2009, at 1, http://www.usfa.fema.gov/downloads/pdf/statistics/v9i5.pdf [https://perma.cc/PQQ6-SG4L].

[18] U.S. FIRE ADMIN., *supra* note 15, at 51–54.

[19] *See infra* Part IV.

[20] *See infra* Parts V–VI.

II. CHARACTER EVIDENCE RULES

A. *The General Character Evidence Rules*

The American justice system, with limited exceptions, has long held that evidence of a person's character or character traits is generally inadmissible.[21] This has been particularly true for criminal defendants.[22] It has been said that, in America, "we try cases, rather than persons."[23] Character evidence is believed to have little probative value and great potential for misuse by finders of fact.[24] The same is not true for European rules of evidence, where evidence of an accused's character is generally admissible.[25] Indeed, "the United States stands virtually alone" in barring admission of character evidence.[26]

Nevertheless, "[t]he character evidence prohibition is settled fixture of the common law of evidence" in America.[27] The general prohibition on character evidence has been codified in the Federal Rules of Evidence. Adopted in 1975, Rule 404(a) provides that "[e]vidence 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,"[28] except in limited circumstances.[29] Not only federal courts, "but also every American jurisdiction purports to recognize a general rule excluding character evidence."[30]

Because character evidence is generally inadmissible, evidence of

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[21] *See* 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 188 (Kenneth S. Broun ed., 6th ed. 2006); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938).

[22] *See* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 232 (1989).

[23] People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988).

[24] FED. R. EVID. 404(a) advisory committee's note ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." (quoting CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, art. VI, at 615 (1964))).

[25] *See* WIGMORE, *supra* note 7, at 1212 (stating that the bar on character evidence "distinguishes [the American] from Continental systems [of evidence]"); *id.* at 1212 n.3 (relating a Danish rape trial where the defendant's criminal record was introduced into evidence before the determination of guilt); *see also* Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REFORM 707, 751 (1989) (concluding that, in European criminal justice systems, it is routine for courts to admit into evidence the defendant's entire criminal record).

[26] 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, 745 (2008).

[27] *Id.* at 741.

[28] FED. R. EVID. 404(a).

[29] *See* FED. R. EVID. 404(a)(2).

[30] Imwinkelried, *supra* note 26, at 743; *see also id.* at 743 n.19 (indicating that "[f]orty-one states have adopted evidence codes patterned after the Federal Rules" and "[t]he jurisdictions which have not elected to adopt such a code also recognize the prohibition").

other conduct is similarly generally inadmissible to show a person acted consistent with his or her character or character trait.[31] The belief is that people do not always act consistent with their character.[32] Moreover, admission of such evidence threatens the presumption of innocence because it points to a criminal defendant being a generally bad person.[33] Again, this common law prohibition is reflected in the Federal Rules of Evidence.[34] The first sentence of Rule 404(b) states that "[e]vidence of a crime, wrong, or other 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."[35] As one court has stated, "[t]he concern is that, upon learning of that prior conduct, the jury might think worse of the defendant's character out of some 'rel[iance] on the aphorism once a criminal, always a criminal.'"[36]

In contrast, when it comes to similar fact evidence, no rule of evidence poses a per se ban.[37] The rules of evidence do not bar admission of other "crimes, wrongs, or acts,"[38] as long as the evidence is not admitted for the purpose of proving propensity—that someone acted consistent with his or her purported character.[39] The Federal Rules of Evidence reflect this. Rule 404(b) goes on to provide that evidence of other crimes, wrongs, or acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

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[31] *See* FED. R. EVID. 404(b)(1).

[32] *See, e.g.*, PHILIP DORMER STANHOPE CHESTERFIELD, LETTERS WRITTEN BY THE EARL OF CHESTERFIELD TO HIS SON 156 (1876) ("[M]ankind is made up of inconsistencies, and no man acts invariably up to his predominant character. The wisest man sometimes acts weakly, and the weakest sometimes wisely.").

[33] *See* Walter A. Reiser, Jr., *Evidence of Other Criminal Acts in South Carolina*, 28 S.C. L. REV. 125, 125–26 (1976) (providing a hypothetical scenario where the introduction of other acts evidence regarding the defendant falsely induces the jury to believe that, because of that evidence, the defendant is a bad actor).

[34] *See* United States v. Dudek, 560 F.2d 1288, 1295–96 (6th Cir. 1977) (stating that Rule 404(b) restates the common law).

[35] FED. R. EVID. 404(b). Arguably, the first sentence of Rule 404(b) is redundant because it merely paraphrases the ban against character evidence reflected in Rule 404(a). *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-44 (Joseph M. McLaughlin ed., 1996) (stating that the language of Rule 404(b) is "arguably redundant" of the language of Rule 404(a)).

[36] United States v. Mare, 668 F.3d 35, 39 (1st Cir. 2012) (Torruella, J., dissenting) (quoting United States v. Rubio-Estrada, 857 F.2d 845, 852 (1st Cir. 1988)).

[37] Cammack, *supra* note 7, at 360 ("There is no prohibition against admitting evidence of other actions of the defendant per se.").

[38] FED. R. EVID. 404(b).

[39] The terms "propensity" and "character" are used interchangeably in the case law. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 909 (5th Cir. 1978). This equivalence is misplaced. *See* Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 780–81 (1981) (criticizing the courts' use of the terms as equivalent). It is better to think of propensity in this context as the probability of acting consistent with a character trait.

mistake or accident."[40]

It follows that most courts hold that Rule 404(b) is a rule of inclusion: similar fact evidence is presumed admissible under Rule 404(b) absent evidence showing the sole purpose of the evidence is to prove propensity—an act consistent with a character trait.[41] The federal courts' inclusionary attitude, however, is not a recognition that acts speak louder than words. Indeed, admission of evidence pursuant to Rule 404(b) is premised on the requirement that there be some basis other than character to seek admission of the evidence.[42] Thus, it is not a case of courts concluding that prior acts serve as sufficient proof of a person's character to provide reliable propensity evidence. Unfortunately, in practice, Rule 404(b) is treated as a formula whereby parties and courts focus on fitting the similar fact evidence into one of the explicitly enumerated "exceptions," rather than focusing on whether the similar fact evidence violates the ban on character evidence.[43]

Often, evidence of past similar criminal conduct[44] can determine the

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[40] FED. R. EVID. 404(b).

[41] *See, e.g.*, United States v. Wiktorchik, 525 F. App'x 201, 204 (3d Cir. 2013) (stating that Rule 404(b) is a rule of inclusion rather than of exclusion (citing United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994))); United States v. Jernigan, 341 F.3d 1273, 1280 (11th Cir. 2003) (noting that Rule 404(b) is one of inclusion and that such evidence "should not lightly be excluded" when it is central to the government's case (citing United States v. Perez-Tosta, 36 F.3d 1552, 1562 (11th Cir. 1994))); United States v. Young, 248 F.3d 260, 271–72 (4th Cir. 2001) ("Rule 404(b) is . . . an inclusive rule, admitting all evidence of other crimes and acts except that which tends to prove only criminal disposition." (quoting United States v. Van Metre, 150 F.3d 339, 349 (4th Cir. 1998))); United States v. Howard, 235 F.3d 366, 372 (8th Cir. 2000) (positing that evidence is erroneously admitted under Rule 404(b) only when the evidence "clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts" (quoting United States v. Brown, 148 F.3d 1003, 1009 (8th Cir. 1998))).

[42] FED. R. EVID. 404(b).

[43] Cammack, *supra* note 7, at 361 ("[T]he usual formulation of the rule for criminal cases as a list of permissible non-character uses probably impedes correct application by focusing attention on whether the evidence falls within one of the 'exceptions' contained in the list rather than on whether the evidence violates the character ban.").

[44] To be sure, Rule 404(b) governs similar fact evidence whenever the "crime, wrong or act" was committed in relation to the crime. *See* FED. R. EVID. 404(b). In other words, whether the defendant committed the similar act before, or after, the charged crime does not directly affect the act's admissibility under Rule 404(b). Of course, the non-character reason for admissibility may logically turn on when the act occurred. For example, the government may seek to admit evidence that a defendant was previously convicted of possessing cocaine for the non-character purpose of proving that, at the time of his arrest on the instant offense, he knew he possessed cocaine and not flour. In such a case, a conviction for possession of cocaine after the instant offense does not logically prove the defendant's state of mind at the time of the instant offense. As a practical matter, similar fact evidence admitted pursuant to Rule 404(b) most often involves conduct occurring prior to the charged crime, not after the charged crime. Moreover, Rule 404(b) evidence of acts occurring prior to the charged crime is often far more probative of the defendant's criminal culpability than acts occurring after the charged crime.

outcome of a trial.[45] One commentator opined that admission of uncharged conduct evidence "will usually sink the defense without [a] trace"[46] and is "often virtually decisive of the whole case."[47] Rule 404(b) evidence has been described by commentators as the "prosecutor's delight."[48] It is not surprising, then, that Rule 404(b) has generated more published opinions than any other Federal Rule of Evidence.[49] The admissibility of similar fact evidence arguably becomes critical to a fair criminal justice system.

Although similar fact evidence is most often introduced by the government against the defendant in the criminal context, it is important to recognize that the reverse holds true as well. There is nothing in the language of Rule 404(b) that limits admission of similar fact evidence to instances where it is offered by the government against the accused. In fact, cases where a criminal defendant offered similar fact evidence have referred to it as "reverse 404(b)" evidence.[50] Thus, similar fact evidence may save an innocent defendant from a wrongful conviction, just as it may condemn a guilty defendant when offered against him. In the context of our arson discussion, for example, a defendant may want to introduce evidence that another person connected to the scene of the fire has a history linking her to other fires.

Nevertheless, Rule 404(b) evidence is seldom used by criminal defendants.[51] Some argue courts should be more liberal in admission of

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[45] *See* Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L.J. 813, 814 (1998) (arguing that admission of other crimes evidence makes conviction "highly likely," while without such evidence, "the trial tends to degenerate into a swearing contest").

[46] EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02, at 1-4 (1984) (quoting Elliott, *supra* note 14, at 284).

[47] P.B. Carter, *The Admissibility of Evidence of Similar Facts II*, 70 LAW Q. REV. 214, 215 (1954); *see also* United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.").

[48] *See, e.g.*, Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 249 n.17 (1987); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 142–43 n.31 (1989).

[49] 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, 433 (2006).

[50] *See, e.g.*, United States v. Alayeto, 628 F.3d 917, 921 (7th Cir. 2010) ("Criminal defendants, however, may also use Rule 404(b) to bolster their defenses by making use of what is known as 'reverse 404(b)' evidence."); United States v. Savage, 505 F.3d 754, 761 (7th Cir. 2007) (referring to such evidence as "reverse 404(b)" evidence); United States v. Williams, 458 F.3d 312, 313–15 (3d Cir. 2006) (same); United States v. Montelongo, 420 F.3d 1169, 1174 (10th Cir. 2005) (same); United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004) (same); United States v. Hamilton, 48 F.3d 149, 155 n.8 (5th Cir. 1995) (same).

[51] *See* United States v. Stevens, 935 F.2d 1380, 1383 (3d Cir. 1991) (referring to "a seldomly used subspecies of Rule 404(b) known as 'reverse 404(b)'").

reverse 404(b) evidence as opposed to government-introduced similar fact evidence against a defendant because the propensity concerns outlined above are not present.[52] In fact, the majority of federal courts of appeals have held that the primary purpose of Rule 404(b) is to protect criminal defendants from the prejudice of propensity presumptions; therefore, the limitations of similar fact evidence referenced in Rule 404(b) should not apply to the so-called reverse 404(b) evidence.[53] Notably, though, appellate courts often affirm the district courts' denials of reverse 404(b) evidence because the evidence is insufficiently relevant or probative, and amounts to little more than "pointing [the] finger at someone else who, having a criminal record, *might* have committed the crime the defendant is accused of committing."[54]

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[52] *See, e.g.*, United States v. Seals, 419 F.3d 600, 607 (7th Cir. 2005) ("[T]he defense is not held to as rigorous of a standard as the government in introducing reverse 404(b) evidence."); United States v. Aboumoussallem, 726 F.2d 906, 911–12 (2d Cir. 1984) ("[W]e believe that the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when the prosecutor uses such evidence as a sword . . . . [because] risks of prejudice are normally absent when the defendant offers similar acts evidence of a third-party to prove some fact pertinent to the defense." (citations omitted)); United States v. McClure, 546 F.2d 670, 673 (5th Cir. 1977) (holding that the standard for admission of Rule 404(b) evidence is different and relaxed when the evidence is offered by a defendant).

[53] *See, e.g.*, United States v. Stevens, 935 F.2d 1380, 1404 (3d Cir. 1991) (holding that a defendant should be permitted, under "a lower standard of similarity," to offer "other crimes" evidence against a third party pursuant to Rule 404(b) because "prejudice to the defendant is [no longer] a factor"); United States v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir. 1987) (holding that "Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant"); United States v. Sepulveda, 710 F.2d 188, 189 (5th Cir. 1983) (holding that Rule 404(b) only applies to acts by the defendant); United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983) (holding that "Rule 404(b) does not specifically apply to exclude . . . evidence [that] involves an extraneous offense committed by someone other than the defendant. . . . [because] [t]he evidence was not introduced 'to show that the defendant has a criminal disposition . . .' so the policies underlying Rule 404(b) are inapplicable" (quoting United States v. Krezdorn, 639 F.2d 1327, 1333 (5th Cir. 1981))). *But see* United States v. Lucas, 357 F.3d 599, 605–06 (6th Cir. 2004) (rejecting a lesser standard for application of Rule 404(b) when evidence is offered by a criminal defendant, holding "that prior bad acts are generally not considered proof of *any* person's likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity" (emphasis in original)); Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999) (holding that all of the restrictions for admission of evidence under Rule 404(b) "apply to [its application to] third parties"); United States v. McCourt, 925 F.2d 1229, 1232 (9th Cir. 1991) (holding that "[b]ecause Rule 404(b) plainly proscribes other crimes evidence of 'a person,' it cannot reasonably be construed as extending only to [the] accused" (citation omitted)).

[54] United States v. Murray, 474 F.3d 938, 939 (7th Cir. 2007); *see also, e.g.*, United States v. Johnson, 729 F.3d 710, 716–17 (7th Cir. 2013) (affirming a district court's denial of admission of reverse 404(b) evidence because it was not relevant and would confuse and distract the jurors); United States v. Ushery, 400 F. App'x 674, 677 (3d Cir. 2010) (finding the lower court properly barred reverse 404(b) evidence of another passenger being found with crack cocaine one and a half years prior to defendant being found with crack cocaine in the same vehicle, and noting the evidence was insufficiently probative to suggest the car owner was the guilty party).

