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Spreigl Evidence: Still Searching for a Principled Rule

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SPREIGL EVIDENCE: STILL SEARCHING FOR A PRINCIPLED RULE

Ted Sampsell-Jones†

I. THE PAST: THE DEVELOPMENT OF THE *SPREIGL* DOCTRINE IN MINNESOTA 1372
A. *Earliest Minnesota Cases – A Blunt, Categorical Rule* 1374
B. *Development of Limitations and Exceptions* 1377
C. *Early Twentieth-Century Endorsements of the Propensity Inference* 1379
D. *The Brief Influence of Julius Stone in Minnesota* 1381
E. *Spreigl and the Shift to Procedure* 1383
F. *The Impact of Rule 404* 1385
II. THE PRESENT: CURRENT DOCTRINE AND THE ADMISSIBILITY OF PROPENSITY EVIDENCE 1387
A. *Some Foundational Issues* 1388
B. *Unlinked Plans and the General Similarity Test* 1390
1. *Problems with the "Unlinked Plan" Doctrine* 1391
2. *Wermerskirchen, Wigmore, and Wright* 1394
C. *From Unlinked Plans to Other "Exceptions"* 1396
1. *Intent and Absence of Mistake or Accident* 1397
2. *Knowledge* 1399
3. *Identity* 1400
4. *Summary* 1402
D. *More Procedural Protections* 1402
III. THE FUTURE: A CANDID POLICY DEBATE 1404

Crimes are typically defined in terms of discrete instances of conduct. Criminal trials are therefore limited in scope. Juries are charged not with determining whether a defendant is generally immoral or dangerous, but rather whether he committed a particular criminal act. In short, we try a defendant "for what he did, not for who he is."[1] The character evidence rule reflects that

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1. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977); *accord* United States v. Linares, 367 F.3d 941, 945 (D.C. Cir. 2004); Hart v. Gomez, 174 F.3d

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focus. The rule, developed at common law and codified into Rule 404, states that evidence of a defendant's acts of uncharged misconduct is inadmissible to show his bad character.[2]

But the character evidence rule does not categorically ban evidence of other misconduct. Rule 404(b) allows evidence of uncharged misconduct to be admitted for "other purposes"—i.e., non-character purposes—such as motive, intent, plan, and identity.[3] In Minnesota, evidence offered for such a purpose is known as *Spreigl* evidence after the eponymous 1965 Minnesota Supreme Court decision.[4] (In most jurisdictions, it is known simply as 404(b) evidence.)

Applying Rule 404(b) is often difficult because the line between permissible non-character uses and impermissible character uses of other misconduct evidence is often subtle. Evidence law commentators have often criticized courts for failing to draw the line with enough care.[5] Wigmore himself thought it "hopeless to attempt to reconcile the precedents under various heads."[6] Others have been more ambitious. Just this year, as part of the *New Wigmore* treatise, David Leonard published an entire volume devoted solely to the 404(b) problem of drawing the line between permissible and impermissible uses of uncharged misconduct evidence.[7] Edward Imwinkelried previously published a two-volume treatise devoted mostly to the same question.[8] The

1067, 1073 n.10 (9th Cir. 1999); United States v. Vance, 871 F.2d 572, 575 (6th Cir. 1989); State v. Prioleau, 664 A.2d 743, 771 (Conn. 1995); State v. Sullivan, 679 N.W.2d 19, 23 (Iowa 2004); State v. Yager, 461 N.W.2d 741, 752 (Neb. 1990).

2. FED. R. EVID. 404.

3. *Id.* at 404(b).

4. State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

5. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:28 (3d ed. 2008) ("Perhaps because the issue so inundates courts hearing criminal appeals, published opinions often give it but passing mention, and it is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars."); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.20[3] (2nd ed. 1997) ("[C]ourts on occasion have admitted other-acts evidence almost automatically, without any real analysis, if they find it fits within one of the categories specified in Rule 404(b)."); 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE – EVIDENCE § 5239 ("Yet despite the recurrence of the issues, the [appellate] opinions are often poorly reasoned and provide little guidance to trial judges.") (footnote omitted).

6. 2 WIGMORE ON EVIDENCE § 302, at 246 (Chadborne rev. ed. 1979).

7. DAVID P. LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS (2009) [hereinafter NEW WIGMORE].

8. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (2006).

mass of those accomplished works demonstrates both the importance and the difficulty of the legal problem.

Without question, there is room for disagreement about particular applications of Rule 404(b). In cases around the hazy line between permissible and impermissible uses, reasonable jurists can disagree. But the case law in Minnesota and elsewhere suggests a disagreement not just about particular applications but also about the underlying principle itself—about what counts as a permissible use, about the propriety of the propensity inference itself.

The traditional view of Rule 404(b) is that it bars propensity reasoning but allows the use of uncharged misconduct for non-propensity purposes. Thus, when evidence of uncharged misconduct is offered for one of the other 404(b) purposes, its relevance must not depend on propensity. In other words, when a prosecutor offers evidence of a defendant's other crimes, it is not enough for her to show that the evidence demonstrates his motive, intent, identity, or plan—rather, she must show that the evidence demonstrates his motive, intent, identity or plan through some chain of inferences that does not include the propensity inference.

That traditional view is uniformly endorsed by evidence law treatises.[9] It is also widely recognized by the casebooks used in law school evidence classes.[10]

The case law, however, is far less clear. Many courts recognize (and at least attempt to apply) the traditional view.[11] Others courts

9. 1 IMWINKELRIED, *supra* note 8, § 2.19 ("[T]he act must have independent, legitimate, or special relevance on another [non-propensity] theory.") (footnotes omitted); MUELLER & KIRKPATRICK, *supra* note 5, § 4:28 ("[S]uch proof offered is not saved from the principle of exclusion by the mere fact that it supports a specific inference to a point like intent if the necessary logical steps include an inference of general character or propensity, or if it seems likely that the proof will be *used* to support such an inference."); 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 404.02[9] (8th ed. 2002); WRIGHT & GRAHAM, *supra* note 5, § 5239 ("[T]he rule admits evidence of other crimes whenever it is relevant without using the inference of character anywhere in the chain of inference."). *But see* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (1998) (arguing that the purported propensity ban cannot be squared with the case law).

10. *See, e.g.*, GEORGE FISHER, EVIDENCE 147–50 (2d ed. 2008); ERIC D. GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 181–82 (3d ed. 2000); RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE 331 (3d ed. 2000); DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 355 (2d ed. 2007).

11. *See, e.g.*, United States v. Varoudakis, 233 F.3d 113, 118 (1st Cir. 2000) ("[T]he evidence must have special relevance to an issue in the case such as intent or knowledge, and must not include bad character or propensity as a necessary link in the inferential chain.") (internal quotation marks omitted); United States

reject the traditional view of Rule 404(b), at least implicitly. They routinely admit evidence whose relevance depends primarily on propensity so long as it ultimately goes to prove one of the listed "other purposes" in 404(b). Minnesota courts fall in the latter camp. In general, they do not closely scrutinize the precise chain of inferences that supports the relevance of *Spreigl* evidence, and under various broad doctrines of admissibility, they regularly admit evidence whose sole or primary relevance depends on propensity.[12]

To be sure, Minnesota courts are not in any legal sense obligated to follow the traditional view. As a textual matter, Rule 404(b) itself does not unambiguously endorse the traditional view. As a historical matter, the traditional view was never uniformly endorsed by the case law prior to the rule's enactment, and the drafters of the rule made no effort to settle the well-known contradictions of their contemporaneous case law. As a doctrinal matter, Minnesota's rejection of the traditional view finds ample support both in its own case law and in the case law of the many other courts around the country. The only authority with which the *Spreigl* doctrine squarely conflicts is the authority of evidence law treatises, which are ultimately only worth the weight they are given by courts—in this case, not much.

Still, even if it is in some sense justified by other legal authority, the *Spreigl* doctrine fails as a matter of logic. If the traditional view of Rule 404(b) is rejected, then the character evidence rule itself is meaningless. If propensity reasoning is allowed to prove the other 404(b) purposes, then the character evidence rule amounts to almost nothing, and it should simply be abandoned.

v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) ("[W]hen evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged."); Bradbury v. Phillips Petroleum Co., 815 F.2d 1356, 1365 (10th Cir. 1987) ("The proper approach is not simply to find a 'pigeon hole' in which the proof might fit, but to determine whether the evidence proves something other than propensity . . . ."); People v. Crawford, 582 N.W.2d 785, 791 (Mich. 1998) ("[A] common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been 'offered' for one of the rule's enumerated proper purposes."); State v. McManus, 594 N.W.2d 623, 629 (Neb. 1999) ("Evidence that is offered for a proper purpose is often referred to as having 'special' or 'independent relevance,' which means its relevance does not depend on its tendency to show propensity.").

12. *See infra* Part II.

As a policy matter, a good case can be made for outright repeal. In any event, there is no point in maintaining a meaningless rule (or a rule that courts refuse to enforce). Conversely, if the rule is worth having, then it is also worth enforcing in a meaningful way, and the only meaningful way to enforce the rule is to embrace and attempt to apply the traditional view barring the propensity inference. Either outcome could be justified as a matter of logic and as a matter of policy. What cannot be justified as a matter of logic or policy is the current *Spreigl* doctrine, which only pretends to enforce some sort of ill-defined prohibition on character evidence.