B. *Psychological Underpinnings*

Psychology underlies the bar on character evidence in general and admission of similar fact evidence in particular. The psychological underpinnings in this context are two-fold, each turning on predictions of human thought and behavior. First, there is the psychology of whether a person's character or character trait is a reliable predictor of human behavior. Second, there is the psychology of predicting the jurors' use or misuse of character evidence. We will briefly discuss each.[55]

1. *Predicting Human Behavior Based on Character Traits*

Prior to World War II, the prevailing thought among psychiatrists was that character traits served as a reliable predictor of human behavior.[56] In the 1950s and 1960s, however, that school of thought was theoretically debunked in favor of "situationism."[57] This theory posited that general character traits served as poor predictors of human behavior, holding that conduct turned far more on the situation in which a person was placed.[58] Situationism was the prevailing school of thought when Congress adopted the Federal Rules of Evidence in 1975.[59] As noted, Rule 404(a) consequently reflected this consensus in psychological theory by providing that character evidence is inadmissible to prove a person acted consistent with his character or character traits.[60]

Because situationism concluded that people do not necessarily act consistent with their character, the rules of evidence similarly barred admission of one's other crimes, wrongs, or acts introduced for the purpose of showing the person acted consistent with his character or character traits. The principle behind Rule 404(b) is that the chain of propensity reasoning was deemed erroneous. That is, the intermediate inference drawn from the similar fact—that the person had a character trait—would lead to an ultimate inference that he acted consistent with that character trait.[61]

Since the 1970s, however, situationism has been supplanted by "interactionism."[62] That theory posits that human behavior is the product of one's character traits and situations. Experiments have shown there is a fair amount of predictability in human conduct based on a person's character

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[55] For a thorough treatment and discussion of the various psychological theories regarding the prediction of human behavior based on character traits, see Imwinkelried, *supra* note 26.

[56] *Id.* at 745.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] FED. R. EVID. 404(a).

[61] Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea: *The Doctrine that Threatens to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 42 (1990).

[62] Imwinkelried, *supra* note 26, at 746.

traits.[63] This development weakened the psychological basis for the prohibition against character evidence generally and caused a reassessment of the ban on character evidence.[64]

Furthermore, there is a qualitative distinction between the reliability of predicting future behavior based on a general characteristic trait and predicting future behavior based on past conduct. For example, testimony that a defendant has the general character of being violent may be a poor predictor of whether he would likely assault another person. Evidence that a defendant has previously assaulted his wife on three occasions, however, may be a good predictor of whether he would assault his wife again.[65] This suggests there is a fundamental difference in the confidence we should have in the general prohibition of so-called character evidence, codified at Rule 404(a), versus in the restriction on similar fact evidence, codified at Rule 404(b).

The shift in the psychological understanding of whether humans act consistent with their character led, in part, to adoption of an exception to the general prohibition against character evidence. In September 1994, the United States Congress passed the Violent Crime Control and Law Enforcement Act of 1994 ("the Act").[66] The Act introduced three new rules into the Federal Rules of Evidence, which rendered admissible evidence of a defendant's similar acts involving sexual assault or child molestation for its bearing on any matter to which it is relevant.[67] Federal Rule of Evidence 413 ("Rule 413") permits such similar fact evidence in cases of sexual assault on adult victims.[68] Federal Rule of Evidence 414 ("Rule 414")

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[63] *Id.*

[64] *See, e.g.*, Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 505–06 (1991) (comparing prior arguments in the psychological literature regarding character evidence and the new experimental literature, which argues for greater admissibility of character evidence).

[65] *See, e.g.*, United States v. Benford, 541 F. App'x 861, 863 (10th Cir. 2013) (relating a psychiatrist's opinion that "past aggression is the single best predictor of future aggression"); Sells v. Stephens, 536 F. App'x 483, 486 (5th Cir. 2013) (presenting a psychiatrist's opinion that "the past is the best predictor of an individual's future . . . behavior"); Davis v. Woodford, 384 F.3d 628, 665 (9th Cir. 2004) (stating a psychiatrist's testimony that the "best predictor of future behavior is past behavior").

[66] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[67] FED. R. EVID. 413 advisory committee's notes to 2011 amendment. Note, however, that the rules are of admissibility, not of mandatory admission. The rules became effective on July 9, 1995.

[68] The current version of Rule 413 has undergone stylistic changes but remains the same in substance as the original version. It reads:

> Rule 413. Similar Crimes in Sexual-Assault Cases
>
> (a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

permits similar fact evidence in child molestation cases.[69] Finally, Federal

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

FED. R. EVID. 413.

[69] The restyled version of the rule reads:

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body—or an object—and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

Rule of Evidence 415 ("Rule 415") applies Rules 413 and 414 to civil cases where a claim rests on a party's alleged sexual assault or child molestation.[70] The rules thus changed the ban against the use of propensity evidence to show an act in conformity with a defendant's character, at least in that context.[71]

Because of their significant impact, the new rules did not take an easy path to adoption. The Judicial Conference of the United States had 150 days prior to the new rules taking effect to submit a report containing recommendations for amending the Federal Rules of Evidence.[72] As it prepared to consider the new rules, the Judicial Conference's Advisory Committee on Evidence Rules solicited comments from the courts, professors, and members of professional organizations.[73] According to the report, the majority of judges, lawyers, law professors, and legal organization representatives who responded opposed the rules at the time.[74] The responders' main objection, besides unintended drafting problems, was that the rules would permit admission of unfairly prejudicial

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> (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
>
> (F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

FED. R. EVID. 414.

[70] The restyled version of the rule reads:

> Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation
>
> (a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
>
> (b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
>
> (c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

FED. R. EVID. 415.

[71] The new rules codified what was previously known as the "lustful disposition exception" to character evidence. *See* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 340 (2012).

[72] Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 51 (1995) [hereinafter Report of the Judicial Conference].

[73] *Id.* at 52. Namely, comments were sought from "all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations." *Id.*

[74] *Id.* According to the Judicial Conference, the feedback received from the public "included 84 written comments, representing 112 individuals, 8 local and eight national legal organizations." *Id.*

evidence.[75] Various advisory committees and the standing committee on the issue within the Judicial Conference itself adopted this concern and were nearly unanimous in their rejection of the policies underlying Rules 413–15.[76] The report of the Judicial Conference so reflected and urged Congress to either reconsider its policies in Rules 413–15, or to at least amend Rules 404 and 405 to reflect Congressional intent instead.[77]

Although some of its members similarly opposed the new rules,[78] Congress nevertheless would adopt Rules 413–15 in its 1994 crime bill.[79] To date, certain critics maintain that the rules were adopted before any substantial studies of recidivism in sexual offenders were conducted and that the drafters relied too heavily on the public's media-inflamed concern with repeat sexual offenders.[80] In her floor statement to the House of Representatives, Representative Susan Molinari, the principal House sponsor of the rules, described at length the goals and benefits intended by the rules' supporters.[81] The aim of the rules was to supersede the restrictive aspects of Rule 404(b) in sex offense cases, thus authorizing admission and consideration of uncharged misconduct evidence for its bearing "on any

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[75] *Id.*

[76] *Id.* The Advisory Committee's significant concerns were (1) "the danger of convicting a criminal defendant for past, as opposed to charged, behavior, or for being a bad person"; and (2) mini-trials resulting within trials concerning the prior acts when a defendant would seek to rebut such evidence. *Id.* at 53.

[77] *Id.* at 53–54.

[78] *See, e.g.*, 140 CONG. REC. S12,260–62 (daily ed. Aug. 22, 1994) (statement of Sen. Biden) ("Do not give me credit for this last tough provision. I do not like it. I think it is wrong. I think it is unfair. I think it violates innocent people's civil liberties. . . . I will do all in my power, which is obviously and discernibly limited, but I will do all in my power to get rid of the Hatch-Molinari provision, if I can."); 140 CONG. REC. H8989 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes) (expressing concerns with the changes in Rules 413, 414, and 415). Congress itself had previously rejected the rules in 1991 after they were presented as bills sponsored by Representative Susan Molinari and Senator Bob Dole. David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.–KENT L. REV. 15, 15 (1994); Jeffrey Waller, *Federal Rules of Evidence 413–415: "Laws Are Like Medicine: They Generally Cure an Evil by a Lesser . . . Evil"*, 30 TEX. TECH. L. REV. 1503, 1504 (1999).

[79] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135–37(adopting new Federal Rules of Evidence 413, 414, and 415); *see also* Report of the Judicial Conference, *supra* note 72, at 51–52 (stating that the lone dissenting vote was from the representative of the Department of Justice); Waller, *supra* note 78, at 1504 (stating that some members of Congress strongly opposed the inclusion of three new Federal Rules of Evidence).

[80] *See, e.g.*, R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 33 TEX. TECH. L. REV. 1167, 1169 (2002) (arguing that Congress ignored the legal community's objections to the adoption of the rules and responded to the public outrage over high-profile cases); Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1, 6 (2006) (arguing that the drafted rules pre-dated conclusive data regarding recidivist behaviors). *See generally* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 962 (1998) (arguing Congress's motivations were political, rather than legal).

[81] 140 CONG. REC. H8991–92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

matter to which it is relevant."[82] With the changes contained in the rules, both a defendant's propensity to commit sexual assault or child molestation and the probability that he has been falsely or mistakenly accused of such an offense became permissible considerations.[83] The practical effect of the rules, Representative Molinari argued, was "to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule"—the presumption simply shifted to favoring admission.[84] Most federal courts of appeals have found that Rule 413 supersedes Rule 404's prohibition against character evidence in cases of sexual assault and child molestation, as long as the similar acts are relevant and pass scrutiny of Federal Rule of Evidence 403 ("Rule 403").[85]

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[82] *Id.* at H8991. Additionally, the general restrictions on hearsay evidence and the court's authority under Rule 403 to exclude evidence with probative value that is substantially outweighed by its prejudicial effect would continue to apply, and, as a procedural matter, the government, or the plaintiff in a civil case, would generally have to disclose potential evidence under the new rules at least fifteen days before trial. *Id.*

[83] *Id.*

[84] *Id.* at H8992. Representative Molinari explained that, consequently, evidence admissible under the new rules becomes relevant and probative, and "its probative value is normally not outweighed by any risk of prejudice or other adverse effects." 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). In other words, a court's analysis under the catch-all provision excluding prior conduct evidence that is relevant but unduly prejudicial differs if the evidence is of similar crimes in sexual assault cases. With other cases, the rule has decreed that the propensity inference is too dangerous; with the sexual assault cases, "the propensity inference is permitted for what it is worth." *See* United States v. Rogers, 587 F.3d 816, 822 (7th Cir. 2009).

[85] For the courts' recognition of Rule 413 in cases of sexual assault across circuits, see United States v. Miller, 688 F.3d 322, 328 (7th Cir. 2012) (acknowledging Rule 413); United States v. O'Connor, 650 F.3d 839, 853 (2d Cir. 2011) (acknowledging Rule 413); Martinez v. Cui, 608 F.3d 54, 59–61 (1st Cir. 2010) (drawing an analogy to Rule 415); United States v. Redlightning, 624 F.3d 1090, 1119 (9th Cir. 2010) (contrasting Rule 404(b) and Rule 413); United States v. Batton, 602 F.3d 1191, 1196 (10th Cir. 2010) (reiterating Congress's purposes for enacting the new rules); United States v. Horn, 523 F.3d 882, 887 (8th Cir. 2008) (summarizing Rule 413); United States v. Stout, 509 F.3d 796, 801 (6th Cir. 2007) (noting the changes in the new Federal Rules of Evidence); United States v. Williams, 458 F.3d 312, 317 n.5 (3d Cir. 2006) (acknowledging Rule 413); United States v. Guidry, 456 F.3d 493, 503 (5th Cir. 2006) ("Rule 413 allows the admission of other sexual assaults including those that are the subject of uncharged conduct."); United States v. Sims, 161 F. App'x 849, 852–53 (11th Cir. 2006); United States v. Stamper, 106 F. App'x 833, 835 (4th Cir. 2004) (per curiam) ("Rule 413. . . allow[s] the admission of evidence for the purpose of establishing propensity to commit other sexual offenses."); United States v. Latney, 108 F.3d 1446, 1448 (D.C. Cir. 1997) (acknowledging Rule 413).

For cases recognizing the adoption of Rule 414 in cases of child molestation across the nation, see United States v. Foley, 740 F.3d 1079, 1087–88 (7th Cir. 2014) (noting the procedures for admitting evidence under Rule 414); United States v. Reynolds, 720 F.3d 665, 670–71 (8th Cir. 2013) (same); United States v. Mason, 532 F. App'x 432, 437 (4th Cir. 2013) (applying a balancing test to facially admissible evidence offered under Rule 414); United States v. Levinson, 504 F. App'x 824, 827–28 (11th Cir. 2013) (reiterating that Rule 414 is an exception to the limitations of Rule 414(b)); United States v. Cunningham, 694 F.3d 372, 385 n.22 (3d Cir. 2012) (acknowledging Rule 414); United States v. Moore, 425 F. App'x 347, 351–52 (5th Cir. 2011) (concluding that evidence was properly admitted under Rule 414); Martinez v. Cui, 608 F.3d 54, 59–61 (1st Cir. 2010) (laying out the law of the First

An important parallel for this Article is the underlying rationale for Rules 413–15. It remains unclear whether the main driving force behind Rules 413–15 was the seriousness of the offenses at issue[86] or the recidivist tendencies of sexual offenders.[87] A review of the legislative history suggests that recidivism was, at minimum, an important factor in the development of the new rules.[88] The Congressional floor statements made by the proponents of the rules, for instance, credit the view that recidivism in sexual assault and child molestation offenders indeed constituted a major factor in the creation of the exception.[89] For example, one of the key factors in Representative Molinari's analysis of the need for Rules 413–15 was the disposition of sexual assault and child molestation offenders. She insisted on the importance of "a history of similar acts . . . [as evidence of] an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people."[90] Similarly, a

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Circuit and drawing an analogy to Rule 415); United States v. Benally, 500 F.3d 1085, 1089–91 (10th Cir. 2007) (drawing an analogy to Rule 413); United States v. Seymour, 468 F.3d 378, 384–85 (6th Cir. 2006) (restating the purpose of Rules 413 and 414 and finding that Rule 413(c) and Rule 414(c) are compatible); United States v. LeMay, 260 F.3d 1018, 1024–31 (9th Cir. 2001) (conducting an in-depth analysis of the history and application of Rule 414); United States v. Larson, 112 F.3d 600, 604–05 (2d Cir. 1997) (viewing analysis under Rule 403 to be consistent with evidence offered under Rule 414); *see also* Carmell v. Texas, 529 U.S. 513, 563 n.7 (2000) (acknowledging Rule 413 in dicta); 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (reassuring Congress that Rule 403's balancing test will still apply with the addition of the new rules). The circuits vary, however, in their level of scrutiny in the Rule 403 analysis. *Compare* Miller, 688 F.3d at 327 (stating that the lower court did not apply the balancing test properly), *with* Batton, 602 F.3d at 1198 (stating that the lower court did not err in applying the balancing test).

[86] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (noting the importance of protecting the public from rapists and child molesters).

[87] The view then becomes that an assessment of a defendant's propensities and probability given past conduct is not only permissible, but actually desirable. *See id.* ("[T]here is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense."). Some authors suggest that both recidivism of the offenders and the nature of the offenses themselves led to the rules' creation. *See, e.g.*, Joseph A. Aluise, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 163–64 (1998) ("The comments by . . . lawmakers, coupled with the assertions within the Analysis Statement, reveal the policy assumptions underlying Federal Rules of Evidence 413–15.").

[88] *See, e.g.*, 140 CONG. REC. H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("In sex-related crimes, it can be particularly useful to demonstrate a propensity of the accused to commit similar prior offenses."); 140 CONG. REC. H2434 (daily ed. Apr. 19, 1994) (statement of Rep. Kyl) (quoting Paul McNulty, former director of policy at the Department of Justice that propensity evidence is valuable in sex offense trials due to "the recidivist nature of sex offenders").

[89] *See, e.g.*, 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (explaining that the reform, in her view, was "justified by the distinctive characteristics of the cases it will affect").

[90] *Id.* at H89911–92 (citing to (1) the need to illuminate the credibility of the charge when relying on child victims, whose credibility can be readily attacked in the absence of corroboration; and (2) the importance of assessing the relative plausibility of a defendant's claims of the victim's consent and avoiding irresolvable swearing matches).

statement by the rules' author David J. Karp—considered an authoritative part of the reform's legislative history[91]—listed propensity as the first of the two main considerations[92] for the rules. Taking note of the strong condemnation of propensity inferences in the then-existing Federal Rules of Evidence, Mr. Karp explained that the inference concerning propensity, or disposition, was in fact a key common-sense ground for admitting similar fact evidence in cases of sexual assault and child molestation.[93] He posited that,

> Ordinary people do not commit outrages against others because they have relatively little inclination to do so, and because any inclination in that direction is suppressed by moral inhibitions and fear of the practical risks associated with the commission of crimes. A person with a history of rape or child molestation stands on a different footing. His past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him. A charge of rape or child molestation has greater plausibility against a person with such a background.[94]

Undoubtedly, the question of whether recidivism in sex offenders has been sufficiently studied, or established as an accepted fact in the first

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[91] *See generally* Karp, *supra* note 78, at 15. The statement was originally presented on behalf of the Justice Department to the Evidence Section of the Association of American Law Schools on January 9, 1993. *Id.*

[92] The second consideration was probability. Mr. Karp explained that

> It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type. In conjunction with the direct evidence of guilt, knowledge of the defendant's past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive.

Id. at 20.

[93] *See id.* (explaining that the past conduct of a person with a history of rape or child molestation provides evidence of the aggressive and sexual impulses that differentiate him or her from others).

[94] *Id.* Mr. Karp portrayed probability and propensity as the key grounds on which the new rules stood but later added that additional support for the rules had come from the public policy concerns about the secretive nature of the crimes at issue, the common resulting lack of neutral witnesses, the reluctance of victims to report the crime and testify, the danger of a rapist remaining at large, the plausibility of a defendant's claim of consent, and the need to corroborate child victims' testimony. *See id.* at 20–21. Mr. Karp returned to the issue of propensity at length in his discussion of the special rules recognized for sex offenders in various jurisdictions in history, such as state "sexual psychopath" laws establishing civil commitment for sex offenders, and state courts adopting special rules as a practical equivalent of an admissibility rule to allow evidence of similar crimes in sex offense cases. *Id.* at 30–34.

place, has seen much debate[95] and warrants its own in-depth analysis. The aforementioned statements of the lawmakers nevertheless support the notion that, in their creation of the rules, they were driven at least in part by the disposition of the offenders who commit sexual assaults and child molestations.

This brings us back to the psychology of predicting future behavior based on similar fact evidence. Rule 404 was based on the belief that psychology did not support the premise that propensity evidence is reliable, based on the belief that people do not act consistent with their character traits.[96] As shown above, that psychological theory has been called into question since the adoption of Rule 404.[97] Rules 413–15 were adopted, in part, based on the premise that, at least in some types of crime, character traits are so reliable a predictor of behavior that propensity evidence is explicitly admissible. Now we will consider the psychology of predicting juror behavior when presented with similar fact evidence.

2. *Predicting Juror Behavior when Presented with Similar Fact Evidence*

Admission of similar fact evidence is problematic only if we believe jurors will misuse the evidence.[98] The concern is that jurors will not appreciate the potential limitations of character evidence in predicting human behavior.[99] It is believed that, were they to learn a defendant has a certain character trait or engaged in a particular bad act in the past, the jurors would give that evidence too much weight.[100] Some argue that "at a

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[95] *See* Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Respondent, Stogner v. California, 539 U.S. 607 (2003) (No. 01-1757), 2003 WL 542208, at *23–24 (discussing the differences in the conclusions of various scientific studies over the span of several decades, but noting that child molesters, in particular, are often repeat offenders who remain at risk of reoffending and whose recidivism is better identified by long-term studies).

[96] *See supra* Part II.B.

[97] *See id.*

[98] *See* Cammack, *supra* note 7, at 358–59 (stating that the problem with admission of similar fact evidence is that "[m]any fear that jurors will over estimate the value of the evidence giving it more weight than it deserves" and that "jurors will use evidence of a person's character to decide whether the person deserves to be punished *because of her character*, rather than whether the person deserves to be punished because she performed a particular act"); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 135–36 (1989) ("The ability of a jury to use evidence admitted under the Rule 404(b) exception for a proper purpose, at least in intent cases, is highly questionable.").

[99] As Justice Jackson said, "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475–76 (1948) (footnote omitted).

[100] *See* Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 18 ("The danger is that a lay trier of fact may give the similar fact evidence far more weight than it deserves."); *see also* ZUCKERMAN, *supra* note 22, at 222 (asserting that jurors give "an exaggerated estimation of the probative value of previous crimes and other deviant conduct").

subconscious level the jurors may be tempted to punish the accused for the other [acts],"[101] rather than use knowledge of the other acts properly to determine whether the defendant committed the charged offense.[102] The danger is believed to be especially acute if the jurors learn the defendant was criminally convicted of the other acts.[103]

There is some empirical evidence, though dated, supporting this supposition.[104] The assumption that the psychological data supports a finding that lay persons routinely overestimate the value of character evidence, however, has been challenged more recently.[105] Moreover, the justice system presumes that, when jurors are instructed on the proper use of similar fact evidence, they follow those instructions.[106] There is empirical evidence to provide confidence in this assumption.[107] This

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[101] Imwinkelried, *supra* note 61, at 48.

[102] *See* John T. Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 78 (1973) (discussing Texas state court cases barring evidence of similar fact evidence regarding a robbery unconnected to the charged offense); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 763 (1961) (arguing juries are tempted to convict criminal defendants if they learn of other crimes or wrongs because they feel the defendants may have escaped justice).

[103] *See* C.R. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 291 (1979) (arguing that evidence of prior convictions introduces suspicion into the minds of the jurors); *see also* United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979) (noting that "[t]wo concerns are expressed by the first sentence of Rule 404(b): (1) that the jury may convict a 'bad man' . . . and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged" (footnote omitted)).

[104] The empirical evidence cited by commentators is a dated study conducted by the London School of Economics and the Chicago Jury Project in 1958. That study tended to show that jurors had difficulty affording a criminal defendant the presumption of innocence when they found out the defendant had a criminal history. *See generally* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 178–79 (1966) (discussing results of the study showing jury members made different credibility judgments towards defendants with criminal records). This study did not, however, address the impact of similar fact evidence directly. Nor did the study evaluate the effectiveness of proper limiting instructions. Finally, the study involved evidence of other crimes committed by a testifying defendant and not admission of similar fact evidence pursuant to the doctrine of chances.

[105] *See* Office of Legal Policy, *supra* note 25, at 732 (arguing there is no reason to believe that evidence of other offenses carries an extraordinary risk of prejudice).

[106] *See, e.g.*, United States v. Chong Lam, 677 F.3d 190, 204 (4th Cir. 2012) (holding that jurors are presumed to follow a trial court's limiting instructions regarding the use of similar fact evidence admitted pursuant to Rule 404(b) (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987) (additional citation omitted)); United States v. Smith, 352 F. App'x 387, 390, 2009 WL 3739436 (11th Cir. 2009) (unpublished) (same) (citing United States v. Gonzalez, 703 F.2d 1222, 1224 (11th Cir. 1983) (additional citation omitted)); United States v. Givan, 320 F.3d 452, 462 (3d Cir. 2003) (same); United States v. Murphy, 241 F.3d 447, 451 (6th Cir. 2001) (same); *see also* Jones v. United States, 527 U.S. 373, 394 (1999) (stating that juries are presumed to follow a court's instruction (citations omitted)); Huddleston v. United States, 485 U.S. 681, 691–92 (1988) (opining that jury instructions regarding the proper use of similar fact evidence admitted pursuant to Rule 404(b) provide protection against the jury's improper use of the evidence).

[107] *See* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L.

includes an empirical study specifically involving similar fact evidence.[108] Based on the authors' own observations and experience, and those of other practitioners and scholars, jurors give tremendous weight to, and appear to follow, a trial judge's instructions.[109]

Thus, just as it has become clear there are reasons to doubt the psychology behind the character evidence rule, there are reasons to question the presumption that jurors presented with similar fact evidence will misuse it.[110] This is not to say that we advocate for abandoning the character evidence rule. It is nevertheless important to understand the reasons for the rule when we address admission of other fire evidence in arson cases pursuant to the doctrine of chances next.

REFORM 401, 419 (1990) (reviewing a study of 600 jurors that found that educated jurors' responses improved after instruction).

[108] *See* Evelyn Goldstein Schaefer & Kristine L. Hansen, *Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation*, 14 CRIM. L.J. 157, 170, 176 (1990).

[109] The lead author of this Article has tried more than sixty jury trials, has observed many more, and has discussed jury trials with many other practitioners. For additional support, see Mark A. Dombroff, *Jury Instructions Can Be Crucial in Trial Process*, LEGAL TIMES, Feb. 25, 1985, at 26 (noting that jurors are likely to both assign great weight to a judge's instructions and to discount statements by lawyers); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 65 (1995) ("Most judges seem to believe that jurors understand and apply the law of negligence well, and leading commentators concur that juries decide competently."); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 324 (2013) (noting that "jurors generally do follow instructions, or at least they try"); J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 351 ("Simple instructions to this effect could have a great deal of influence; jurors respect and attempt to follow jury instructions, and if clearly worded, instructions can be effective."); Schneider, *Evidence*, 53 WAYNE L. REV. 295, 418 (2007) (noting that, in the context of Michigan state law, the presumption that jurors follow limiting instructions of the court, though potentially "unmitigated fiction," is one that "underpins the entire jury system and without which the system could not function"); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 GA. L. REV. 1, 28, 31 (1993) (describing a study where eighty percent of plaintiff's lawyers and seventy-one percent of defense lawyers believed that juries followed instructions); Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 82–87 (2014) (discussing a limited study where jurors self-reported that they followed the court's instructions on the use of social media); James W. Hoolihan, *What Jurors Think About Attorneys*, BENCH & BAR MINN. (Feb. 14, 2014), http://mnbenchbar.com/2014/02/what-jurors-think-about-attorneys/ [https://perma.cc/UA45-Z5CU] ("I can say without reservation that I have been awed and gratified at the universal attitude of jurors who wish to do the right thing and give their time and attention in a sincere effort to follow the instructions of the court and to be fair and judicious."). The Supreme Court of the United States appears to have endorsed this assumption as well. *See, e.g.*, United States v. Olano, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions." (citing Richardson, 481 U.S. at 206 (additional citation omitted)); Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."). *But see* Bruton v. United States, 391 U.S. 123, 126 (1968) (limiting the scope of the presumption that jurors follow a court's instructions in the context of joint criminal trials and confrontation rights).

[110] *See* Williams, *supra* note 103, at 347 ("The potential for prejudice possessed by an item of evidence is often largely a matter of guesswork.").

III. THE DOCTRINE OF CHANCES

A. *The Doctrine of Chances Generally*

The doctrine of chances is a theory of legal relevance, which posits that, as the number of unusual incidents increase in relation to a defendant, so does the probability that the incidents were not accidental.[111] In other words, when an unlikely event—like a fire—occurs often in relation to the same person, it is objectively improbable that the fires were merely accidents. The doctrine of chances reflects reasoning by process of elimination.[112] Professor Edward Imwinkelried has explained:

> Based on ordinary common sense and mundane human experience, it is unlikely that a large number of similar accidents will befall the same victim in a short period of time. Considered in isolation, the charged fire . . . may easily be explicable as an accident. However, when all similar incidents are considered collectively or in the aggregate, they amount to an extraordinary coincidence; and the doctrine of chances can create an inference of human design. The recurrence of similar incidents incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus.[113]

The doctrine of chances is of relatively recent advent in American jurisprudence, especially when compared with the character evidence prohibition. The doctrine of chances began appearing in reported American case law in the 1970s, about the time the Federal Rules of Evidence were being formulated.[114] It has its origins, however, in England at the turn of the last century. In *Rex v. Smith*,[115] the defendant's wife was discovered drowned in her bathtub.[116] The defendant asserted it was an accident and that he had no involvement in her death.[117] The government said otherwise, producing evidence that the defendant's two prior wives similarly died by drowning in their bathtubs.[118] An appellate court affirmed the defendant's conviction and the trial court's admission of the evidence of the prior drownings, holding that it was instructive "upon the question whether the

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[111] *See* WIGMORE, *supra* note 14, § 302, at 241.

[112] Imwinkelried, *supra* note 49, at 452.

[113] *See* EDWARD J. IMWINKELRIED, 1 UNCHARGED MISCONDUCT EVIDENCE § 4:3, at 4-42 to 4-43 (rev. ed. 2008) (footnotes omitted).

[114] *See* Imwinkelried, *supra* note 49, at 423 (explaining that the doctrine of chances made its initial advent in American case law in the 1970s).

[115] [1916] 11 A.C. 229 (Cr. App.) (Eng.) (appeal taken from Central Criminal Court).

[116] *Id.* at 229.

[117] *Id.* at 233, 236.

[118] *Id.* at 229.

acts alleged to constitute the crime charged in the indictment were designed or accidental."[119] The court reasoned that it was objectively improbable the defendant was the victim of so many similar accidents—that he was either the unluckiest person alive or that one or more of the deaths was the product of human design.[120]

The seminal American case applying the doctrine of chances was *United States v. Woods*.[121] In that case, a seven-month-old foster child died of a cyanotic episode.[122] What caused him to stop breathing was unknown.[123] The child had no history of cyanosis until he was placed in his most recent foster home.[124] In stark contrast, however, the child's foster mother had a long history of children in her care suffering cyanotic episodes.[125] In the previous twenty-five years, nine children in her care suffered at least twenty cyanotic episodes, resulting in seven deaths.[126] The district court admitted the evidence pursuant to the doctrine of chances, the jury convicted her, and the conviction was affirmed by the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").[127]

The doctrine has since been explicitly applied in other federal criminal cases. In *United States v. York*,[128] the court applied the doctrine of chances to a case involving the collection of insurance proceeds from a deceased.[129] The United States Court of Appeals for the Seventh Circuit concluded that the inference derived from application of the doctrine "is purely objective, and has nothing to do with a subjective assessment of [the defendant's] character."[130] Similarly, in *United States v. Queen*,[131] the Fourth Circuit applied the doctrine of chances to admit evidence the defendant engaged in prior acts of witness intimidation in a trial of the defendant on charges of witness tampering.[132] In *United States v. Klein*,[133] the United States Court of Appeals for the Second Circuit invoked the doctrine of chances in affirming admission of prior occasions where the defendant, being tried for

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[119] *Id.* at 237.