This article first examines how Minnesota's character evidence doctrine developed, with a particular focus on the historical confusion regarding the propriety of the propensity inference.[13] It then examines current case law and argues that Minnesota's current *Spreigl* doctrine routinely allows propensity evidence.[14] It finally proposes a choice between abandoning the current *Spreigl* doctrine and repealing the character rule itself.[15] I take no position on which alternative should be chosen, but either is better than the status quo. The current doctrine in Minnesota is a Potemkin village.

I. THE PAST: THE DEVELOPMENT OF THE *SPREIGL* DOCTRINE IN MINNESOTA

It is often said that the character evidence rule is in decline.[16] That is true so far as it goes, but it leaves the false impression of some past golden age when the character evidence rule was well understood and rigorously enforced by courts. In fact, the history of the rule in Minnesota and elsewhere is a history of substantial confusion. The rationale for the rule has shifted over time, and the rule itself has been enforced inconsistently throughout its history. That legacy of confusion helps to explain the current *Spreigl* doctrine and its unprincipled approach to propensity evidence.

13. *See infra* Part I.
14. *See infra* Part II.
15. *See infra* Part III.
16. *See* 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, 423 (2006) ("Paradoxically, in the past decade, the tables have turned. The character evidence prohibition is no longer considered sacrosanct.").

The confusion about the rule's scope is in part a function of confusion about the rule's rationale. The modern rationale of the character evidence rule is that evidence of a defendant's prior crimes will lead the jury to convict on improper grounds. In Wigmore's famous articulation of the rationale:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of the crime thus exhibited, and either to allow it to bear to strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.[17]

The United States Supreme Court echoed those concerns more recently in *Old Chief*:

> Such improper grounds certainly include the one that [the defendant] points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."[18]

As both Wigmore and *Old Chief* suggest, there are in fact two distinct rationales—two distinct types of unfair prejudice that character evidence might produce. The first risk has to do with the propensity inference itself. The inference from propensity is that because a defendant committed crimes in the past, it is more likely that he committed the charged crime as well. In other words, "because someone was a bad guy once, he is likely to be a bad guy again."[19] The propensity inference meets the standards of relevance, but there is a risk that jurors will give it more weight than it deserves.

The second risk has nothing to do with the propensity inference. Rather, the second rationale relates to nullification and

17. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 233 (1904).

18. Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir 1982)).

19. United States v. McCourt, 925 F.2d 1229, 1236 (9th Cir. 1991).

preventative conviction. The concern is that if jurors know of a defendant's prior crimes, they will return a verdict of guilty even if they do not conclude that the defendant committed the presently charged offense. If the jurors reason that way, they do not rely on the propensity inference from past crimes to current crimes—rather, they convict on past crimes alone.

As in *Old Chief*, courts often treat the two rationales as overlapping and even indistinct. But the two rationales are different, and importantly so. Ultimately, the scope of the character evidence rule is mostly a function of the first rationale. The scope of the character evidence rule depends on the extent to which the propensity inference is allowed.

On that point, as I will discuss below, the current law in Minnesota (as in many jurisdictions) is muddled. The current confusion, however, is nothing new or recent. The common law character evidence rule that prevailed prior to the enactment of the Rules of Evidence was muddled. At times, Minnesota courts barred evidence of uncharged misconduct regardless of whether the propensity inference was involved, and at other times, Minnesota courts explicitly endorsed propensity reasoning. Those dueling strands of reasoning were never conclusively resolved by the case law, nor were they resolved by the enactment of Rule 404 itself. It is that history of confusion that explains the current problems with the doctrine.

A. Earliest Minnesota Cases – A Blunt, Categorical Rule

The character evidence rule began to develop in England during the late seventeenth century.[20] The rule was originally justified not by the modern rationales of unfair prejudice but rather by concerns regarding relevance and surprise.[21] At least into the early eighteenth century, the rule was enforced only sporadically and subject to substantial exceptions.[22] Thus, at the time when American jurisdictions imported the character evidence rule, it was relatively recent and somewhat uncertain in scope.

By the mid-nineteenth century, when Minnesota became a state and its court system began operation, the rule had solidified

20. See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 190–95 (2003); Thomas J. Reed, *Trial By Propensity: Admission of Other Criminal Act Evidence in Criminal Trials*, 50 U. CIN. L. REV. 713, 716–18 (1981).

21. LANGBEIN, *supra* note 20, at 191.

22. *Id.* at 202–03.

somewhat in American law. Nineteenth- century Minnesota cases appeared to state the rule in a fairly strong form, but also in an inchoate form, with an indefinite scope and rationale.

The earliest published Minnesota case dealing with the rule was probably *Hoberg v. State*,[23] decided in 1859, one year after Minnesota was admitted to the union. Hoberg was charged with theft, which was proven in part by evidence that the stolen goods were found in his house.[24] In the course of its case, the prosecution also presented evidence that some dresses were also discovered there.[25] Hoberg's daughter testified that the dresses were not stolen, and perhaps in rebuttal, the prosecution called a witness to testify that the dresses had been stolen from his clothes line.[26] The Minnesota Supreme Court held that the admission of the rebuttal testimony was error that entitled Hoberg to a new trial.[27] The court held:

> These last statements, as before observed, were far beyond what the prosecution proposed to prove by the witness, and were well calculated to prejudice the prisoner in the minds of the jury. The State should not have been permitted, on the pretense of discrediting the witness, by impeaching her on a matter immaterial to the issue, to prove a distinct felony not charged in the indictment. We can scarcely conceive of any testimony more likely to have had an injurious effect upon the minds of the jury.[28]

The *Hoberg* ruling said nothing further about the scope of the rule or its rationale. It stood for the general proposition that evidence of uncharged crimes was prejudicial and "injurious," but it did not specify why.[29]

A decade later, the court once again applied the rule in a surprisingly strong form in *State v. Hoyt*.[30] Hoyt was charged with killing Stamford, and Stamford's wife testified that on the day of and the day after the alleged murder, Hoyt had also assaulted her.[31] The court ruled that it was error to admit evidence of the other

23. 3 Minn. 181 (1859).
24. *Id.* at 182.
25. *Id.*
26. *Id.* at 183.
27. *Id.* at 185.
28. *Id.* at 184.
29. *Id.*
30. 13 Minn. 125 (1868).
31. *Id.* at 127.

assault because it "had no tendency to establish the charge contained in the indictment, and its natural effect was to prejudice the jury against the defendant."[32]

To modern eyes, that conclusion looks far too strong. The court suggested that the evidence was *irrelevant* to the charged offense, but certainly evidence that Hoyt assaulted Stamford's wife at least made it somewhat more likely that he also killed Stamford. Indeed, the evidence was likely relevant for both non-propensity and propensity reasons.[33] But the court deemed it both irrelevant and prejudicial. Again, as in *Hoberg*, the court did not discuss the nature of the prejudice.

In 1898 in *State v. Austin*,[34] a saloon owner was accused of selling liquor to minors. He testified in his own defense that he had never sold liquor to minors.[35] In rebuttal, the prosecution called witnesses who had seen him selling liquor to minors.[36] The English common law character evidence rule, like the modern rules, allowed the prosecution to present character evidence in rebuttal.[37] The evidence in *Austin* might still have been objectionable because it was in the form of specific instances rather than reputation evidence.[38] But the *Austin* court's ruling had nothing to do with form. Rather, it suggested that rebuttal character evidence was not allowed *in any form*. It held:

> It was error for the court to receive the evidence. If it was introduced for the purpose of impeaching the defendant, who had denied making such sales, it was clearly inadmissible, for the state had no right, for the purpose of discrediting defendant, to ask questions which were immaterial to the issue, and which would tend to prove against defendant an offense distinct from that charged in the indictment.
>
> . . .

32. *Id.*

33. Under modern doctrine, the evidence would likely be admitted on a non-propensity theory both as "inextricably intertwined" evidence and also as evidence of a linked plan.

34. 74 Minn. 463, 77 N.W. 301 (1898).

35. *Id.* at 464, 77 N.W. at 302.

36. *Id.*

37. LANGBEIN, *supra* note 20, at 196–98; *See* FED. R. EVID. 404(a)(1) (stating that "evidence of a pertinent trait of character" of a defendant is admissible if "offered by an accused, or by the prosecution to rebut the same"); MINN. R. EVID. 404(a)(1) (same).

38. *See* FED. R. EVID. 405(a); MINN. R. EVID. 405(a).

> It is a general rule that evidence of a distinct and independent offense cannot be admitted on the trial of a defendant charged with a criminal offense. To admit evidence of another criminal act would be to oppress a defendant by trying him for an offense of which he has had no notice, and for which he is unprepared, and, frequently, to prejudice him in the eyes of the jury. There are well-known exceptions to this rule, but the evidence now under consideration does not bring the case within any of the exceptions.[39]

Once again, to modern eyes, the conclusion in *Austin* looks too strong because it appears to endorse a categorical ban on rebuttal evidence rather than a narrower ban based on the form of the rebuttal evidence.