[120] *See* Imwinkelried, *supra* note 49, at 435 ("The court's reasoning focused on the objective improbability of so many similar accidents befalling Smith. Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an actus reus.").

[121] 484 F.2d 127 (4th Cir. 1973).

[122] *Id.* at 129.

[123] *Id.* at 130.

[124] *Id.* at 129.

[125] *Id.* at 130.

[126] *Id.*

[127] *Id.* at 128–29, 139.

[128] 933 F.2d 1343 (7th Cir. 1991), *overruled on other grounds by* Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999).

[129] *Id.* at 1349–50.

[130] *Id.* at 1350.

[131] 132 F.3d 991 (4th Cir. 1997).

[132] *Id.* at 992–93.

[133] 340 F.2d 547 (2d Cir. 1965).

interstate transportation of forged securities, had previously received stolen traveler's checks.[134]

Thus, the doctrine of chances has achieved a notable level of acceptance in federal criminal cases.[135] Moreover, pursuant to the doctrine of chances, the similar fact evidence can be admissible to prove the actus reus, the mens rea, or both.[136] This is readily apparent when reviewing cases where the doctrine has been applied in arson cases.

B. *The Doctrine of Chances Applied to Arson Cases*

The doctrine of chances is applicable to arson cases where there is evidence the defendant was connected to other fires.[137] Again, Professor Imwinkelried described the doctrine of chances as applied in an arson case:

> Suppose that the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant and even nonarson fires at premises owned by the defendant. In these cases, the courts invoke the doctrine of objective chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires in a short period of time. The coincidence defies common sense and is too peculiar. The ultimate inference is the commission of an actus reus, but the intermediate inference is objective unlikelihood under the doctrine of chances rather than the defendant's subjective, personal character.[138]

When evidence of other fires is offered against an arson defendant pursuant to the doctrine of chances,

> the prosecutor is offering the evidence to establish an ultimate inference of action. . . . [T]he prosecutor has avoided

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[134] *Id.* at 549.

[135] *See, e.g.*, Beall v. Yates, No. CV 09-3880-VBF (PJW), 2011 WL 4404072, at *1, *5 (C.D. Cal. Sept. 14, 2011) (on a habeas petition, affirming the state court's use of the doctrine of chances analysis in admitting prior act evidence); *see also* Moody v. Scribner, No. CV 06-06557-GHK (VBK), 2010 WL 1222038, at *1, *3, *8–9 (C.D. Cal. Jan. 22, 2010) (denying habeas relief for state court's admission of prior acts under the doctrine of chances).

[136] Imwinkelried, *supra* note 45, at 838 ("The doctrine of chances has broad application. In cases such as *Woods*, the doctrine can rationalize the admission of uncharged misconduct to establish the actus reus. However, the doctrine can also be pressed into service when the pivotal issue is mens rea rather than the actus reus.").

[137] IMWINKELRIED, *supra* note 113, § 4:3, at 4-44.

[138] *Id.* § 4:1, at 4-6 to 4-11 (footnotes omitted).

> relying on the defendant's personal character as the intermediate inference. . . . While deciding to draw the intermediate inference, the jury need not focus on the defendant's subjective character. The question for the jury is not whether the defendant is the type of person who sets incendiary fires . . . . The question is whether it is objectively likely that so many fires . . . could be attributable to natural causes. It is that objective unlikelihood that tends to prove human agency, causation, and design.[139]

It is that development of the alternative intermediate inference by the prosecutor that avoids the prohibition of Rule 404(b).[140] Instead of the logical relevance theory forbidden by Rule 404(b) of "act of uncharged conduct → defendant's subjective character → action consistent with the defendant's character," the permissible logical evidence theory put forth by the doctrine of chances is "act of uncharged conduct → objective improbability of accident → commission of actus reus."[141]

Only a couple federal courts have explicitly applied the doctrine of chances in arson cases in determining admissibility of other fire evidence. In *Westfield Insurance. Co. v. Harris*,[142] the Fourth Circuit held a district court abused its discretion when it excluded evidence of seven fires the arson defendant experienced over a period of sixteen years prior to the fire with which he was charged, ruling the doctrine of chances demonstrated the relevance of the evidence.[143] In *United States v. Young*,[144] the trial court acknowledged that, in theory, the other fire evidence could be admissible pursuant to the doctrine of chances but nevertheless excluded the evidence because the government failed to identify any evidence that the defendant had started the other fires.[145] A number of state courts have similarly admitted evidence of other fires in arson cases pursuant to the doctrine of chances.[146]

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[139] *Id.* § 4:1, at 4-14 (footnotes omitted).

[140] *Id.* § 4:1, at 4-14 to 4-15.

[141] *Id.* § 4:1, at 4-5, 4-15; *see also* Imwinkelried, *supra* note 49, at 423 (engaging in a thorough discussion of the doctrine of chances, including its history, criticism, and application).

[142] 134 F.3d 608 (4th Cir. 1998).

[143] *Id.* at 614–15.

[144] 65 F. Supp. 2d 370 (E.D. Va. 1999).

[145] *Id.* at 373–74.

[146] *See, e.g.*, People v. Mardlin, 790 N.W.2d 607, 617–18 (Mich. 2010) (holding, under the doctrine of chances, that evidence of four prior fires involving homes and vehicles owned or controlled by the defendant was admissible to prove lack of accident and noting "the very function of the doctrine of chances is to permit the introduction of events that might appear accidental in isolation, but that suggest human design when viewed in aggregate"); People v. Erving, 73 Cal. Rptr. 2d 815, 822 (Ct. App. 1998) (holding the doctrine of chances was properly used to justify the admission of uncharged fires to prove the defendant's intent and identity when the defendant had lived in four geographically distant neighborhoods, and where arson fires had regularly occurred either at her home or within

In one federal case, the district court rejected the government's attempt to prove the actus reus with other fires pursuant to the doctrine of chances. In *United States v. Gant*,[147] the government sought to admit evidence the defendant was linked to seventeen other fires.[148] Applying the standard analysis for admission of similar fact evidence when offered to prove intent pursuant to Rule 404(b), the district court analyzed the proffered evidence and concluded the government could offer evidence of "four post-2000 fires that Defendant was either convicted of starting or admitted to starting."[149] The district court addressed the doctrine of chances only under the relevance prong of the analysis for admission of evidence pursuant to Rule 404(b). In doing so, the court explained:

> Insofar as the government is arguing that the prior fires are admissible to prove the actus reus under the "doctrine of chances," the court finds that the doctrine is inapplicable given the court's narrowing of the admissible fires. Even if it were applicable, the government cites no Eighth Circuit case law applying the doctrine. Accordingly, the court shall admit evidence of the four fires solely for the purpose of showing Defendant's mens rea.[150]

On appeal, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") affirmed the district court's admission of the evidence of the four fires out of the seventeen.[151] The *Gant* court found this evidence admissible, pursuant to Rule 404(b), to show the defendant's intent and lack of accident.[152] Though the Eighth Circuit did not reference the doctrine of chances in its ruling, it did cite *Westfield Insurance Co.*, noting that, "where prior acts of apparent coincidence are similar, the repeated reoccurrence of such an act takes on increasing relevance to support the proposition that there is an absence of accident."[153]

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walking distance of it but ceased after she moved). Notably, in *Erving*, the objective inference made through the application of the doctrine of chances was that it was extremely unlikely that through bad luck or coincidence an innocent person would live near so many arson fires, occurring so frequently, in so many different neighborhoods. *See also* State v. Allen, 725 P.2d 331, 333 (Or. 1986), (finding prior arson evidence admissible under the doctrine of chances when it possessed logical relevance independent of proof of the defendant's character); *State v. Wieland*, 887 P.2d 368, 370–72 (Or. Ct. App. 1994) (using the doctrine of chances to justify the admission of evidence of prior fires as relevant to show the fires were not accidental).

[147] United States v. Gant, No. 11-CR-2042-LRR, 2012 WL 2576466 (N.D. Iowa July 3, 2012).

[148] Sealed Order at 4, United States v. Gant, No. 11-CR-2042-LRR (N.D. Iowa Dec. 28, 2012), Doc. 199.

[149] *Id.* at 15.

[150] *Id.* at 14–15.

[151] United States v. Gant, 721 F.3d 505, 508–10 (8th Cir. 2013).

[152] *Id.* at 509.

[153] *Id.* (citing *Westfield Ins. Co.*, 134 F.3d at 614–15). The district court specifically declined ruling on the doctrine of chances. *See* Sealed Order, *supra* note 148, at 14–15.

Still, other federal courts have admitted evidence of other fires in arson cases without explicitly addressing the doctrine of chances. For example, in *United States v. Anderson*,[154] the defendant and others were convicted of conspiring to burn a furniture warehouse to collect insurance proceeds.[155] The trial court had admitted evidence the defendant set earlier fires at other facilities to collect insurance proceeds.[156] In affirming the trial court's admission of the evidence, the United States Court of Appeals for the Fifth Circuit held the evidence admissible because there was sufficient evidence to show the defendant intentionally set the prior fires, rendering them relevant to prove the defendant's motive and intent.[157] In *United States v. Mare*,[158] the United States Court of Appeals for the First Circuit ("First Circuit") upheld the admission of the evidence of an arson defendant having claimed that he had previously set a fire to another person under Rule 404(b).[159] The First Circuit reasoned that, regardless of whether it was true, the statement was admissible because it "shed[] relevant light on his mindset in committing the charged offense."[160]

In *United States v. Ihmoud*,[161] the Eighth Circuit affirmed the trial court's admission of evidence that the arson defendants were involved in setting other stores and cars on fire in order to collect insurance proceeds.[162] The trial court found the evidence admissible, pursuant to Rule 404(b), to show the defendants' plan or common scheme.[163] In upholding that finding, the Eighth Circuit noted that

> [a]ny prejudice from the evidence of the 2000 fire was limited by the court's instruction to the jury that they "may not use this similar acts evidence to decide whether a defendant carried out the acts involved in the crime charged in the indictment" and that, to find the defendant guilty, they "must first unanimously find beyond a reasonable doubt based on the rest of the evidence that will be introduced in this case that a defendant carried out the acts involved in the crime charged in the indictment."[164]

Other federal courts have refused to admit evidence of other fires in arson cases—without, however, addressing the applicability of the doctrine

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[154] 976 F.2d 927 (5th Cir. 1992).
[155] *Id.*
[156] *Id.* at 928.
[157] *Id.* at 928–29.
[158] 668 F.3d 35 (1st Cir. 2012).
[159] *Id.* at 38.
[160] *Id.* at 39.
[161] 454 F.3d 887 (8th Cir. 2006).
[162] *Id.* at 892.
[163] *Id.*
[164] *Id.* (citation omitted).

of chances. For example, in *United States v. Varoudakis*,[165] the First Circuit reversed a conviction of a man charged with setting his restaurant ablaze to collect insurance money, finding the trial court erred in admitting testimony of the defendant's former girlfriend that he had previously torched his car to collect insurance money.[166] The government had offered the evidence under Rule 404(b), arguing it was admissible to prove the defendant's plan, knowledge, and intent.[167] The court found there was no connection between the car and restaurant fires that would suggest it was part of a common scheme or plan, particularly when the defendant's girlfriend was merely an observer to the car fire, but a participant in the restaurant fire.[168] The First Circuit opined the government's offer of evidence of the prior fire "involve[d] an inference of propensity as 'a necessary link in the inferential chain.'"[169]

Similarly, in *United States v. Utter*,[170] the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") excluded evidence that the defendant, in a separate incident, threatened a tenant after she did not pay a full month's rent, saying that he would "burn her out."[171] The government offered the evidence to show "how the defendant react[ed] to financial stress."[172] The court rejected this reasoning, explaining that was "the type of character and propensity evidence prohibited by Rule 404(b)."[173] The Eleventh Circuit did not, however, address the doctrine of chances.

Interestingly, some federal courts have barred arson defendants from offering evidence that other suspects had a history of arson. In none of these cases of reverse 404(b) evidence, however, did the courts address the doctrine of chances.

In *United States v. Logan*,[174] the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") sustained admission of evidence that a hotel owner defendant was involved in six prior arsons but rejected his attempt to introduce evidence of another employee's history of arson.[175] On appeal, the defendant did not challenge the lower court's admission of evidence of his setting multiple fires in other hotels he had owned in an effort to collect insurance.[176] A co-defendant did challenge on appeal, however, the trial

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[165] 233 F.3d 113 (1st Cir. 2000).
[166] *Id.* at 116.
[167] *Id.* at 119.
[168] *Id.*
[169] *Id.* at 120 (internal citation and quotation marks omitted).
[170] 97 F.3d 509 (11th Cir. 1996).
[171] *Id.* at 513–14.
[172] *Id.*
[173] *Id.* at 514.
[174] No. 97-5912, 1999 WL 551353 (6th Cir. July 19, 1999).
[175] *Id.* at *4, *13.
[176] *Id.* at *17.

court's barring of evidence that another employee had a "history of setting fires extending as far back as 1973."[177] Defense argued evidence of the other fires "would have shown [the employee] had a motive and common plan for setting fires to collect insurance premiums . . . ."[178] The court rejected this argument, finding the employee had stood a chance to collect insurance in only the oldest of the prior fires and stood no chance of recovering insurance proceeds from the charged fire.[179]

In another case involving reverse Rule 404(b) evidence, a trial court rejected an arson defendant's attempt to introduce evidence of the victim's mother previously setting a fire in a relative's yard.[180] The defendant argued the evidence was admissible to show that woman was the one who had committed the charged arson.[181] Analyzing the admissibility of the evidence under the "identity" purpose of Rule 404(b), the United States Court of Appeals for the Ninth Circuit affirmed the district court's rejection of the evidence, reasoning that there was insufficient evidence the prior "small fire in a front yard" was "sufficiently distinctive to warrant an inference that the person who committed" that fire also committed the "massive [house] fire" at issue in the prosecution.[182]

This review of the extant federal case law addressing the admissibility of other fire evidence in arson cases reveals an inconsistent and unprincipled manner of evaluating the admissibility of such evidence, particularly when courts fail to analyze admission of the evidence pursuant to the doctrine of chances. We have seen that some courts apply the doctrine of chances, while most do not. There is inconsistency in what the courts require regarding the number of other fires, their similarity to the charged fire, and the consistency of motive in determining admissibility. Courts are also vague in the quality and quantity of evidence necessary to establish an adequate factual basis for admissibility of other fire evidence. Finally, few courts have addressed an appropriate limiting instruction to guide the jury's proper use of other fire evidence. This demonstrates the need for a clear methodology for addressing the admissibility of other fire evidence, a topic we take up in the next Part.

IV. ADDRESSING ADMISSIBILITY OF OTHER FIRE EVIDENCE

To determine whether other fire evidence is admissible in an arson case pursuant to the doctrine of chances, courts should consider a number of factors in the context of Rules 403 and 404(b). To begin with, courts

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[177] *Id.* at *5.
[178] *Id.*
[179] *Id.*
[180] United States v. Arcand, 220 F. App'x 508, 510 (9th Cir. 2007) (unpublished).
[181] *Id.*
[182] *Id.* (citation omitted).

should recognize that Rule 404(b) does not provide a formula pursuant to which evidence must "fit" within one of the permissible non-character reasons listed. Rather, courts ought to start with the understanding that the Federal Rules of Evidence do not bar similar fact evidence unless it is offered only to prove propensity.

When other fire evidence is offered pursuant to the doctrine of chances, courts must first determine whether it is being offered to prove actus reus or mens rea, or both. Then courts must consider a number of factors bearing on the nature of the other fire evidence and its relation to the charged fire. If a court finds the other fire evidence admissible pursuant to the doctrine of chances, the court must then determine whether the evidence should nevertheless be barred pursuant to the balancing test in Rule 403. Finally, if a court determines to admit the other fire evidence, it should fashion a limiting instruction designed to properly and effectively channel the jury's consideration of the evidence for permissible purposes.

A. *Other Fire Evidence to Prove Actus Reus, Mens Rea, or Both*

Similar fact evidence offered for the non-character purpose of applying the doctrine of chances can be admitted to prove actus reus, mens rea, or both.[183] As a general matter, evidence admitted pursuant to Rule 404(b) is often offered to prove only mens rea. Indeed, in such cases courts generally instruct jurors that they cannot even consider similar fact evidence unless they first find the defendant committed these criminal acts.[184] Unfortunately, not all judges or lawyers understand that similar fact evidence can be admitted to prove actus reus, and not just mens rea, if offered for other legitimate purposes.[185] Similar fact evidence admitted pursuant to the doctrine of chances is one such purpose.

Evidence of other fires may be admitted pursuant to the doctrine of

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[183] *See supra* note 141 and accompanying text.

[184] *See, e.g.*, United States v. Sandoval, 460 F. App'x 552, 559 (6th Cir. 2012) (unpublished) (where the jury was instructed as follows, "You have heard testimony that the defendant committed acts and wrongs other than the ones charged in the indictment. If you find the defendant did those acts and wrongs, you can consider the evidence as it relates to the government's claim on the defendant's intent or absence of mistake or accident. You must not consider it for any other purpose"); United States v. Rothermich, 432 F. App'x 644, 647 (8th Cir. 2011) (unpublished) (where the jury was instructed in the following manner: "If you find that this evidence [that the defendant possessed drugs in the past] is more likely true than not true, you may consider it to help you decide whether the Defendant knowingly and intentionally participated in the conspiracy charged in Count I and was not merely an unwitting—an uninvolved participant and whether the Defendant possessed pseudoephedrine with the intent to manufacture methamphetamine").

[185] *See* United States v. Thomas, 114 F.3d 228, 265 (D.C. Cir. 1997) ("In holding that the jury was entitled to hear evidence of [defendant]'s pre-eighteen conduct for the limited purpose of showing knowledge of the conspiracy's existence, the court relied on Federal Rule of Evidence 404(b), which permits the introduction of *prior conduct* to prove intent or other elements of the *mens rea*, but forbids such evidence to be used to infer the charged wrongful act." (emphasis in original)).

chances to prove the defendant committed the charged arson, that is, committed the actus reus, without running afoul of the character evidence prohibition. This would arise, for example, in a case where the defendant cannot deny the fire was the result of arson but denies any responsibility for it. The theory of relevance of other fires in this circumstance would be:

Item of Evidence		Intermediate Inference		Ultimate Inference
Other fires	→	The objective improbability of so many other fires befalling the defendant	→	The actus reus[186]

Evidence admitted pursuant to this legitimate purpose would not focus on the arson defendant's character. Rather, the jury's focus is on "whether the uncharged incidents are so numerous that it is objectively improbable that so many [fires] would befall the accused."[187]

Similarly, other fire evidence is admissible pursuant to the doctrine of chances to prove the defendant intentionally set the charged fire. This would arise, for example, in a case where the defendant claimed the fire started accidentally as a result of discarding a cigarette or some other act of negligence. The theory of relevance of other fires in this circumstance would be:

Item of Evidence		Intermediate Inference		Ultimate Inference
Other fires	→	The objective improbability of the defendant's innocent involvement in so many fires	→	The mens rea[188]

Evidence admitted pursuant to this legitimate purpose again would not focus on the arson defendant's character. Rather, the focus is on the objective improbability of the defendant accidentally starting the charged fire, having been linked to other fires already.[189]

One can easily envision an arson case where the defendant denies both the actus reus by denying having anything to do with the charged fire, and the mens rea by denying intentionally setting the fire. In such a case, evidence of other fires would be admissible, pursuant to the doctrine of chances, to prove both actus reus and mens rea. Prior to admitting other fire evidence to prove either actus reus or mens rea, however, courts should consider a number of factors to ensure that the evidence is properly admitted pursuant to the doctrine of chances and that the evidence is not subject to misuse by the jury.

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[186] Imwinkelried, *supra* note 61, at 55 fig.3.
[187] *Id.* at 56.
[188] *Id.* at 65 fig.4.
[189] *Id.*

B. *Factors for Applying the Doctrine of Chances to Arson Cases*

Once the court has identified the purpose for which the evidence is being offered—that is whether it is being offered to prove the defendant committed the charged arson, or whether it is being offered to prove the defendant intended to start the fire instead of accidentally starting the fire—the court should next consider a number of other factors to determine whether the other fire evidence is admissible. These factors include (1) the relative frequency of the other fires, (2) the relative similarity of the other fires, (3) the relative timing of the other fires, (4) the causation of the other fires, and (5) the quality of the other fire evidence.[190]

1. *Relative Frequency of Other Fires*

How many other fires are sufficient for the evidence to be admissible pursuant to the doctrine of chances? In other words, is the fact that the defendant is tied to one other fire sufficient, pursuant to the doctrine of chances, to be admissible? Generally speaking, absent a logical explanation, even one sufficiently unusual similar event so significantly decreases the likelihood of another such accident befalling a person that it has probative value.

In *The World According to Garp*, Garp and his wife are looking at a house with a realtor when a small plane crashes into it. Garp immediately decides to buy the house. "Honey, the chances of another plane hitting this house are astronomical. It's been pre-disastered."[191]

House fires are sufficiently unusual that even a single prior fire could be probative. Accordingly, several courts have admitted evidence of a single prior fire.[192] The greater the number of prior fires, logically, the greater the probative value of the evidence.

Should the frequency of the occurrences, in relation to each other and the charged fire, matter on the question of admissibility? Two unusual events in one month have more probative value, arguably, than two unusual events in a lifetime. Multiple fires suffered by a defendant over the

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[190] *See* Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1228–31 (1986) (discussing admission of similar fact evidence pursuant to the doctrine of chances and identifying the following factors for the courts to consider: (1) how often the act has been repeated; (2) how complex the repeated act is; (3) how much time has passed between the commission of the acts; (4) how clearly it has been proven that defendant was the perpetrator of the other misconduct; (5) whether the victims of the other misconduct and the charged crime are similar; and (6) whether the physical elements of the other misconduct and the charged crime are similar).

[191] THE WORLD ACCORDING TO GARP (Warner Bros. 1982).

[192] *See, e.g.*, United States v. Mare, 668 F.3d 35, 39 (1st Cir. 2012) (affirming admission of evidence, pursuant to Rule 404(b), that defendant admitted to having previously started a fire); United States v. Hermes, 847 F.2d 493, 496–97 (8th Cir. 1988) (affirming admission of evidence, pursuant to Rule 404(b), that defendant had arranged a prior fire).

course of a few years are objectively less likely than the same number of fires suffered over a defendant's lifetime, all other factors being equal. Accordingly, the relative frequency of fires in a short period of time is more probative, pursuant to the doctrine of chances.

"Relative frequency" refers to the concept of determining whether the defendant has been involved in fires more frequently than the typical person.[193] In other words, the probative value of the other act evidence—in this case other fires—depends on how "objectively unlikely" it is that the defendant was innocently involved in the other fires.[194] Relative frequency may differ depending on whether the government is offering the other fire evidence to prove actus reus, mens rea, or both. When offered to prove actus reus, "the focus is on the frequency of a particular type of loss[,] [for example, a] . . . fire at a person's building."[195] When used to establish mens rea, in contrast, "the relevant frequency is the incidence of the accused's personal involvement in a type of event," such as a fire.[196] Proving relative frequency for either purpose may be practically difficult when such data has not been collected. "[I]t is far more difficult to find the relevant frequency data when the question is the existence of mens rea."[197]

In evaluating whether other fire evidence should be admissible, statistics may be helpful or harmful. Statistics are available about the frequency of fires in the United States, broken down by cause, type, and structure.[198] At least one study of serial arsonists looked at their backgrounds and characteristics, frequency of starting fires, and motivations.[199] According to that study, white males under the age of twenty-five account for nearly two-thirds of all intentionally set fires.[200] Characteristics of arsonists also include poor marital relationships, unstable employment, and inferior academic performance—although an above-average intelligence.[201] The authors of this Article were unable to find any empirical study, however, on the probability of someone with some or all of these characteristics intentionally starting a fire.

There are also factors that could explain an innocent person with higher statistical probability of having accidental fires. A person who

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[193] *See* Imwinkelried, *supra* note 61, at 67–68 (observing that, before invoking the doctrine of chances, courts generally require proof that the accused has been involved in similar incidents so often that it is objectively unlikely that he or she became involved in the charged incident innocently).

[194] *Id.* at 68.

[195] *Id.*

[196] *Id.*

[197] *Id*.

[198] *See* U.S. FIRE ADMIN., *supra* note 15, at 52–61 figs.21–25.

[199] ALLEN D. SAPP ET AL., A REPORT OF ESSENTIAL FINDINGS FROM A STUDY OF SERIAL ARSONISTS (1994), https://www.ncjrs.gov/pdffiles1/Photocopy/149950NCJRS.pdf [https://perma.cc/8WQA-ENZK].

[200] *Id.* at 5.

[201] *Id.*

cooks frequently is more likely to have a fire than one who does not.[202] A person who smokes is more likely to have a fire.[203] A person with a wood-burning fireplace is more likely to have a fire.[204] Common sense would also suggest that a person who is accident-prone is more likely to have a fire than someone who is not, though there are no available statistics on that factor. Indeed, there may be many other factors that could increase or decrease the likelihood of an individual suffering an accidental fire.

What is missing, unfortunately, is data to establish the probability of the average American becoming an innocent victim of a fire. The authors have been unable to find any statistics regarding the probability of a person suffering a house fire, car fire, or any other type of fire, let alone the probability of suffering multiple such fires. The data has simply not been collected, nor would collecting such data be an easy task.

In any event, statistics can be complicated and subject to manipulation.[205] Statistics are far less robust on the incidence of fires than on Sudden Infant Death Syndrome ("SIDS") deaths. For instance, in one English SIDS case, reliance on statistics was claimed to have misled a jury to convict a woman of murder and send her to prison for life.[206] In *Regina v. Clark*, a woman's conviction for murdering her two children was overturned on appeal when it was determined that statistics on SIDS deaths were miscalculated by an expert and misused by the prosecution.[207] Sally Clark, a solicitor, had been charged with murdering her two children after her second child died, apparently of SIDS, called "cot death" in England.[208] The case involved the application of the so-called Meadow's Law, propounded by Professor Sir Roy Meadow, which holds that "one cot death is a tragedy, two cot deaths is suspicious, and, until the contrary is proved, three cot deaths is murder."[209] The government's expert committed a fundamental statistical error in arriving at the conclusion that the chances

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[202] Cooking is the leading reported cause of both residential and nonresidential fires in the United States. U.S. FIRE ADMIN., *supra* note 15, at 3–4, 51–52.

[203] Smoking increases the likelihood of having a fire and, interestingly, more fire fatalities occur with smoking listed as the cause of fire than for any other cause. *Id.* at 52.

[204] Heating is the second leading cause of residential fires reported in the United States. *Id.* at 51.

[205] Samuel Clemens (Mark Twain) popularized the saying: "There are three kinds of lies: lies, damn lies, and statistics." MARK TWAIN, 1 AUTOBIOGRAPHY OF MARK TWAIN (Harriet Elinor Smith ed., Univ. of Cal. Press 2012) (1906) (attributing the remark to 19th Century British Prime Minister Benjamin Disraeli).

[206] Regina v. Clark, [2002] EWCA (Crim.) 54, [1], [258] (Eng.).

[207] *Id.* at [9], [78].

[208] *See id.* at [2]–[3]; *see also* Ray Hill, *Multiple Sudden Infant Deaths—Coincidence or Beyond Coincidence?*, 18 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 320, 320 (2004) (noting Sally Clark was convicted of the murder of both her children after her second child died).

[209] Hill, *supra* note 208, at 320. Interestingly, Professor Hill points out that two American pathologists, D.J. and V.J.M. Di Maio, originated this "law," concluding that, "while a second SIDS death from a mother is improbable, it is possible and she should be given the benefit of the doubt[, but a] third case . . . is not possible and is a case of homicide." *Id.* at 326 (citation omitted).

of Ms. Clark having two natural cot deaths were "one in 73 million."[210] The prosecution then succumbed to the "prosecutor's fallacy" of converting this statistic to a 1-in-73 million chance that Ms. Clark was innocent.[211] It turned out that the statistical likelihood of a mother suffering two natural SIDS deaths was unknown but significantly more likely than the government's expert claimed.[212] The defendant's conviction was overturned.

All this is to point out the inherent weakness and potential manipulation of mere statistics. That is not to say that courts should necessarily bar either party from introducing statistical evidence or expert testimony regarding other fire evidence. Conversely, courts should not require either side to produce statistical evidence regarding the relative probability of accidental fires in determining whether the other fire evidence is admissible pursuant to the doctrine of chances. Jurors are well qualified to evaluate and weigh the significance of other fire evidence pursuant to the doctrine of chances without statistical data. This is a situation where we may rely upon jurors to use their common sense.[213] Jurors presented with evidence that the defendant—a smoker—suffered only one prior fire will use their common sense to give little or no weight to the fact the defendant had another fire. In contrast, a jury will likely give greater weight to evidence showing a non-smoker defendant suffered a half-dozen fires in a decade. Statistics may or may not aid the jury in applying their common sense in such cases.

2. *Relative Similarity of Other Fires*

How similar must the similar fact, the other fire, be for it to be admissible pursuant to the doctrine of chances? The other fires should be

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[210] The case statistic was based on an empirical study in Great Britain that determined that the incidence of SIDS death was 1 in 8543. Regina v. Clark [2002] EWCA (Crim) 54 [118] (Eng.). The government's expert determined the odds of two such deaths by multiplying 1/8543 by 1/8543. *Id.* at [106]. This was fundamentally erroneous because that calculation is permissible only when the two deaths could have been regarded as independent events, such as flipping a coin. This deduction was deemed "complete nonsense," not the least because the studies showed an increased likelihood of an additional SIDS death after the first. Hill, *supra* note 208, at 324–25.