As for rationales for the rule, the *Austin* court mentioned three. First, mimicking *Hoberg* and *Hoyt*, the court suggested that uncharged offenses were "immaterial" to the charged offense.[40] Second, the court mentioned surprise and lack of notice.[41] And third, the court mentioned prejudice.[42] As in *Hoberg* and *Hoyt*, the court did not elaborate on the nature of the prejudice.

In short, the earliest Minnesota cases applied a robust but naïve form of the character evidence rule. The character evidence rule initially appeared to be categorical, and the Minnesota Supreme Court did not initially recognize exceptions that had already been recognized in other jurisdictions. As for the rule's rationale, the court only spoke generally of prejudice. It never explained what sort of prejudice evidence of other crimes would produce. In particular, it never explained whether its view of prejudice included the propensity inference itself, or the risk or preventative detention, or both.

B. Development of Limitations and Exceptions

The early Minnesota cases of *Hoberg*, *Hoyt*, and *Austin* suggested that evidence of uncharged misconduct was categorically inadmissible, no matter the context or purpose. Those rulings were out of step with the standard interpretations of the character evidence rule that prevailed elsewhere. But before long, the

39. *Austin*, 74 Minn. at 464, 77 N.W. at 302 (citation omitted).
40. *Id.*
41. *Id.*
42. *Id.*

Minnesota Supreme Court began to develop a far more moderate rule. It did so by recognizing several limitations and exceptions.

First, the court recognized that evidence of uncharged acts could be admitted if they were part of the same transaction or series of events as the charged crime. In other words, the court began to develop the "res gestae" doctrine.[43] Its first limitation of this sort came in *State v. Madigan* in 1894.[44] A lawyer was charged with perjury for filing a fraudulent lawsuit that the plaintiff had not authorized.[45] The prosecution presented evidence that the defendant, prior to filing the suit, had forged a document claiming to show the plaintiff's authorization.[46] The court held that the evidence was properly received because "[i]t certainly was material on the question of whether or not defendant was the attorney of [the plaintiff]."[47]

Following *Madigan*, in a series of other cases around the turn of the century, the court similarly held that where uncharged and charged acts were "all one transaction," evidence of the former could be admitted to prove evidence of the latter.[48] These cases accepted a broader notion of relevance and materiality than the court had initially endorsed. In so doing, they effectively (though never explicitly) overruled *Hoyt*.

Second, the court began to suggest that the character evidence rule did not apply, or did not apply as strongly, to prosecutions of certain crimes such as fraud and forgery.[49] These case-based exceptions had been recognized elsewhere in both the English and early American applications of the character evidence rule.[50]

Third, and most importantly, the court began to recognize exceptions based on the purpose for which the uncharged acts were offered. The exceptions were first described in detail in 1902

43. "Latin 'thing done.' The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception . . . ." BLACK'S LAW DICTIONARY 1335 (8th ed. 2004).

44. 57 Minn. 425, 59 N.W. 490 (1894).

45. *Id.* at 428–31, 59 N.W. at 491–92.

46. *Id.* at 431, 59 N.W. at 492.

47. *Id.*

48. *See, e.g.*, State v. Wilson, 72 Minn. 522, 526, 75 N.W. 715, 717 (1898); State v. Hayward, 62 Minn. 474, 65 N.W. 63 (1895).

49. State v. Bourne, 86 Minn. 426, 90 N.W. 1105 (1902); *Wilson*, 72 Minn. at 527, 75 N.W. at 717.

50. NEW WIGMORE, *supra* note 7, § 2.41, at 36–64.

in *State v. Fitchette*.[51] After discussing the general rule excluding evidence of uncharged misconduct, the court noted:

> [S]everal well-defined exceptions to the general rule as stated above have been recognized in the decided cases,– as where facts tend to show a distinct hostility, jealousy, or erotic passion indicated by a previous criminal act; or where the transaction depends upon the specific intent with which it is committed, when the claim can be made that the investigated act was the result of a mistake; or where the identity of the accused or of the instrumentality to perpetrate the crime is so connected or involved in some other act of guilt that one relates to the other; or, again, where the previous offense is a part of a scheme or conspiracy incidental to or involved in the one on trial.[52]

The *Fitchette* court cautioned against overuse of the exceptions and stressed that borderline cases should be resolved in favor of exclusion.[53] But before long, the court began applying the exceptions broadly.

C. Early Twentieth-Century Endorsements of the Propensity Inference

During the early twentieth century, as the character evidence rule in Minnesota developed into something resembling its modern form, it remained remarkably under-theorized. In explaining the rule, *Fitchette* relied on several late nineteenth century evidence treatises. Quoting *Wharton's* treatise, the court described the rationale of the character rule:

> [t]o admit evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he has had no notice, and sometimes by prejudicing the jury against him by publishing offenses of which, even if guilty, he may have long since repented, or which may have long since been condoned. Trials would, by this process, be injuriously prolonged, the real issue obscured, verdicts taken on side issues.[54]

The endorsed rationale was thus still based largely on notions of materiality, collaterality, and unfair surprise. The court's stated understanding of the prejudice was that it was unfair to inform the

51. 88 Minn. 145, 92 N.W. 527 (1902).
52. *Id.* at 148, 92 N.W. at 528.
53. *See id.* at 148–49, 92 N.W. at 528.
54. *Id.* at 148, 92 N.W. at 528 (quoting WHARTON'S CRIMINAL EVIDENCE 29 (9th ed. 1884)).

jury of past acts for which a defendant may have repented.[55] The modern concerns of preventative detention and overweighting propensity had yet to appear.

More strikingly still, in several turn of the century cases, the court made statements that appeared to endorse the propensity inference. In *Madigan*,[56] the court stated broadly that "[i]f the evidence offered tends to prove the commission of the crime charged, it is not incompetent because it also tends to prove the commission of another crime."[57] In 1903 in *State v. Ames*,[58] the court stated the matter in even stronger terms:

> The question as to the admissibility of evidence of this character has been before the courts often, and the rule permitting its introduction is variously stated by judges; but, reduced to its narrowest compass, the true rule is that evidence of the commission of other crimes is admissible when it tends corroboratively or directly to establish the defendant's guilt of the crime charged in the indictment on trial, or some essential ingredient of such offense. As stated by Chief Justice Parker in *People v. Molineux*: "Does the evidence of the other crime fairly aid in establishing the commission by defendant of the crime for which he is being tried? And that test, and none other, is fairly established by the authorities."[59]

Of course, the propensity inference itself is one means by which evidence of other acts might "corroboratively establish" guilt for the charged crime. Evidence of other crimes can aid in establishing guilt—and one way that it can so aid is by demonstrating the defendant's propensity.

Ames was arguably ambiguous on the propriety of propensity reasoning, but the court's endorsement soon became more explicit. In *State v. Whipple*[60] in 1919, the court upheld the admission of prior drug sales against a defendant charged with a drug crime.[61]

> It was competent for the state to introduce evidence of other sales of morphine to Chandler and of the sale of

55. *See id.*
56. 57 Minn. 425, 59 N.W. 490 (1894).
57. *Id.* at 432, 59 N.W. at 492.
58. 90 Minn. 183, 96 N.W. 330 (1903).
59. *Id.* at 191–92, 96 N.W. at 333 (citation omitted).
60. 143 Minn. 403, 173 N.W. 801 (1919).
61. *See id.* at 407, 173 N.W. at 802.

> morphine to other drug addicts, in violation of the statute. Evidence of this character is admissible if it is part of one plan or scheme carried on by defendant to willfully violate the law, *or if it tends to show an inclination or predisposition to commit the offense charged.* The evidence of other offenses received in this case was within the rule.[62]

The court thus held that evidence of uncharged misconduct was admissible to show "inclination or predisposition"—which is to say that it was admissible to show propensity.[63] In a series of other cases over the next two decades, the court cited *Ames* and *Whipple* in decisions allowing prior crimes as "confirmatory" or "corroborating" evidence.

Ames's endorsement of propensity reasoning was ambiguous, and *Whipple's* more explicit endorsement was not repeated by the court. It certainly cannot be said that the Minnesota Supreme Court consistently endorsed the propensity reasoning in the early twentieth century. But at a minimum, those cases show that into the mid-twentieth century, the Minnesota Supreme Court lacked a clear understanding of the role that the propensity inference played in the operation of the character evidence rule. As we will see, that confusion has yet to be resolved.