[211] The "prosecutor's fallacy" is asserting "that the probability of a particular piece of evidence being found to have occurred if the defendant were innocent is presented as the probability of the defendant being innocent." Richard Nobles & David Schiff, *Misleading Statistics Within Criminal Trials: The Sally Clark Case*, 2 *Significance* 17–18 (2005).

[212] Hill, *supra* note 208, at 322 ("[A] baby is 10 times more likely to be a SIDS victim if a previous sibling was a SIDS victim than if not.").

[213] The doctrine of chances rests upon the common sense of jurors. Office of Legal Policy, *supra* note 25, at 738; *see also* Imwinkelried, *supra* note 61, at 69 (recognizing that, when there is little or no data, a fact finder has to rely on common sense and experience to determine whether the relative frequency of the other fact evidence is such that it is objectively unlikely the defendant was involved in the other event innocently).

similar to the charged fire at least "in [their] gross features."[214] Arguably, the more similar the other fire is to the charged fire, the more probative value it has.[215] That does not mean that dissimilar fires have no probative value or are inadmissible. For example, if the evidence shows the defendant has had five of his homes burn down in the course of ten years, that evidence is probative pursuant to the doctrine of chances even if it were determined that each of the fires started in different ways. Likewise, evidence that the defendant had a car fire, a house fire, an apartment fire, and a grass fire, all in the course of the previous ten years, is probative pursuant to the doctrine of chances, regardless of the object that was burned. Evidence offered pursuant to the doctrine of chances should thus not be confused with evidence offered to show modus operandi.[216]

Another question to wrestle with in this regard is, what is it about the charged fire and the other fire that is the proper subject of comparison? In

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[214] WIGMORE, *supra* note 14, § 304, at 251.

[215] *See, e.g.*, United States v. Zapata, 139 F.3d 1355, 1358 (11th Cir. 1998) (noting that the probative value of similar fact evidence may be high where that evidence is "very similar" to the charged conduct).

[216] For examples of the courts using similar fact evidence to establish modus operandi in the context of arson, see *United States v. Gant*, 721 F.3d 505, 510 (8th Cir. 2013) (holding it was not improper for a prosecutor to suggest that other bad acts shed light on a defendant's modus operandi in the charged offense), and *United States v. Trenkler*, 61 F.3d 45, 53 (1st Cir. 1995) (allowing the introduction of prior bad acts as evidence where the uncharged and charged acts share distinguishing idiosyncratic characteristics that are sufficient "to earmark them as the handiwork of the same individual"). For a general explanation of the use of similar act evidence to establish modus operandi by circuit, see *United States v. Ramos-Atondo*, 732 F.3d 1113, 1123 (9th Cir. 2013) (ruling that the evidence of a prior conviction involving use of similar cross-border smuggling procedures was relevant to show a modus operandi); *United States v. Mack*, 729 F.3d 594, 602 (6th Cir. 2013) (stating that "prior bad act evidence" is probative when it is so similar to the charged crime as to establish the defendant's modus operandi, pattern, or signature); *United States v. Kinchen*, 729 F.3d 466, 477 n.1 (5th Cir. 2013) (finding that an uncharged act offered to establish identity or modus operandi must bear such a high degree of similarity to the charged crime as to mark it as the handiwork of the accused); *United States v. Otuya*, 720 F.3d 183, 188–89 (4th Cir. 2013) (stating that other crime evidence may be offered to show modus operandi, a non-character purpose); *United States v. Young*, 701 F.3d 1235, 1239 (8th Cir. 2012) (holding that other act evidence was admissible to prove identity when the prior acts and the charged offense involved "a unique set of signature facts"); *United States v. Carlton*, 534 F.3d 97, 102 (2d Cir. 2008) (finding that evidence of the defendant's prior convictions was properly admitted to show identity through a common modus operandi); *United States v. Givan*, 320 F.3d 452, 467–68 (3d Cir. 2003) (noting a jury may use evidence of a defendant's prior crime committed in an unusual and distinctive manner also present in a subsequent crime to infer that the defendant committed the second crime); *United States v. Shumway*, 112 F.3d 1413, 1420 (10th Cir. 1997) (explaining that an uncharged act may be offered to prove identity based on modus operandi when it shares enough elements with the charged act to constitute a "signature quality"); *United States v. Smith*, 103 F.3d 600, 603 (7th Cir. 1996) (stating that modus operandi evidence showing a defendant's distinctive method of operation must be "sufficiently idiosyncratic" to admissibly permit a pattern inference); *United States v. Lail*, 846 F.2d 1299, 1301 (11th Cir. 1988) (reversing the lower court after finding that modus operandi was not sufficiently established when an uncharged act and the charged crime were substantially different and shared no signature traits); and *United States v. Pisari*, 636 F.2d 855, 858–59 (1st Cir. 1981) (describing the level of similarity necessary to justify admission of other crimes as signature to prove identity).

other words, what has to be similar between the charged fire and the other fire? Is it the object that burned, be it a house, car, or an apartment? Or is it the manner in which the fire was started? Should admissibility turn on, for example, the time of day or night the fire occurred? What about the motive for the fire, be it to collect insurance, retaliation, or mere excitement?

It almost goes without saying that the more of these facts that are similar between the other fires and the charged fire, the more probative the evidence and the more likely a court should rule the evidence admissible. Beyond that, "it is not possible to specify the requisite similarity between the charged crime and the other incident."[217] When evidence of other fires is offered pursuant to the doctrine of chances, the other fire evidence need only be "roughly similar" to the charged fire.[218] As long as the other fire evidence shares some similarity to the charged fire, it ought to be admitted.

3. *Relative Timing of Other Fires*

The relative timing of the other fire evidence in relation to the charged arson is important in determining the probative value of the evidence pursuant to the doctrine of chances. By that we mean that there are three aspects to the timing of the other fire evidence that are important: first, how much time has passed between the other fires and the charged fire; second, over what time period the other fires occurred; and, third, the consistency in the timing of the other fires.

Generally speaking, courts have held that the greater the passage of time between the similar fact evidence and the charged conduct, the less probative it is and, therefore, the less is the likelihood of its admissibility under Rule 404(b).[219] If the theory of admissibility is the doctrine of chances, the passage of time may not be as important, however, than it is in other contexts involving Rule 404(b) evidence. Using the famous *Rex v. Smith*[220] facts by way of illustration, if the evidence is that the defendant

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[217] KENNETH W. GRAHAM, JR., 22A FEDERAL PRACTICE & PROCEDURE—EVIDENCE § 5245 (2d ed. 2013).

[218] Imwinkelried, *supra* note 61, at 58–59.

[219] *See, e.g.*, United States v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005) (noting that the age of a prior offense may depreciate its probity but declining to adopt a bright-line test for the age of similar fact evidence offered pursuant to Rule 404(b)); United States v. Rodriguez, 215 F.3d 110, 120–21 (1st Cir. 2000) (noting that the probative value of evidence could be attenuated by the passage of time but affirming that circuit's reasonableness test that requires the evaluation of facts of each case, as opposed to a per se rule against admission of prior bad acts that are deemed too old); United States v. Torres, 977 F.2d 321, 326 (7th Cir. 1992) (affirming a flexible analysis of the temporal proximity requirement contained in Rule 404(b) for other act evidence); United States v. Engleman, 648 F.2d 473, 479 (8th Cir. 1981) (reminding that there is no absolute rule regarding the number of years that can separate offenses for purposes of other crimes evidence and adopting a reasonableness standard that examines the facts and circumstances of each case); United States v. Beechum, 582 F.2d 898, 915 (5th Cir. 1978) ("[T]emporal remoteness depreciates the probity of the extrinsic offense.").

[220] 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

lost three wives all from drowning in their bathtubs, the fact that the extremely unlikely events were separated by decades would not materially detract from the probative value of the evidence. In other words, whether the prior deaths occurred within the two years preceding the charged death or two decades before the charged death, the unlikelihood of the events remains equal. In that sense, the importance of the time factor may be influenced by the unlikelihood of the unfortunate event.

Whether the defendant was connected to a series of fires stretched over a long period of time, as opposed to a short period of time, may affect the probative value of the other fire evidence. Evidence that the defendant has been the apparent victim of fires over a period of decades would lead one logically to conclude, all other things being equal, that mere accident is not at play. In contrast, if the defendant has lived for decades without suffering fires, but has suffered some shortly before or after the charged fire, then logic suggests that some factor has changed in the defendant's life leading to the fires. That factor could lead toward, or away from, a conclusion of criminal conduct. For example, perhaps the connection during the period when the fires broke out is the defendant's recently developed dementia. On the other hand, perhaps the defendant has been suffering financial stress because of personal problems during the time period when the fires have erupted.

By consistency of the other fires, we mean that it is important to look at the sequence of the other fires in relation to themselves and to the charged conduct. In other words, the focus should be in determining whether there is a pattern reflected in the other fire evidence that increases or decreases the possibility that the fires were accidental. For example, evidence the defendant was the apparent victim of fires over a long period of time, with a steady, consistent pattern of occurrences, would tend to suggest that the fires were not the product of accident. In contrast, if the defendant were the victim of a series of apparently accidental fires, but the occurrences are more episodic, then the randomness of such occurrences would lead to the common sense conclusion of a greater possibility of accident.

Of course, what appears random may, upon further investigation, reveal a pattern that could suggest either accident or criminal conduct. If, for example, the episodic nature of the defendant's involvement in other fires was the product of incarceration (i.e. the only time fires did not regularly occur was when he was incarcerated) then it would tend to suggest he was the not the innocent victim in the prior occurrences. On the other hand, the episodic nature of the defendant's connection to other fires may correlate with him taking up, and dropping, a smoking habit, perhaps suggesting that the occurrences were the product of accident if the other fires are consistent with having been started by discarded or neglected cigarettes.

In summary, the importance of the timing of the other fires is not a simple matter of years. Whether the other fires are probative pursuant to the doctrine of chances should be governed by a reasonableness standard based on the facts and circumstances of individual cases.[221]

4. *Causation of Other Fires*

For other fire evidence to be admissible, should the government be required to show that the defendant caused the other fire? The case law would suggest so.[222] Pursuant to the doctrine of chances, however, whether the government can prove the defendant caused the other fire is logically irrelevant to the admissibility of the evidence.[223] Certainly, if there is strong evidence the defendant caused the other fire, it is more probative to the question of whether the other fire was an accident. It is not, however, necessarily more probative of whether the charged fire was an accident.

Moreover, evidence that a defendant caused a prior fire arguably is more likely to be misused by a jury as showing propensity consistent with the defendant's character than a fire for which there is no evidence of the defendant's causation. For example, imagine an arson case where the defendant is charged with setting his house on fire. The government has evidence that the defendant's residence has caught on fire on three prior occasions. With regard to the first, the defendant entered a guilty plea to arson. With regard to the second, the circumstantial evidence showed the fire was the result of arson and the defendant was the most likely suspect. The third fire was deemed by the fire marshal to have been accidental, caused by faulty wiring. Pursuant to the doctrine of chances, the relevance of the prior fires is the relatively low probability that, with the defendant having suffered this series of unfortunate events, the charged fire could be accidental. A jury should be allowed to know of each of the prior fires.

With regard to the first, where the defendant pled guilty to arson, however, there is a danger the jury would use that evidence to conclude that the defendant has a character trait of setting fires and, therefore, acted consistently with that character in setting the charged fire. The danger still exists, but to a lesser degree, with the second fire because the evidence is not conclusive that the defendant intentionally set that fire. There is little danger that the jury would misuse the evidence of the last fire to conclude

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[221] *See* United States v. Franklin, 250 F.3d 653, 659 (8th Cir. 2001) ("To determine if the evidence is too remote, the court applies a reasonableness standard and examines the facts and circumstances of each case." (citation omitted)).

[222] *See* Huddleston v. United States, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."); United States v. Gilan, 967 F.2d 776, 780–82 (2d Cir. 1992) (reversing and remanding the case for a new trial when no evidence linked the defendant to the uncharged act).

[223] *See* Imwinkelried*, supra* note 45, at 838 ("Indeed, the doctrine [of chances] is so broad that it does not even require proof that the accused committed any act similar to the charged offense.").

anything about defendant's character. Rather, the last fire's relevance has precisely and purely to do with probability. If it is very unlikely that a person will suffer a house fire even once in his or her lifetime, and the defendant has apparently already suffered one such unlikely event already, the probability of his suffering a second such unfortunate event by accident would seem less likely unless there is a logical explanation for why this particular defendant would be more likely than others to suffer such accidents. In any event, jurors should be allowed to know of such similar fact evidence and use their common sense, in light of the totality of the evidence, in reaching their verdict.

5. *Quality of Other Fire Evidence*

Similar fact evidence is admissible where the proponent can prove the similar fact by a preponderance of the evidence.[224] Generally, the stronger the quality of the similar fact evidence, the more probative it is.[225] In the context of arson, therefore, to be admissible, other fire evidence need only be proven by a preponderance of the evidence. Where there is more than a preponderance of evidence the other fire occurred, the value of the evidence is more probative, and, hence, the likelihood of its admissibility greater.

The analysis is not that simple, though. First, often encompassed within the quality of evidence factor is the requirement that the other fact must not have simply occurred, but that the defendant was connected to or caused it. Applied to other fire evidence, in other words, the court must wrestle with whether a preponderance of the evidence proves another fire occurred *and* the defendant was sufficiently connected to or caused the other fire. Evidence that a defendant was convicted of an offense is more than sufficient to prove by a preponderance of the evidence both that the other act occurred and that the defendant committed it.[226] A conviction, however, is not required for there to be a preponderance of the evidence

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[224] *See, e.g.*, *Huddleston*, 485 U.S. at 686–89, 687 n.5 (holding it is for the jury to determine similar fact evidence by a preponderance of the evidence); United States v. Bailey, 696 F.3d 794, 799 (9th Cir. 2012) (adopting the holding in *Huddleston* that evidence need not meet the preponderance standard in order to be admitted under Rule 404(b)). *But see* United States v. Tarnow, 705 F.3d 809, 814–15 (8th Cir. 2013) (providing that the standard of proof for similar fact evidence offered pursuant to Rule 404(b) is preponderance of the evidence).

[225] *See, e.g.*, United States v. Johnson, 458 F. App'x 727, 732 (10th Cir. 2012) (discussing the strength of Rule 404(b) evidence and finding it more probative because of the certainty of the evidence); United States v. Santiago, 566 F.3d 65, 72 (1st Cir. 2009) (finding court did not err in admitting Rule 404(b) evidence, though the weight of evidence was lessened by age and nature of prior conviction).