D. The Brief Influence of Julius Stone in Minnesota

In the 1930s, Professor Julius Stone wrote two enormously influential articles in the *Harvard Law Review* on the character evidence rule and the admissibility of other acts evidence. Stone traced the historical development of the rule, first in England,[64] and then in the United States.[65] Stone contended that there was an "original" form of the character evidence rule, and that there was also a "spurious" form that had developed in the early and mid-nineteenth century.[66]

Under the "original rule," according to Stone, "only evidence relevant merely to propensity was excluded. Hence admissibility depended upon the answer to one simple question. Is this

62. *Id.* (emphasis added) (citations omitted).
63. *See id.*
64. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933).
65. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).
66. *Id.* at 989–1004.

evidence in any way relevant to a fact in issue otherwise than by merely showing propensity?"[67] Under the apocryphal and "spurious" form, by contrast, "the rule is stated as a broad rule excluding evidence of all other bad acts, unless the evidence falls within some one of a list of exceptions."[68] The different rules led to different inquiries by courts:

> What is the result? In the place of the inquiry—is this evidence relevant otherwise than merely through propensity? there is immediately substituted the inquiry—does this evidence fall within any exception to the rule of exclusion?[69]

That spurious approach, argued Stone, led to a variety of problems and misapplication.[70]

The spurious rule was both overinclusive and underinclusive. On one hand, the spurious approach led courts to exclude other acts evidence that was relevant for non-propensity purposes simply because they could not fit it within one of the listed exceptions.[71] On the other hand, the spurious approach led courts to admit propensity evidence simply because it went to one of the excepted categories:[72]

> [B]ecause attention is concentrated on interpreting the list of exceptions, not only is the requirement of relevance forgotten, but the very object of the original rule—to prevent proof of guilt by proof of propensity to commit—is quite forgotten, and eventually an exception is admitted to the broad rule which admits evidence *precisely* for the reason that the original rule excluded it. The broad rule, which seemed to give greater protection to the accused, has produced a rule depriving him of every shred of protection.[73]

Put differently, the spurious approach said that other acts were generally inadmissible unless they were offered to show intent, for example. But under this approach, courts allowed the admission of other acts evidence to show intent by way of a propensity inference. If courts allow the propensity inference for the purposes of showing

67. *Id.* at 1004.
68. *Id.* at 1005.
69. *Id.*
70. *See id.* at 1005–08.
71. *See id.* at 1005–06.
72. *See id.* at 1033.
73. *Id.* at 1033.

motive, intent, identity, and the like, then there is little or nothing left of the character evidence rule. That fundamental problem, identified by Stone in the 1930s, still plagues the rule in Minnesota today.

For a brief moment, it appeared that the Minnesota Supreme Court might follow Professor Stone's recommendation to abandon the "spurious rule." In 1952 in *St Paul v. Greene*,[74] the court discussed Stone's article at length.[75] It discussed its previous exceptions-based approach, and noted the criticism from Stone and others.[76] The court seemed to admit that in some previous cases, it had under the exceptions admitted evidence that was indistinguishable from propensity.[77] And while it did not ultimately reject its prior cases, it at least hinted that it might.[78]

But the seeds of reform in *Greene* never took root. Three years later, in *State v. DePauw*,[79] the court re-established its exceptions-based approach.[80] It there upheld the admission of prior unlinked acts of molestation against an accused molester.[81] In so doing, it once again admitted evidence indistinguishable from propensity simply because it arguably fit into one of the excepted categories.

E. Spreigl and the Shift to Procedure

In 1965 the court decided *Spreigl*, the case for which evidence of uncharged misconduct in Minnesota is now named.[82] In *Spreigl*, the court for the first time recognized the modern rationales for the character evidence rule, taken from Wigmore's third edition:

> The reasons thus marshalled in various forms are reducible to three: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from

74. 238 Minn. 202, 56 N.W.2d 423 (1952).
75. *See id.* at 205–06, 56 N.W.2d at 425–26.
76. *See id.* at 203–06, 56 N.W.2d at 424–26.
77. *Id.* at 206 & n.4, 56 N.W.2d at 426 & n.4.
78. *See id.* at 206 n.5 (noting Professor Stone's criticism that the Minnesota Supreme Court had previously admitted evidence "somewhat indistinguishable from propensity").
79. 246 Minn. 91, 74 N.W.2d 297 (1955).
80. *Id.* at 93–94, 74 N.W.2d at 299.
81. *Id.* at 95–96, 74 N.W.2d at 300.
82. 272 Minn. 488, 139 N.W.2d 167 (1965).

> other offences; * * * (3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated * * *.[83]

As it had in *Greene*, the court appeared to recognize that some of its prior rulings (including *DePauw*) had allowed evidence indistinguishable from propensity.[84] "In permitting evidence of prior offenses to be received as a part of a common plan or scheme, we have come perilously close to putting the defendant's character and record in issue . . . ."[85]

"Perilously close" was an understatement, and yet the *Spreigl* court refused to correct or limit those prior cases. The court did not address the fundamental problem—the problem identified by Professor Stone—regarding the role of the propensity inference in cases where other acts evidence was offered for one of the other purposes. In fact, the *Spreigl* court once again allowed the very same type of evidence. As a substantive matter, it allowed the admission of an accused molester's other acts of molestation simply because the "similarity of behavior is sufficient to justify receiving the challenged evidence."[86]

What the court did instead was add a layer of procedural protection. It added a notice requirement:

> [W]e now hold that in the trial of this and future criminal cases where the state seeks to prove that an accused has been guilty of additional crimes and misconduct on other occasions, although such evidence is otherwise admissible under some exception to the general exclusionary rule, it shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularity required of an indictment or information . . . .[87]

Of the three rationales for the character evidence rule cited by Wigmore and noted by the court, the *Spreigl* notice rule addressed only the third rationale. As the Wisconsin Supreme Court noted when it subsequently rejected the *Spreigl* notice rule, "[w]hile this rule may eliminate the surprise on the part of an accused, it does

83. *Id.* at 496, 139 N.W.2d at 172 (quoting JOHN H. WIGMORE, 1 WIGMORE ON EVIDENCE § 194 (Little, Brown, & Co. (1904)).
84. *Id.* at 493, 139 N.W.2d at 171.
85. *Id.*
86. *Id.* at 493, 139 N.W.2d at 170.
87. *Id.* at 496–97, 139 N.W.2d at 173.

little to eliminate any confusion of issues, misleading of the jury, or undue prejudice."[88] To put a finer point on it, the *Spreigl* decision allowed the prosecution to convict by propensity so long as it notified the defendant in advance that it planned to do so.

F. The Impact of Rule 404

The Federal Rules took effect in 1973, and the parallel Minnesota Rules followed in 1977. Under both, Rule 404 was intended to codify the common law character evidence rule. Unfortunately, the common law rule was just as confused around the country as it was in Minnesota, and the drafters of Rule 404 did little to alleviate the confusion.[89]

Rule 404(b), the critical provision, stated:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[90]

To a large degree, the Rule reflected the "spurious" approach to character evidence that Professor Stone had derided four decades earlier. Some have suggested that the Rule was intended to incorporate elements of both the original approach and the spurious approach.[91] But in any event, the Rule listed the typical common law "exceptions" to the character evidence rule. Moreover, the Rule did nothing to settle the question of whether, or to what extent, propensity reasoning was allowed to prove one of the excepted other purposes.[92]

The Federal Advisory Committee said very little about Rule 404(b), which was surprising given the Rule's importance, and

88. Whitty v. State, 149 N.W.2d 557, 565 (Wis. 1967).

89. *See* GREEN ET AL., *supra* note 10, at 173 ("The drafters of the Federal Rules had the opportunity to propose a complete overhaul; they chose not to."); WRIGHT & GRAHAM, *supra* note 5, § 5239 ("Lamentably, the Advisory Committee chose to leave the law in its messy state; Rule 404(b) does nothing to clarify the issues, and may in some respects have muddied the waters even more.").

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

91. NEW WIGMORE, *supra* note 7, § 4.3.2.

92. *See* WRIGHT & GRAHAM, *supra* note 5, § 5239 ("Rule 404(b) is a good illustration of Wigmore's Rule of Codification: the 'always conceded principle should frequently be found solemnly enacted, while the important controversies . . . are ignored and left without solution.'") (quoting 7 WIGMORE ON EVIDENCE 523 n.1 (3d ed. 1940)).

given how much controversy had arisen over the common law rule.[93] The Advisory Committee notes repeated that evidence of other crimes was inadmissible to show character, but was admissible for other purposes.[94] It went on:

> No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.[95]

The Advisory Committee cited no representative case that demonstrated a proper approach. It cited only a single piece of authority: a 1956 *Iowa Law Review* article, *Other Vices, Other Crimes*, by Professors Slough and Knightly.[96]

The citation to Slough and Knightly's article was surprising in its own right since that article provided a stinging critique of courts' erosion of the character evidence rule. The authors argued courts had fundamentally undermined the rule by creating so many broad exceptions, many of which were applied in a haphazard fashion.[97] "Common law precepts, though well-meaning and unctuously spoken, die quickly when trapped in the withering crossfire of judicial exceptions."[98] Slough and Knightly particularly criticized the willingness of courts to admit propensity evidence in sex cases under the pretext of showing "design" and scheme.[99] Precedents justifying such pretexual admissions, they noted, spread to other types of cases.[100] The authors concluded on a pessimistic note: "present rules, void of common meaning, will never halt the trend toward liberal admissibility."[101]

In citing Slough and Knightly's article, the drafters of Rule 404 demonstrated that they recognized the problems with the common law character rule and its exceptions. And yet they did nothing to address, much less fix, those problems. The drafters codified what

93. FED. R. EVID. 404, advisory committee's note.
94. *Id.*
95. *Id.*
96. *See id.* (citing M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956)).
97. Slough & Knightly, *supra* note 96 at 349–50.
98. *Id.* at 325.
99. *Id.* at 332–36.
100. *Id.*
101. *Id.* at 349.

they apparently knew was an incoherent mess. In any event, because Rule 404 substantially codified the then-existing character evidence rule, it did little to change the law. In Minnesota, when considering evidence of uncharged misconduct, courts continued to rely primarily on pre-Rules precedent such as *Spreigl* rather than on the Rule itself.

II. THE PRESENT: CURRENT DOCTRINE AND THE ADMISSIBILITY OF PROPENSITY EVIDENCE

Minnesota's current doctrine on the character evidence rule is a reflection of its past. The doctrine has a confused history, and the confusion persists. As the character evidence rule developed, Minnesota courts never articulated any coherent theory of when (and whether) a propensity inference is allowed. Minnesota courts have yet to articulate such a theory. That failing, moreover, is not merely academic or theoretical. The concrete result is that propensity evidence is regularly allowed in the guise of 404(b)/*Spreigl* evidence.

To be sure, the cases are far from uniform. The *Spreigl* issue is litigated as much as or more than any issue in Minnesota criminal law.[102] With hundreds of appellate cases deciding *Spreigl* claims, it is not surprising that there are some cross-currents and contradictions, and it is impossible to describe the doctrine completely in a few pages. Minnesota courts still occasionally vacillate between more restrictive and less restrictive standards, just as they did for the first century and a half of cases.[103] But despite the admitted lack of uniformity, it is still possible to draw some general conclusions about the *Spreigl* doctrine in Minnesota. In general, Minnesota courts have adopted broad doctrines of admissibility that allow evidence of uncharged misconduct even when the primary or sole relevance of the evidence is based on

102. A LexisNexis search of Minnesota appellate cases in the last decade containing the term "Spreigl" yields 433 results. A search for "Strickland" yields 431; "Miranda" yields 365; "Apprendi" yields 263; and "Batson" yields 99. *See also* WRIGHT & GRAHAM, *supra* note 5, § 5239 ("There is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence of other crimes, wrongs, or acts.").

103. *See* Chad M. Oldfather, *Other Bad Acts and the Failure of Precedent*, 28 WM. MITCHELL L. REV. 151, 153 (2001) (discussing and criticizing the "internal tensions and inconsistencies" in *Spreigl* doctrine); Note, *Evidence of Defendant's Other Crimes: Admissibility in Minnesota*, 37 MINN. L. REV. 608 (1953) (discussing and criticizing Minnesota's approach to other acts evidence).

propensity.

A. Some Foundational Issues

There are several other purposes listed in Rule 404(b), and as a result, there are—or at least there should be—several distinct 404(b) doctrines. Before addressing specific difficulties with each doctrine, it is worth noting some general, foundational problems with the way in which Minnesota courts apply the character evidence rule.

One foundational problem is that Minnesota courts occasionally fall into the habit of treating the various "other purposes" listed in Rule 404(b) as undifferentiated. While it is true that the other purposes overlap in some respects, they are nonetheless analytically distinct. The various listed purposes have distinct meanings and distinct applications. When analyzing evidence of uncharged misconduct, it is not enough to simply say that it is relevant to show "motive, intent, plan, and identity." That sort of "laundry list" or "smorgasbord" approach has been criticized by both courts and scholars,[104] and yet Minnesota courts occasionally employed it.[105]

A second problem is that Minnesota courts treat the 404(b) "other purposes" as "exceptions" to the character evidence rule.[106] Unlike the true exceptions to the character rule contained in Rules 404(a)(1), (2), and (3), the listed purposes in 404(b) are not exceptions but rather non-character uses of other acts evidence. While this mistake may seem merely semantic, it is symptomatic of

104. *See, e.g.*, SALTZBURG ET AL., *supra* note 9, § 404.02[9] (criticizing the "laundry list" approach to Rule 404(b)).

105. *See, e.g.*, Ture v. State, 681 N.W.2d 9, 15 (Minn. 2004) ("The district court admitted the Edwards murder evidence for several purposes other than to identify Ture as the murderer of Wohlenhaus as well as Edwards, including to illustrate Ture's intent and modus operandi."); State v. Cote, No. A03-993, 2004 Minn. App. LEXIS 639, at *9 (Minn. Ct. App. June 4, 2004) (upholding the admission of evidence "under the motive and common-plan exceptions" without analyzing the difference between those two purposes); State v. Tennant, No. C3-89-2238, 1990 Minn. App. LEXIS 777, at *3 (Minn. Ct. App. Aug. 7, 1990) ("The state offered the prior assault conviction to show intent, identity, absence of mistake, and common scheme or plan.").

106. *See, e.g.*, State v. Bartylla, 755 N.W.2d 8, 20 (Minn. 2008) (referring to the common plan "exception" to the character evidence rule); State v. Ness, 707 N.W.2d 676, 688 (Minn. 2006) (discussing the same); State v. McLeod, 705 N.W.2d 776, 785 (Minn. 2005) (discussing the same); Angus v. State, 695 N.W.2d 109, 119 (Minn. 2005) (discussing the various *Spreigl* "exceptions to the general exclusionary rule").

a larger problem—a failure to understand what Rule 404(b) means and what it allows.[107]

Ultimately, the core flaw with the current *Spreigl* doctrine is that Minnesota courts often examine only *whether* uncharged misconduct is relevant to prove a 404(b) purpose, but they fail to examine *how* it is relevant. Uncharged misconduct is almost always relevant to identity or intent, for example, because the propensity inference itself almost always provides relevance. The important question is whether the uncharged misconduct is relevant *in some way that does not rely on the propensity inference*. The important question, in other words, is whether there is some non-propensity chain of inferences that demonstrates motive, plan, intent, identity, and so on.

That question is admittedly very difficult to answer in some cases. In some cases, the distinction between propensity and non-propensity reasoning will be difficult to decipher. In such cases, reasonable jurists could disagree about whether some piece of evidence evades propensity reasoning or not. But while the answer will not always be clear, questioning the precise means of relevance is critical to proper 404(b) analysis. Minnesota courts occasionally ask that critical question,[108] but generally they do not. They do not appear to recognize that it makes any difference.

A few examples show the depth of the problem. In *State v. Hill*, the defendant was accused of having sex with his girlfriend's young daughter.[109] The State presented evidence that, ten years earlier, he had sex with another girlfriend's young daughter.[110] The court of appeals upheld admission of the evidence to show "identity" on this basis: "[b]ecause Hill committed a similar crime in a similar way against similarly situated victims, it is more likely that Hill is the person who abused RBL [(the eight-year-old

107. *See* FISHER, *supra* note 10, at 150 ("[T]hinking of the permitted purposes listed in Rule 404(b) as 'exceptions' to the propensity evidence ban can lead a court astray.").

108. *See, e.g.*, State v. Smith, 749 N.W.2d 88, 94 (Minn. Ct. App. 2008) ("[T]he legitimacy of the purpose must be demonstrated, and the talismanic invocation of an item from the rule 404(b) list does not constitute such a demonstration."); State v. Montgomery, 707 N.W.2d 392, 398 (Minn. Ct. App. 2005) ("It is not sufficient simply to recite a 404(b) purpose without also demonstrating at least an arguable legitimacy of that purpose.").

109. State v. Hill, No. A06-371, 2007 Minn. App. LEXIS 273, at *2 (Minn. Ct. App. Mar. 27, 2007).

110. *Id.* at *3.

daughter)]."[111] It said nothing more about the precise means of relevance.

In *State v. Anderson*,[112] a defendant was charged with manufacturing meth.[113] The State admitted evidence that a week after the arrest for the charged offense, Anderson was again arrested for attempting to manufacture meth.[114] The court of appeals upheld the admission of the evidence on this basis: "Anderson's subsequent arrest is sufficiently similar to make it relevant to the present offense, thus satisfying the [relevance requirement]."[115] It said nothing more about the precise means of relevance.

Hill and *Anderson* are extreme examples of a common tendency that runs through Minnesota *Spreigl* cases. Courts note that evidence of some other act is relevant for some accepted 404(b) purposes and thus admit the evidence without saying anything further. The result is often a tacit endorsement of propensity reasoning and a broad doctrine of admissibility for evidence of uncharged misconduct.

B. Unlinked Plans and the General Similarity Test

The single most important source of Minnesota's very broad doctrine of admissibility is its adoption of the "unlinked plan" theory of the common plan doctrine. One of the enumerated 404(b) purposes is "plan."[116] Thus, under Rule 404(b), evidence of a defendant's uncharged misconduct may be admitted to show his plan. Most evidence law authorities state that to be admissible under the common plan doctrine, the uncharged acts should be somehow linked with the charged crime.[117]

111. *Id.* at *5.
112. No. A03-1629, 2004 Minn. App. LEXIS 1065 (Minn. Ct. App. Sept. 21, 2004).
113. *Id.* *1.
114. *Id.* at *3–4.
115. *Id.* at *8–9.
116. MINN. R. EVID. 404(b); *accord* FED. R. EVID. 404(b).
117. *See, e.g.*, 1 IMWINKELRIED, *supra* note 88, § 3.24 (criticizing the "unlinked plan" doctrine); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 113, at 668 (2d ed. 1994) (discussing the same); 2 WEINSTEIN & BERGER, *supra*, note 5, § 404.22[5][a] (discussing the same); Miguel A. Mendez & Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473 (1995) (discussing the same); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 233–34

Under the "linked plan" theory, where uncharged and charged acts are both integral parts of some overarching criminal plan, uncharged acts are admissible.[118] Thus, for example, "when a criminal steals a car to use it in a robbery, the automobile theft can be proved in a prosecution for the robbery."[119] In such an example, because the uncharged act of theft is directly linked to the charged offense, the relevance of the uncharged act does not depend on a propensity inference.