[226] *See, e.g.*, United States v. Gay, 423 F. App'x 873, 876 (11th Cir. 2011) (where the prior conviction was sufficient to establish a similar fact by a preponderance of evidence); United States v. Crippen, 627 F.3d 1056, 1064 (8th Cir. 2010) (same); United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995) (same).

showing the defendant committed the act.[227]

Second, as pointed out above, when other fire evidence is offered pursuant to the doctrine of chances, however, the government need not prove the defendant caused the other fire for the evidence to be relevant to the issue of relative probability. In other words, that the defendant had multiple houses burn down around him is relevant to determining probability regardless of whether there is evidence the defendant caused the other fires.[228] Of course, evidence the defendant committed another arson, whether convicted or not, is more probative of whether the defendant intentionally set the instant fire than when such linkage is missing. Nevertheless, any evidence linking the defendant to the other fire is more probative, of course, than the existence of other fires in the general vicinity of the defendant where a linkage is missing. Similarly, when the evidence shows the other fires were caused by arson or were of questionable origin, the other fire evidence is arguably more probative of whether the charged fire was intentionally set. Nevertheless, even when the cause of the other fire is unknown or appears to be accidental, the other fire evidence may still have probative value when offered pursuant to the doctrine of chances.

Thus, in determining whether other fire evidence is admissible in an arson case when offered pursuant to the doctrine of chances, courts ought to look carefully at the quality of the evidence that goes to the other fire's causation, and the quality of the evidence linking the defendant to the other fire. Although the fact the defendant was convicted of arson for starting the other fire has the greatest probative value, courts should not require such "beyond a reasonable doubt" evidence to rule other fire evidence admissible. On the other hand, evidence showing a weak connection between other fires for which there appears to be an innocent cause should be viewed skeptically by courts.

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[227] *See, e.g.*, United States v. Kelley, 981 F.2d 1464, 1473 (5th Cir. 1993) ("Evidence admissible under Rule 404(b) is not limited to *convictions*, but also includes other 'wrongs' or 'acts.'" (emphasis in original)); United States v. Arboleda, 929 F.2d 858, 867 (1st Cir. 1991) ("But Rule 404(b) by its own terms is not limited to evidence of offenses resulting in convictions, as it refers to 'other crimes, wrongs, or acts.'").

[228] *But see* Cammack, *supra* note 7, at 381 ("It must, of course, be shown that the accused committed all the similar acts, since the probative value of the evidence rests on the improbability of the defendant's repeated innocent or inadvertent involvement in the same rare circumstances."). In making this argument, the author failed to consider the probative value of the rare circumstances occurring to the defendant, even in the absence of proof the defendant caused these other events. Indeed, the true value of the doctrine of chances is divorcing the logical analysis from propensity; it is not necessary to show the defendant caused the other events; only that the other events occurred to the defendant with such frequency that it suggests human agency.

C. *Balancing Probative Value Against Prejudicial Effect*

If it appears the other fire evidence is otherwise admissible after evaluating the evidence pursuant to the factors set forth in the preceding Part, a court must still determine whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[229] Generally speaking, exclusion of evidence pursuant to Rule 403 balancing of probative value against prejudicial effect is considered an extraordinary remedy and is used sparingly by the courts.[230] The same should be true of excluding evidence under the prejudice analysis of 404(b).

Generally, the courts have construed their discretion to exclude evidence under Rule 403 narrowly.[231] As a rule, the balance under the Rule should be struck in favor of admissibility.[232] Consequently, judges tend to look at the evidence in a light most favorable to its admission, maximizing its probative value[233] and minimizing its undue prejudicial impact.[234] In reaching its conclusion regarding the admissibility of other act evidence, however, a district court should generally fully evaluate the proffered evidence[235] and undergo an explicit analysis under Rule 403, clearly articulating its rationale.[236] Additionally, the courts are advised to issue

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[229] FED. R. EVID. 403.

[230] *See, e.g.*, United States v. Edouard, 485 F.3d 1324, 1344 n.8 (11th Cir. 2007) (stating that exclusion of evidence under Rule 403 is an "extraordinary remedy" that courts should use "sparingly").

[231] United States v. McGlothin, 705 F.3d 1254, 1266 (10th Cir. 2013) (citations omitted); United States v. Williams, 49 F. App'x 420, 426 (4th Cir. 2002); *see also* United States v. Smith, 459 F.3d 1276, 1295 (11th Cir. 2006) (noting that the extraordinary remedy of exclusion of Rule 403 should be used only sparingly since it permits the trial court to exclude concededly probative evidence); United States v. Mende, 43 F.3d 1298, 1302 (9th Cir. 1995) (same).

[232] *Smith*, 459 F.3d at 1295.

[233] *See* United States v. Earls, 704 F.3d 466, 471 (7th Cir. 2012) ("When determining the admissibility of evidence under Rule 403, this Court 'employ[s] a sliding scale approach: as the probative value increases, so does our tolerance of the risk of prejudice.'" (quoting Whitehead v. Bond, 680 F.3d 919, 930 (7th Cir. 2012))).

[234] *See, e.g.*, United States v. MacKay, 715 F.3d 807, 840 (10th Cir. 2013) (explaining that, in Rule 403's balancing, courts "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value" (quoting United States v. Cerno, 529 F.3d 926, 935 (10th Cir. 2008))); United States v. Jernigan, 341 F.3d 1273, 1284 (11th Cir. 2003); United States v. Dennis, 625 F.2d 782, 796–97 (8th Cir. 1980) (citing United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978)); *see also McGlothin*, 705 F.3d at 1266 ("Evidence is unfairly prejudicial only if it makes 'a conviction more likely by provoking an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant, wholly apart from its judgment as to his [or her] guilt or innocence of the crime charged.'" (quoting United States v. Smith, 534 F.3d 1211, 1219 (10th Cir. 2008))).

[235] *See* United States v. Johnson, 458 F. App'x 727, 729–30 (10th Cir. 2012) (instructing that courts must fully evaluate the proffered evidence and make a clear record of their reasoning).

[236] *See* United States v. Miller, 688 F.3d 322, 327–28 (7th Cir. 2012) (noting that a pro forma recitation of the Rule 403 balancing test is insufficient because it does not allow an appellate court to conduct a proper review of the district court's analysis and directing district courts to carefully analyze

appropriate limiting jury instructions to temper the risk of any unfair prejudice stemming from the introduction of other act evidence.[237]

Although Rule 403 should be applied narrowly and used sparingly to bar admission of otherwise relevant and admissible evidence, it may be appropriate for the admission of other fire evidence in arson cases. If other fire evidence is admissible pursuant to the doctrine of chances, perhaps Rule 403 considerations rarely should justify barring such evidence in its entirety. Rather, it would stand to reason that courts should more likely weigh the Rule 403 considerations with respect to each "other fire" against its probative value to determine the admissibility of a particular other fire pursuant to the doctrine of chances.[238] It bears repeating that there is no rule of evidence that bars other fact evidence; rather, there are only rules that bar improper use of other fact evidence.

D. *Channeling the Jury's Consideration of the Evidence*

To properly channel the jury's consideration of other fire evidence, a court must address both how the jury may use the evidence and how it may not. Jurors generally hold trial judges in high regard,[239] and as we stated previously, the law rightfully presumes jurors will comply with a judge's instruction.[240] Of course, the nature of the instruction itself may seriously affect whether it properly channels the juror's use of evidence and the degree to which the jury is likely to comply with the instruction. Vague or imprecise instructions are less likely to affect jurors' conduct. Weakly worded or passively written instructions are less likely to compel compliance by jurors. When other fire evidence is admitted pursuant to the doctrine of chances in an arson case, therefore, courts should strive to provide clear, concise, and strongly worded instructions to channel the

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the prejudicial effect, to provide a considered explanation of its reasons for admitting the evidence, and to avoid a merely perfunctory analysis); *see also MacKay*, 715 F.3d at 839 (stating that Rule 403 analysis includes considerations of "(1) whether the evidence was relevant, (2) whether it had the potential to unfairly prejudice the defendant, and (3) whether its probative value was substantially outweighed by the danger of unfair prejudice"); *Johnson*, 458 F. App'x at 729–30 (outlining factors for the balancing test, the measure of probativeness, and the determination of unfair prejudice in that circuit).

[237] *See* United States v. Williams, 620 F.3d 483, 492 (5th Cir. 2010) (holding that the lower court's instructions to the jury both during the presentation of the evidence and during the subsequent jury charge were appropriate and lowered the risk of unfair prejudice to the defendant). *But see* United States v. Ciesiolka, 614 F.3d 347, 358 (7th Cir. 2010) (noting that, although appropriate limiting instructions could conceivably cure prejudice, the lower court's use of boiler-plate language in instruction and refusal to repeat said instruction upon request were error).

[238] *See* United States v. Gant, No. 11-CR-2042-LRR, 2012 WL 2576466, at *3 (N.D. Iowa July 3, 2012) (although the court did not apply the doctrine of chances to other fire evidence, it barred only certain fires because of their age, rather than barring all other fire evidence as a category).

[239] Imwinkelried, *supra* note 45, at 843.

[240] *Supra* notes 106–09 and accompanying text.

jury's use of the evidence for only proper purposes.

There are a number of factors that will affect the efficacy of the court's limiting instructions when it comes to addressing the use of other fire evidence in arson cases. First, the instruction should clearly explain the proper purpose for which the evidence is admitted.[241] In this respect, the trial court ought to be explicit and precise. The court should explain whether the purpose of the other fire evidence is to prove actus reus or mens rea, or both. It should explain that the purpose of the evidence is to address probability—that is, the other fire evidence was admitted on the theory that the fact the defendant was connected to other fires makes it unlikely that all of them were accidental.

Second, the limiting instruction should bluntly state the improper purpose for which the evidence cannot be considered.[242] Here, courts ought not shy away from acknowledging the potential misuse to which the jury could use the evidence. Rather, the court should tell the jury that there may be a temptation by jurors to use the evidence improperly by making conclusions about what the evidence says about the defendant's character and propensity to commit arsons. The instruction should directly acknowledge this and tell jurors they may not conclude that the defendant must have committed the charged arson because he was connected to other fires.

Third, the court should condemn the improper use of the other fire evidence in strong terms.[243] The court should state that to use the evidence improperly would violate the jurors' oath, deny the defendant a fair trial, and betray the court's trust and reliance on the jury to carry out their duties.

Fourth, the instruction should be repeated. The court should provide the instruction to the jury at the time the evidence is introduced during the trial.[244] The court should then repeat the instruction at the time the jury is charged and the case is submitted to the jury for deliberations.

Here is a proposed limiting instruction to use when other fire evidence is admitted pursuant to Rule 404(b) and the doctrine of chances:

> [In this case, the defendant disputes that the charged fire was the result of arson and denies that he/she intentionally started the charged fire. You have heard evidence that the

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[241] *See* EDWARD J. IMWINKELRIED, 2 UNCHARGED MISCONDUCT EVIDENCE § 9:72, at 9-235 (rev. ed. 2009); Imwinkelried, *supra* note 49, at 458.

[242] Imwinkelried, *supra* note 49, at 458.

[243] *Id.* ("In particular, the instruction should condemn the latter [forbidden character reasoning] in no uncertain terms.").

[244] *Id.*

defendant was connected to [an]other fire[s].[245] If you determine by a preponderance of the evidence the defendant was connected to the other fire[s], you may consider that evidence for a limited purpose. You may use that evidence to determine whether you believe that the likelihood of the defendant being connected to [one or more of] the other fire[s] and the charged fire is too extraordinary for it to be a matter of chance or accident. If you find defendant's connection to the other fire[s], when combined with his/her connection with the charged fire, is too coincidental, you may consider it as evidence that the other fire[s] and/or the charged fire [was/were] intentionally set.[246]]

[In this case, the defendant does not dispute that the charged fire was the result of arson but disputes that he/she committed the arson. You have heard evidence that the defendant was connected to [an]other fire[s]. If you determine, by a preponderance of the evidence, that the defendant was connected to the other fire[s], you may consider that evidence for a limited purpose. You may use that evidence to determine whether you believe that the likelihood of the defendant being connected to [one or more of] the other fire[s] and the charged fire is too extraordinary for it to be a matter of chance or accident. If you find defendant's connection to the other fire[s], when combined with his/her connection with the charged fire, is too coincidental, you may consider it as evidence that defendant intentionally set [one or more of] the other fire[s] and/or the charged fire.][247]

You may not, however, in any way consider evidence of the other fires as showing propensity. You may be tempted to conclude that the defendant's connection to [an]other fire[s] means that he/she must have started the charged fire. Defendant's character or character traits in relation to other fires is not at issue in this trial. Even if you conclude the defendant started the other fire[s], that does not mean that he/she started the charged fire. Just because someone committed an act at some other time does not mean he/she

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[245] This language recognizes that, in the right case, a single other fire may be admissible pursuant to the doctrine of chances.

[246] This portion of the instruction is to be given if the defendant is contesting both mens rea and actus reus, and is claiming the charged fire was an accident.

[247] This portion of the instruction is to be given if the defendant admits the fire was intentionally set but denies the actus reus; that is, denies that he was the one who intentionally started the fire.

> committed the act in question. Using the evidence for this purpose would violate your duties to fairly and impartially consider the evidence and follow my instructions. [Rather, you are to use the evidence of the other fire[s] only in assessing the common sense probability of the defendant being connected to the other fire[s] and the charged fire[s] by mere chance, rather than as the result of intentional conduct.][248] [Rather, you are to use the evidence of the other fire[s] only in assessing the common sense probability of the defendant being connected to the charged fire[s] by mere chance, rather than as the result of intentional conduct.][249]
>
> [You have heard expert testimony regarding the statistical probability of the defendant being connected to fires. You may consider that evidence and give it whatever weight you believe it deserves. You are not required to give it weight if you do not believe it deserves any weight. You may use your common sense and ordinary life experience in assessing whether the defendant's connection to fires was extraordinary.][250]

As a matter of trial strategy, a defense attorney may conclude that a limiting instruction would call undue attention to the other fire evidence. As with most limiting instructions, which serve the purpose of protecting the defendant's interests, a court should defer to the judgment of the defense attorney.[251] If the defense attorney believes a limiting instruction, on balance, is more harmful than helpful, then the court should not provide the instruction.

V. OTHER FIRE EVIDENCE TO PROVE PROPENSITY IN ARSON CASES

Thus far in this Article, we have addressed the admissibility of other fire evidence pursuant to the doctrine of chances, laboring under the presumption that such evidence would not be admissible to prove

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[248] This sentence would be used in cases where the defendant was not convicted of committing arson in connection with other fires.

[249] This sentence would be used in cases where the defendant was convicted of committing arson in connection with other fires. Obviously, in cases where the evidence shows the defendant was convicted of arson for one or more other fires, and there is evidence tying him to other fires for which he was not convicted of arson, the court will need to tailor the instruction with a combination of these two sentences with reference to the specific fires at issue.

[250] This portion of the instruction should be given whenever either party presents expert statistical evidence on the probability of fire occurrences.

[251] *See* Goldsby v. United States, 152 F. App'x 431, 437 (6th Cir. 2005) (noting that, "whether to request a particular instruction is within an attorney's tactical discretion and attorneys often decide not to request such an instruction because it calls attention to" the evidence or issue (quoting Coleman v. Brown, 802 F.2d 1227, 1235 (10th Cir. 1986))).

propensity because such use is barred by the general character evidence rule. For that reason, we analyzed the non-propensity basis for admission of other fire evidence pursuant to the doctrine of chances. In this Part, however, we challenge that presumption and explore whether, in certain arson cases at least, other fire evidence might be admissible to prove propensity. In other words, we explore here whether there ought to be an exception for other fire evidence as there is under Rules 413–15 of the Federal Rules of Evidence for similar crime evidence in sexual assault and child molestation cases.