Minnesota, however, does not require any direct linkage between charged and uncharged acts. Rather, to admit evidence under Minnesota's "common plan or scheme" doctrine, the prosecution need only show that the charged and uncharged acts are "similar in time, place, or modus operandi."[120] The test, in other words, is not one of linkage or interdependence; it is instead a test of similarity. Minnesota's doctrine is an example of what evidence scholars have called the "unlinked plan" or "spurious plan" theory of the common plan doctrine.[121]

1. Problems with the "Unlinked Plan" Doctrine

There are several problems with Minnesota's unlinked plan doctrine. First, Minnesota courts have effectively merged the plan doctrine with the "modus operandi" doctrine. Such a merger is unwise, because the "two theories proceed from very different premises, fundamentally affecting how each theory should operate."[122]

Second, similarity is a vague and indeterminate metric for admissibility. Minnesota courts have a long history of admitting evidence with a fairly low degree of similarity.[123] In *State v.*

(2005) (discussing the same); Susan Stuart, *Evidentiary Use of Other Crime Evidence: A Survey of Recent Trends in Criminal Procedure*, 20 IND. L. REV. 183, 197 (1987) (discussing the same); Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2470–71 (2000) (discussing the same).

118. David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 546–47 (1994).

119. MCCORMICK ON EVIDENCE § 190 (Kenneth S. Broun ed., 6th ed. 2006).

120. State v. Kennedy, 585 N.W.2d 385, 390 (Minn. 1998).

121. *See, e.g.*, Bryden & Park, *supra* note 118, at 550.

122. NEW WIGMORE, *supra* note 7, § 13.5, at 720.

123. *See, e.g.*, State v. Gomez, 721 N.W.2d 871, 877–78 (Minn. 2006) (upholding the admission of prior burglaries of elderly victims against a defendant charged with murder in the course of a burglary); State v. Wright, 719 N.W.2d 910, 917–18 (Minn. 2006) (admitting a thirteen-year-old unlinked assault conviction to show a "common scheme" for a charged murder); State v. Berry, 484 N.W.2d 14,

Kennedy,[124] the Minnesota Supreme Court said that, to be admissible, *Spreigl* evidence need only be "sufficiently or substantially similar to the charged offense."[125] More recently, in an apparent effort to tighten the requirements of admissibility (and in an arguable rejection of the *Kennedy* standard), the court emphasized in *State v. Ness*[126] that uncharged and charged acts must bear "marked similarity."[127] *Ness* may have succeeded in tightening the standards somewhat,[128] but Minnesota courts have nonetheless continued to rely on the *Kennedy* standard and admit evidence with low degrees of similarity.[129]

But, regardless of whether "marked" rather than "substantial" similarity is required, the more fundamental problem is that the notion of similarity itself is deeply relative.[130] Indeed, in many

17–18 (Minn. 1992) (admitting three prior instances of dissimilar violence because "[e]ach of the three incidents is relevant because of the similarity of the way appellant behaved when trying to maintain control of the people with whom he worked."); State v. Krueth, No. A06-1590, 2008 Minn. App. LEXIS 486, at *5 (Minn. Ct. App. May 6, 2008) (upholding the admission of another murder in a murder case because "both victims were killed in darkness; both were killed with one shot; both were killed in their homes."); State v. Bloodsaw, No. C7-01-365, 2001 Minn. App. LEXIS 1407, at *4 (Minn. Ct. App. Dec. 26, 2001) (upholding the admission of a prior offense for promoting prostitution to show a current offense of promoting prostitution because both involved transporting prostitutes to a motel to meet with customers); State v. Schulberg, No. C4-95-2709, 1996 Minn. App. LEXIS 1120, at *4 (Minn. Ct. App. Sept. 24, 1996) (upholding the admission of prior thefts and burglaries because "[e]ach was an offense against property").

124. 585 N.W.2d 385 (Minn. 2006).

125. *Id.* at 391.

126. 707 N.W.2d 676 (Minn. 2006).

127. *Id.* at 688; *see also* State v. Clark, 738 N.W.2d 316, 346–48 (Minn. 2007) (finding that the trial court had admitted insufficiently similar evidence but also finding the error harmless); State v. Black, No. A06-2390, 2008 Minn. LEXIS 379 (Minn. July 15, 2008) (summarily reversing the Court of Appeals' decision to uphold the admission of Spreigl evidence, and remanding for reconsideration in light of *Ness*' "marked similarity" requirement).

128. *See, e.g.*, State v. Black, No. A06-2390r, 2008 Minn. App. LEXIS 1226, at *8–17 (Minn. Ct. App. Oct. 21, 2008); State v. Matlock, No. A06-1385, 2007 Minn. App. LEXIS 1019, at *7–9 (Minn. Ct. App. Oct. 2, 2007).

129. *See, e.g.*, State v. Bartylla, 755 N.W.2d 8, 20–22 (Minn. 2008) (upholding the admission of a prior burglary conviction to show "common plan" in a rape and murder case); State v. Carlson, No. A07-2144, 2009 Minn. App. LEXIS 175, at *8–15 (Minn. Ct. App. Feb. 10, 2009) (relying on the *Kennedy* "substantially similar" standard and upholding the admission of evidence); State v. Petrin, No. A06-1913, 2008 Minn. App. LEXIS 586, at *6–11 (Minn. Ct. App. May 20, 2008).

130. *See* Nelson Goodman, *Seven Strictures on Similarity*, in EXPERIENCE & THEORY 19, 19 (L. Foster & J. Swanson eds. 1970) ("Similarity, ever ready to solve philosophical problems and overcome obstacles, is a pretender, an impostor, a

cases, there is no way to determine which factors cut which way. If a man rapes one woman in Duluth and another in Minneapolis, are the two rapes geographically similar because they both took place in the same state, or are they geographically different because they took place 150 miles apart? Asking that question is roughly equivalent to asking whether I am similar to a chimp.

Third, and most fundamentally, Minnesota's doctrine allows an inference that is indistinguishable from a propensity inference. The fact that an accused rapist has raped before in a roughly similar fashion does not show that he had a "plan" or "scheme" to commit both rapes—what it shows is that he commits the same type of offense repeatedly. What it shows, in other words, is propensity. In fact, the Minnesota Supreme Court has explicitly stated that such evidence is allowed to "complete the picture" of the defendant,[131] which seems like an invitation for character-based reasoning.

The risks presented by such evidence are precisely the same risks that motivate the character rule, and the unlinked plan theory "effectively eviscerates the character ban whenever the individual has engaged in similar misconduct."[132] Admitting similar acts "on the theory that they prove plan often smacks of a thin fiction that merely disguises what is in substance the forbidden propensity inference."[133]

A test based on similarity gets the rule backward. As uncharged acts grow more similar to charged acts, they undoubtedly become more relevant, but they become more relevant largely because the propensity inference itself becomes stronger. If Minnesota courts were to recognize that the propensity inference is itself off-limits (even when used to show a *Spreigl* purpose), then increased similarity would raise the prejudicial value more than the probative value. But Minnesota courts do not recognize that point. Instead, the current doctrine implicitly suggests that a stronger propensity inference based on similarity actually counts in favor of admission rather than against it.

quack."); Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913, 941 (1992) ("[S]imilarity is an especially elusive and troublesome concept.").

131. State v. Lynch, 590 N.W.2d 75, 81 (Minn. 1999); State v. Berry, 484 N.W.2d 14, 18 (Minn. 1992).

132. NEW WIGMORE, *supra* note 7, § 9.2.2, at 575.

133. MUELLER & KIRKPATRICK, *supra* note 117.

2. Wermerskirchen, Wigmore, and Wright

Minnesota courts have been largely impervious to the criticisms of the unlinked plan doctrine (as well as to those criticisms directed specifically at Minnesota case law on uncharged misconduct).[134] The closest thing to a defense of the doctrine came in *State v. Wermerskirchen,*[135] where the Minnesota Supreme Court reaffirmed the broad doctrine of admissibility in cases of sex crimes.[136] In so doing, the court sniffed at critics:

> It is undoubtedly true that some academic commentators would like the "common scheme or plan" doctrine to be one with a quite narrow application. These commentators also would like to limit other-crime evidence so that it may not be admitted to show the corpus delicti, to prove the doing of the act charged. Whatever the possible *general* merits of these arguments or their possible persuasiveness in some contexts, it is clear that in the specific context of rape and sex abuse prosecutions, particularly child sex abuse prosecutions, we have rejected the argument propounded by these academic commentators.[137]

The court did not name or cite the "academic commentators" to which it was responding, and it is doubtful whether any such commentator has ever argued that other crimes are never admissible to prove the doing of the act charged—that was merely a straw man. The court's suggestion that sex crimes provide a particular reason for rejecting such criticisms was also strange because Minnesota has never limited the broad unlinked plan doctrine to sex crimes.[138]

Somewhat more substantively, the court in *Wermerskirchen* went on to argue that its broad doctrine of admissibility was supported by eminent authorities including both Wigmore himself and also Charles Wright.[139] But its reliance on those authorities was, to put it mildly, dubious.

It is true that Wigmore argued that sexual assaults on other victims could, in at least some cases, be used as non-propensity

134. For earlier criticisms of Minnesota law, see Oldfather, *supra* note 103 and Note, *supra* note 103.
135. 497 N.W.2d 235 (Minn. 1992).
136. *Id.* at 240.
137. *Id.*
138. *See id.*
139. *See id.*

evidence of plan or design.[140] But even assuming that Wigmore was correct, he imposed several limitations on the plan doctrine that Minnesota has never followed. First, Wigmore cautioned that the relevant "plan" must be some "plan to do the specific act charged" (rather than just a general "plan" to rape people), and without such a limitation, the evidence would violate the character rule.[141] Second, Wigmore emphasized that the test was a "stringent" one requiring a "much higher degree of similarity" similar to the traditional modus operandi doctrine.[142] Third, Wigmore quoted with approval court cases holding that to be admissible as evidence of plan or design, uncharged acts must be somehow "connected" with the charged acts.[143]

Wigmore offered a telling example of the sort of case where a sexual assault on another woman could be admitted to show plan or design. If a man were charged with assaulting a woman in her house, the prosecution could admit evidence "that the defendant on the same day, with a confederate guarding the house, assaulted other women in the same family who escaped, leaving the complainant as the only woman accessible to him for his purpose."[144] In such a case, where the two assaults were highly similar and truly connected, evidence of one could be offered to show the defendant's plan or design, which would demonstrate that he had in fact committed the other.

Minnesota has never limited its common plan doctrine to cases of the sort Wigmore had in mind. In fact, Minnesota has adopted precisely the sort of general similarity test that Wigmore expressly rejected. The *Wermerskirchen* court's reliance on Wigmore as apparent support for its broad doctrine was misplaced.

The court's reading of Wright's treatise was downright tendentious. Professor Wright had indeed recognized that many courts had freely admitted other crimes evidence in sex cases.[145] He suggested that courts did so because they were "understandably desperate for some evidence beyond the victim's accusation that will prove that the accused did the acts of which he stands charged."[146] The thrust of Wright's argument was that, due to the

140. *See* 2 WIGMORE, *supra* note 6, § 357.
141. *Id.* § 304, at 249 n.1.
142. *Id.* § 304, at 251.
143. *Id.* § 304, at 252.
144. *Id.* § 304, at 249.
145. WRIGHT & GRAHAM, *supra* note 5, § 5239, at 461–62.
146. *Id.*

powerful moral and political forces at play in rape cases, courts had (essentially for policy reasons) stretched the doctrine to admit other crimes evidence.[147]

But while the nature of rape cases makes such decisions "understandable," Wright never suggested that such decisions were legally justified under the character evidence rule.[148] In fact, he went on to say that courts had relied on "debatable assumptions about recidivism and problematic psychiatric theories."[149] He argued that courts had admitted such evidence "under the guise" of Rule 404(b), when in fact the evidence was only relevant to show "the propensity inference that the general rule in 404(b) is supposed to exclude."[150] In short, by selectively quoting Wright's treatise, the *Wermerskirchen* court implied that Wright had endorsed the very cases he criticized.

If the character evidence rule bars propensity inferences, the unlinked plan doctrine cannot be justified. Minnesota courts, however, have long allowed an expansive form of the doctrine, and they have never responded to, or even recognized, the mass of evidence law authority criticizing the doctrine. By accepting evidence of uncharged acts based merely on similarity, Minnesota courts have implicitly accepted propensity reasoning.

C. From Unlinked Plans to Other "Exceptions"

The common plan or scheme doctrine dominates *Spreigl* cases in Minnesota. The doctrine is so expansive that it often obviates the need to examine the other listed 404(b) purposes. In some cases, moreover, Minnesota courts seem to treat the general similarity test for the scheme doctrine as being the overriding test for all 404(b) purposes.[151] But even to the extent that separate

147. *See id.* § 5239, at 462.
148. *Id.*
149. *Id.*
150. *Id.* at n.5.
151. *See* State v. Perez, 397 N.W.2d 916, 919 (Minn. Ct. App. 1986) ("Regardless of the purpose for which the evidence is admitted, there must be some relationship in time, location, or modus operandi between the crime charged and the [prior crime] . . . ."); *see also* State v. Tabaka, No. A05-1899, 2007 Minn. App. LEXIS 337, at *18 (Minn. Ct. App. Apr. 17, 2007) (stating that for evidence offered to show knowledge, relevance and materiality depend on similarity); Bendzula v. State, No. A05-137, 2005 Minn. App. LEXIS 305, at *9–10 (Minn. Ct. App. Sept. 13, 2005) (relying on common plan standard and holding that prior similar drug offenses were relevant to show "access to drugs"); State v. Jones, No. A03-1136, 2004 Minn. App. LEXIS 951 (Minn. Ct. App. Aug. 17, 2004)

doctrines for other purposes are developed, they exhibit their own similar problems. The problems all stem from courts' failure to examine and explain exactly how a particular piece of uncharged misconduct evidence demonstrates a particular 404(b) purpose.

1. Intent and Absence of Mistake or Accident

Some form of intent is an element of most crimes. A defendant can negate intent by showing that his conduct was the result of an accident or mistake.[152] Rule 404(b) states that evidence of other acts can be used to show "intent" and also "absence of mistake or accident."[153] The two categories, though listed separately, are almost coextensive. They are properly treated together because "'[a]bsence of mistake or accident' is generally synonymous with intent."[154]

Minnesota courts, however, have not always recognized that "intent" and "absence of mistake or accident" are essentially synonymous under the rule. In *State v. Clark*,[155] for example, the Minnesota Supreme Court treated the two categories as entirely separate. The defendant and his accomplice Reed were charged with killing a police officer.[156] The state admitted evidence that Clark and Reed had also robbed a bank.[157] The court held that the evidence was not admissible to show intent, but it nonetheless held that the evidence was admissible to show "absence of mistake."[158] It offered no explanation for the distinction.

At other times, Minnesota courts have allowed the admission to show "absence of accident" even when no issue of intent was raised. In *State v. Nelson*,[159] the defendant was charged with

(stating that for evidence offered to show motive, "[r]elevance and materiality depend on" similarity); State v. Cote, No. A03-993, 2004 Minn. App. LEXIS 639, at *9 (Minn. Ct. App. June 8, 2004) (applying similarity test for evidence admitted "under the motive and common-plan exceptions"). *But see* MUELLER & KIRKPATRICK, *supra* note 5, § 4:30 ("One might think that the important thing is a close resemblance between the prior and the charged offense. Often resemblance does indeed count, but not always.").

152. *See, e.g.*, FISHER, *supra* note 10, at 148.
153. FED. R. EVID. 404(b).
154. NEW WIGMORE, *supra* note 7, § 7.2.2, at 429.
155. 755 N.W.2d 241 (Minn. 2008).
156. *Id.*
157. *Id.* at 245.
158. *Id.* at 261.
159. 562 N.W.2d 324 (Minn. Ct. App. 1997)

assaulting her daughter.[160] The defendant claimed that her daughter's injuries were caused while playing with her sister—she denied, in other words, that she had committed the charged conduct at all.[161] The court of appeals upheld the admission of evidence of a prior instance of abuse on the theory that it showed "absence of accident" and thus rebutted the defense.[162] But the defense, although it involved a claimed accident, had nothing to do with intent.[163] If the evidence had any relevance aside from propensity, the court failed to identify it.

Finally, even where Minnesota courts do recognize the congruence between intent and absence of mistake, they often fail to recognize that intent is an ultimate fact that is usually the "last inference in a logical chain of reasoning that leads through other facts" such as knowledge, motive, or plan.[164] To the extent that intent can be proved more directly by evidence of other acts, it is typically through the "doctrine of chances."[165] Minnesota courts have almost never discussed the doctrine of chances,[166] and yet they have admitted evidence of uncharged acts to show intent without explaining how the evidence demonstrates intent, and without explaining whether the chain of reasoning actually avoids the propensity inference.[167]

160. *Id.* at 325.
161. *Id.* at 326.
162. *Id.* at 327.
163. Nor was the prior incident otherwise relevant through the doctrine of chances. *Id.*
164. NEW WIGMORE, *supra* note 7, § 7.1, at 426.
165. *Id.* § 7.3.2.
166. The only discussion of the doctrine by a Minnesota appellate court came in a recent unpublished case. State v. Owens, No. A06-2481, 2008 Minn. App. LEXIS 495, at *5 (Minn. Ct. App. May 6, 2008) ("The doctrine of chances has not been adopted by Minnesota appellate courts, but the principles underlying the doctrine are similar to those underlying Minnesota's other-bad-acts rule.").
167. State v. Babcock, No. C9-03-131, 2003 Minn. App. LEXIS 1465 (Minn. Ct. App. Dec. 9, 2003) (upholding the admission of prior instances of violence to show absence of mistake in a murder case); State v. Belssner, 463 N.W.2d 903, 909–10 (Minn. Ct. App. 1990) (holding that a defendant's previous convictions for forgeries were relevant to show his intent in the charged forgery because the previous instances were similar); State v. Stevens, No. C7-88-935, 1989 Minn. App. LEXIS 343 (Minn. Ct. App. Mar. 28, 1989) (upholding the admission of other frauds, without further analysis, because they "were plainly relevant to show intent and absence of mistake").