As reflected above, Congress adopted Rules 413–15 in 1994, creating an exception to the general bar on character evidence, such that, in sexual assault and child molestation cases, evidence that the defendant engaged in similar misconduct is admissible for any relevant reason, which includes propensity.[252] Further, as we discussed above, the reason Congress carved out this exception was, in part, because of evidence showing sexual predators have a higher degree of recidivism due to a psychological proclivity to commit such offenses.[253]

In considering arson cases, the question arises whether a similar exception should be carved out for other fire evidence. Of course, arson may be committed for any number of reasons, including revenge, to collect insurance, to conceal another crime, or as a hate crime.[254] There are some, however, who commit arson because they are psychologically predisposed to do so. These people—pyromaniacs—start fires because they become excited by doing so.[255] Repeated instances of starting fires is a necessary

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[252] *See supra* notes 66–85 and accompanying text (discussing adoption of Rules 413–15 and policy surrounding it).

[253] *See supra* notes 87–95 and accompanying text (discussing recidivism as part of the reasoning for adopting the rules concerning sexual abuse and child molestation).

[254] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 476 (5th ed. 2013) [hereinafter DSM-V] (mentioning profit, motive, sabotage, revenge, concealment of a crime, and terrorism as reasons other than pyromania for intentionally setting fires).

[255] "Pyromania" is classified as an impulse-control disorder by DSM-V. *Id.* The diagnostic criteria for pyromania include:

> A. Deliberate and purposeful fire setting on more than one occasion.
>
> B. Tension or affective arousal before the act.
>
> C. Fascination with, interest in, curiosity about, or attraction to fire and its situational contexts (e.g., paraphernalia, uses, consequences).
>
> D. Pleasure, gratification, or relief when setting fires, or when witnessing or participating in their aftermath.
>
> E. The fire setting is not done for monetary gain, as an expression of sociopolitical ideology, to conceal criminal activity, to express anger or vengeance, to improve one's living circumstances, in response to a delusion or hallucination, or as a result of impaired judgment (e.g., in dementia, Mental Retardation, Substance Intoxication).

criterion for diagnosing a person with pyromania.[256] The very existence of other fires is, therefore, an indication of the likelihood the person will start additional fires.

There is an argument that a person psychologically motivated to start fires has a predisposition—a propensity—to commit arsons as compelling and consistent as those who are psychologically motivated to commit sexual assaults or child molestation. Where there is evidence that the defendant is a pyromaniac, additional evidence of other fires should arguably be admissible to show the defendant has a propensity to start fires because of his impulse control disorder. In other words, the other fire evidence would be admitted to show that the defendant is a pyromaniac and that, consequently, the fact that he started other fires makes it more likely that he started the charged fire. When a defendant has a psychological propensity to start fires, it is somewhat absurd to bar evidence of his other fires under the general prohibition against propensity evidence. "There is a point in the ascending scale of probability when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence."[257]

Accordingly, one solution might be an exception written into the Federal Rules of Evidence permitting introduction of other fire evidence for any purpose, as long as the government can show the defendant is a pyromaniac. Such a rule might read as follows:

> Rule 416. Evidence of Other Fires in Arson Cases
>
> In a criminal case in which the defendant is accused of an offense of arson, evidence of the defendant's involvement in other fires is admissible and may be considered for its bearing on any matter to which it is relevant, where the government demonstrates by a preponderance of the evidence that the defendant is a pyromaniac.

Before shucking the general rule in favor of *yet another* exception to a rule, however, there are several factors to consider. First, what evidence would be required to prove the defendant is a pyromaniac, so as to justify applying such an exception? Second, is there a sufficient incidence of pyromaniac-caused arsons to justify creating such an exception? Third, what policy implications would arise from creating this impulse control disorder exception for other areas of conduct where humans may be

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> F. The fire setting is not better accounted for by Conduct Disorder, a Manic Episode, or Antisocial Personality Disorder.

Id.

[256] *See id.*

[257] Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 983–84 (1933).

psychologically compelled to act because of a mental defect or disorder? We will address each of these questions in turn.

As an evidentiary matter, proving a defendant is a pyromaniac may be an insurmountable burden for the government, and a time-consuming quagmire for the court and jury. Presumably, the question of admissibility under this Rule would be for the trial judge to make,[258] and the jury would determine by a preponderance of the evidence whether the government showed the defendant was a pyromaniac.[259] Absent a waiver of the psychotherapy privilege[260] or some other unusual circumstance, however, it is unlikely the government would have access to an actual mental health diagnosis that the defendant met the diagnostic criteria for pyromania.[261] At best, the government might have statements made by the defendant that would support the diagnostic criteria.[262] There might be other circumstantial evidence that would suggest the defendant is a pyromaniac. For example, there might be evidence that the defendant had a fascination with fires and firefighters.[263] Indeed, the other fire evidence itself would be evidence to support the first diagnostic criteria: "[d]eliberate and purposeful fire setting on more than one occasion."[264] Finally, the government might present expert testimony, albeit with the disadvantage of the expert's inability to speak with the defendant, the subject of the diagnosis.

Thus, for the government to establish the factual premise for invoking

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[258] *See* FED. R. EVID. 104(b) (authorizing a trial judge to admit a conditionally relevant item of evidence subject to proof of the fact upon which the relevance is conditioned).

[259] *See* Huddleston, 485 U.S. at 688–90 (1988) (holding that the trial judge has only a limited screening role of determining the admissibility of uncharged misconduct evidence based on whether a rational jury could find, by a preponderance of the evidence, the accused committed the act).

[260] *See* Jaffee v. Redmond, 518 U.S. 1, 12–17 (1996) (recognizing a psychotherapy privilege that protects confidential communication by a patient to a licensed or unlicensed mental health provider or social worker).

[261] For example, in *United States v. Warr*, 530 F.3d 1152, 1156 (9th Cir. 2008), the defendant waived his privilege at the sentencing hearing and presented an evaluation by a psychologist diagnosing him with pyromania in an apparent attempt to seek a lower sentence.

[262] For example, in *United States v. Gant*, the defendant had confessed to a law enforcement officer that he had started "a lot" of prior fires and had "more of an attraction or fascination with fire than the average person." Brief of Appellee at 7–8, United States v. Gant, 721 F.3d 505 (8th Cir. 2013) (No. 12-3855), 2013 WL 1636512. Further, three inmates related statements the defendant made about his fascination with fire, his excitement when discussing fires, his descriptions of how to set fires, or how he was fixated at watching television reporting about fires. *Id.* at 27–30.

[263] The DSM-V notes that pyromaniacs "are often regular 'watchers' at fires in their neighborhoods, may set off false alarms, . . . derive pleasure from institutions, equipment, and personnel associated with fire[,] . . . may spend time at the local fire department, set fires to be affiliated with the fire department, or even become firefighters." DSM-V, *supra* note 254, at 476. In *United States v. Gant*, the government proffered evidence the defendant attended a community college where he studied police science, including classes that taught about arson, and worked for a period as an emergency medical technician. Brief of Appellee, *supra* note 262, at 5–6.

[264] DSM-V, *supra* note 254, at 476.

the pyromaniac exception to the character evidence rule, it would have to marshal the circumstantial evidence available to it showing the defendant had characteristics consistent with pyromania. The trial court would be required to devote time to hear the circumstantial evidence that could be proffered by the government. Finally, the court would most likely not have the advantage of any expert testimony by an expert who actually had the opportunity to examine the defendant. Needless to say, establishing the factual premise for invocation of the rule would be a difficult and time consuming project, which is an argument against creating such new rule of evidence.

As a practical matter, before adopting an exception to a general rule, one must also examine the frequency of the occurrence for which the exception is sought. In other words, if the matter simply does not arise often, it makes little sense to adopt a rule to address it. It appears that pyromaniacs are not frequently prosecuted for arson federally. First, it appears there are few pyromaniacs to start with.[265] It is considered a "rare" psychological disorder.[266] In one study, pyromania was determined to be the reason for only three percent of those convicted of arson.[267] In another study involving serial arsonists serving time in prison, a group that by the serial nature of their crime might suggest pyromania, only about thirty percent identified excitement as the motive for the arsons.[268] Finally, among the reported federal arson cases, very few reflect a fact pattern suggestive of pyromania.[269] The relative infrequency of pyromania as a source of federal arson cases similarly militates against the adoption of a new federal rule of evidence creating an exception to the character evidence rule to address those rare occasions.

Finally, as a policy matter, before a rule of evidence should be adopted to address pyromaniacal propensity, it is necessary first to consider

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[265] SAPP ET AL., *supra* note 199, at 2 (noting that "relatively little research has been conducted on arsonists" and that "[m]ost of the available research is in the form of clinical studies of very small numbers of arsonists").

[266] DSM-V, *supra* note 254, at 477 ("[P]yromania as a primary diagnosis appears to be very rare. Among a sample of persons reaching the criminal justice system with repeated fire setting, only 3.3% had symptoms that met full criteria for pyromania.").

[267] Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 667 & n.9 (S.D. Ind. 1991) (relying on ALL-INDUS. RESEARCH ADVISORY COUNSEL, ARSON INCIDENCE CLAIM STUDY 11 & tbl.10 (1982)).

[268] SAPP ET AL., *supra* note 199, at 96–97 (providing that, in a study of 83 inmates convicted of serial arson, 41.4% identified revenge as the motive, 4.8% committed arson for profit, 30.5% identified excitement as the motive, and the remainder were of mixed motive).

[269] The authors could find only a few cases in which the facts suggest the defendant committed the arson as a result of pyromania. *See, e.g.*, United States v. Gant, 721 F.3d 505 (8th Cir. 2013); United States v. Warr, 530 F.3d 1152 (9th Cir. 2008) (involving a defendant diagnosed with pyromania and charged with nine counts of wild-land arson); United States v. Orr, No. 92-50235, 1992 WL 280992 (9th Cir. Oct. 14, 1992) (involving a California arson investigator who set a series of fires). In all of the other reported federal cases, there was evidence that the motive of the arson was for profit, revenge, or some other reason inconsistent with the idea the defendant was a pyromaniac.

whether there are other, similar mental health diseases, defects, or disorders that would similarly demonstrate propensity to engage in other criminal activity. A cursory review of the diagnostic manual suggests there are many other mental conditions that may lead to propensity to commit other criminal offenses: there is kleptomania, an irresistible impulse to steal;[270] pathological gamblers have a persistent and recurrent urge to gamble;[271] and, of course, there are the disorders associated with addiction to both controlled and noncontrolled substances.[272] Thus, it appears there are several other psychological impairments or disorders, similar to pyromania, that may drive people to commit other crimes. It makes little sense, as a policy matter, to adopt a rule of evidence pertaining to propensity to commit one type of crime based on one psychological disorder when there are other psychological diseases, defects, and disorders that could similarly lead one to conclude that a person has a psychological propensity to commit other crimes.

In sum, it appears that a sweeping pyromania exception to the general ban on character evidence is unwarranted. Although arguably similar to cases of sexual assault and child molestation when it comes to a defendant's propensity to commit further crimes, cases of pyromania would involve an incredibly difficult burden of proof, infrequent application, and inconsistent policy outcomes with regard to other propensity-driven mental health conditions. Thus, carving out a pyromania-based exception to the prohibition on propensity evidence is unjustified. This is the point at which the practical similarity of serial arsonist cases with those of serial sexual offenders under Rules 413–15 ends. We, therefore, conclude that other fire evidence should not be admissible to prove propensity.

VI. CONCLUSION

The admissibility of evidence that an arson defendant was connected to other fires can be decisive evidence, making the difference between acquittal and conviction. If such evidence is appropriately admissible, then juries should not be deprived of considering the evidence for proper purposes in making their decisions. Conversely, if the evidence fails to meet the test of admissibility, exposing a jury to such evidence could very well deprive an arson defendant of a fair trial.

The responsibility for determining whether such evidence should be admitted lies first with the government. Trial courts often do not have a full

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[270] DSM-V, *supra* note 254, at 478–79.

[271] *Id.* at 585–90.

[272] *See id.* at 481–85 (discussing everything from alcohol use disorders, to polysubstance related disorders).

understanding of all the facts of a case, or the time, necessary to critically assess the admissibility of such evidence. "By contrast, the prosecution does have these advantages of context and time."[273] In fairness, however, prosecutors do not have the leisure or perspective of appellate courts, which have the benefit of time and the full record, detached from the rough and tumble of trial court litigation, to reflect with the benefits of hindsight upon the decisions made by prosecutors and trial judges alike. Prosecutors must, nevertheless, strive to fairly evaluate the propriety of evidence that an arson defendant was connected to other fires.[274] Prosecutors should exercise discretion and not invoke the talismanic language of Rule 404(b), relying on the standard of review on appeal,[275] in an uncritical attempt to seek admission of such evidence simply because it is there.

Trial courts, of course, have the ultimate responsibility to evaluate admissibility of evidence that an arson defendant was connected to other fires. The trial court bears responsibility to ensure that both the prosecution and the defendant receive a fair trial. In a criminal case, a trial judge should strive to ensure that its rulings do not improperly permit the guilty to escape justice any more than they improperly permit the innocent to be

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[273] United States v. Varoudakis, 233 F.3d 113, 125 (1st Cir. 2000) (reversing the conviction after the trial court admitted evidence of the arson defendant previously setting his car on fire). The court in *Varoudakis* went on to criticize the government's general approach to similar fact evidence:

> Despite the fairness implications of the prosecution's use of prior bad act evidence, the prosecution too often pushes the limits of admissibility of this evidence, knowing its propensity power and gambling that the time constraints on the trial court, the court's broad discretion, the elasticity of Rule 404(b), and the harmless error rule of the appellate court, will save it from the consequences of overreaching. That is not always a good gamble.

Id.

[274] Although most federal prosecutors are fully aware of, and strive to live up to, the standard of conduct for United States Attorneys enunciated by the Supreme Court, it bears repeating here, if only as a reminder that:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

[275] Appellate courts review for abuse of discretion a trial court's ruling regarding the admission of evidence pursuant to Rule 404(b). *See, e.g.*, United States v. Adkins, 743 F.3d 176, 183 (7th Cir. 2014) (setting forth the standard of review for admission of Rule 404(b) evidence); United States v. Williams, 740 F.3d 308, 314 (4th Cir. 2014) (same); United States v. Simpson, 741 F.3d 539, 554–55 (5th Cir. 2014) (same).

convicted.

This Article provides guidance for both prosecutors and trial courts in determining whether to seek admission of, and to admit, evidence of an arson defendant's connection to other fires. The factors set forth in Part IV of this Article supply a basis for analyzing the sufficiency of the evidence and whether it advances a non-propensity basis for admission under the doctrine of chances. Part IV also includes proposed jury instructions designed to channel the jury's proper use of the evidence and diminish the possible misuse of the same. In the end, of course, each case will turn upon its unique facts, calling for discerned judgment.