2. Knowledge

Knowledge is an element of some criminal offenses. For example, to prove a drug possession offense, the prosecution must prove that the defendant knew the nature of the substance.[168] Other acts can demonstrate knowledge.[169] If a defendant claims that he thought the cocaine found in his possession was baby powder, the prosecution can admit evidence of other instances of knowing cocaine possession to prove the element of knowledge in the charged crime.[170]

But the probative value of such evidence depends in large part on the nature of the defense. In drug cases where the dispute centers on some other element, the use of prior convictions to show knowledge is much more dubious.[171] Minnesota courts nonetheless regularly admit such evidence regardless of the nature of the defense. In *State v. Tabaka*,[172] for example, the court of appeals upheld the admission of the defendant's prior meth convictions to show "that he knew what methamphetamine is," even though there was no suggestion that Tabaka had presented any lack of knowledge defense.[173]

Similarly, in *State v. Datwyler*,[174] a defendant was charged with conspiracy to manufacture meth.[175] The defendant had essentially conceded that she was planning to manufacture meth—she had conceded, in other words, *attempted* manufacture, but she contested *conspiracy*, which carries a greater punishment.[176] The State was allowed to present evidence of her prior conviction for manufacturing meth on the theory that it demonstrated her

168. United States v. Eggleston, 165 F.3d 624, 626 (8th Cir. 1999).

169. Such evidence is important especially where the defendant's knowledge is disputed. Minnesota courts admit *Spreigl* evidence to show knowledge regardless of whether knowledge is disputed. *See* State v. Spreigl, 139 N.W.2d 167 (1965).

170. *See Eggleston*, 165 F.3d at 624. Similarly, where a defendant presents a "mere presence" defense, the prosecution can admit evidence of other instances of the defendant encountering the illegal substance. *See, e.g.*, State v. Schostag, No. C9-95-2236, 1996 WL 422511, at *1 (Minn. Ct. App. July 30, 1996).

171. *See Eggleston*, 165 F.3d at 624; NEW WIGMORE, *supra* note 7, § 6.3.1, at 391.

172. No. A05-1899, 2007 Minn. App. LEXIS 337 (Minn. Ct. App. Apr. 17, 2007)

173. *Id.* at *18. *See, e.g.*, State v. Penny, No. C3-03-142, 2004 Minn. App. LEXIS 314, at *6 (Minn. Ct. App. Apr. 6, 2004); State v. Schostag, No. C9-95-2236, 1996 Minn. App. LEXIS 884, at *4 (Minn. Ct. App. July 30, 1996.).

174. No. A04-2255, 2006 Minn. App. LEXIS 93, at *1 (Minn. Ct. App. Jan. 24, 2006).

175. *Id.*

176. *Id.* at *8.

"knowledge of the manufacturing process."[177] Her knowledge was not disputed, and in any event, it had no tendency to prove the agreement necessary to support the conspiracy charge.[178] The court of appeals nonetheless upheld the admission of the *Spreigl* evidence to show her knowledge.[179]

In cases like *Tabaka* and *Datwyler*, "the uncharged misconduct evidence is relevant on both character and non-character bases."[180] The relative strength of each inference depends on the case—it depends largely on the nature of the defense presented. In cases like *Tabaka* and *Datwyler*, where knowledge is not contested,[181] the probative value of the non-character inference is minimal, and thus the possibility that the jury will use the evidence primarily to support a character inference is much greater. The cases are certainly not uniform,[182] but Minnesota courts too often admit such evidence.

3. Identity

Identity is always an element of a crime—the prosecution must always prove that the defendant—not someone else—committed the conduct constituting the offense.[183] Like intent, identity is one of the listed 404(b) purposes, but like intent, it is rarely a distinct ground for admission. Identity is almost always proven by means of one of the other purposes, such as motive, opportunity, or plan.[184]

177. *Id.* at *4.
178. *Id.* at *6.
179. *Id.* at *6–8.
180. NEW WIGMORE, *supra* note 7, § 6.3.1, at 382.
181. Even where knowledge of some sort is denied, the relevance of the evidence depends on the nature of the denial. In *State v. Anderson*, No. A04-1888, 2005 Minn. App. LEXIS 571 (Minn. Ct. App. Dec. 13, 2005), for example, a defendant charged with meth possession testified that he was not aware that there was a baggie of meth under his car seat. The court upheld the admission of his prior meth offense to show knowledge. *Id.* at *14–15. But while the prior conviction clearly demonstrated knowledge of *the nature of the substance*, it is difficult to see how it demonstrated any knowledge that there was a meth baggie under his seat on that occasion—again, the primary relevance is propensity.
182. *See* State v. Jones, No. A06-35, 2007 Minn. App. LEXIS 525 (Minn. Ct. App. June 5, 2007) (reversing conviction where prior gun crimes were admitted to show that the defendant knew there was a gun in the car); State v. Montgomery, 707 N.W.2d 392 (Minn. Ct. App. 2005) (reversing drug conviction where the state admitted prior drug convictions as *Spreigl* evidence).
183. *See* 29 AM. JUR. 2D *Evidence* § 571 (2008) ("Identification of the defendant as the guilty actor is essential, so that any evidence which serves to establish the actor's identity is relevant, and, if competent, is admissible.").
184. At times, Minnesota courts have suggested that *Spreigl* evidence may

Minnesota courts unfortunately fall into the trap of "us[ing] the 'identity' label to justify admission of uncharged misconduct evidence without analyzing the logic that supports that conclusion."[185] In *State v. Clark*,[186] for example, the supreme court stated that another robbery with an accomplice was admissible to show identity as common actors, but it made no effort to explain how it showed identity without relying on propensity.[187]

In *State v. Smith*,[188] a defendant was charged with being a felon in possession of a firearm, but he denied that the gun discovered by police belonged to him.[189] The court of appeals held that two prior felon-in-possession convictions were relevant to show identity.[190]

> The other-acts evidence, showing conclusively that at one time he admitted to possessing a gun when he was ineligible to do so and showing convincingly that he was in the presence of guns at the same location and at a time not remote from the date of the search, surely made it more likely that he possessed the gun at issue than if there was no such other-acts evidence. The evidence was relevant for the purpose of showing the identity of Smith as the possessor of a firearm.[191]

While it is true that the prior convictions for possessing other weapons "surely made it more likely" that Smith possessed the weapon in the charged incident, the important question is *how* they make it more likely.[192] It is difficult to see how they do so other than by propensity reasoning.

Ironically, the opinion in *Smith* contained one of the most sophisticated discussions of the character rule ever found in Minnesota law. It came closer than any other Minnesota case in history to endorsing the traditional view of Rule 404(b). And yet in the end, the *Smith* court endorsed an apparent a chain of inferences—from prior possession of a different gun to "identity" in the charged incident—that has little or no probative force apart

demonstrate identity only by way of the common plan doctrine. *See* State v. Matlock, No. A06-1385, 2007 Minn. App. LEXIS 1019, at *7 (Minn. Ct. App. Oct. 2, 2007).

185. NEW WIGMORE, *supra* note 7, § 12.3, at 694.
186. 755 N.W.2d 241 (Minn. 2008).
187. *Id.*
188. 749 N.W.2d 88 (Minn. Ct. App. 2008).
189. *Id.* at 90–91.
190. *Id.* at 94.
191. *Id.*
192. *Id.*

from propensity.

4. Summary

These cases analyzing identity, knowledge, and intent are just a small sample of the hundreds of Minnesota appellate cases involving *Spreigl* evidence. This sample is not perfectly representative of the massive body of *Spreigl* law—no sample could be, since conflicting threads abound within the case law. But this sample nonetheless demonstrates the critical feature of Minnesota's *Spreigl* doctrine, which is a failure to follow—or even recognize—the traditional view of Rule 404(b).

Under the traditional view, when evidence is offered for a 404(b) other purpose, the critical question is not *whether* the evidence is relevant, but *how* the evidence is relevant. Under the traditional view, courts must ask whether the evidence of uncharged misconduct is relevant through some means other than propensity. Minnesota courts do not ask that question. Because the core principle of the traditional view is absent in Minnesota, the *Spreigl* doctrine is largely unmoored. Uncharged misconduct evidence is often admitted but occasionally excluded, and other than the general similarity test taken from the common plan doctrine, it is difficult to find any guiding principle that runs through the cases.

D. More Procedural Protections

But even as current Minnesota law freely admits 404(b) evidence, however, it provides unusual procedural protections. Since *Spreigl*, the Minnesota Supreme Court has identified "[a] number of procedural requirements and safeguards [to] govern the admission, presentation, and consideration of other-crime evidence."[193] These safeguards were ultimately translated into a five-part test adopted by the Minnesota Supreme Court.[194] In 2006, the same five-part test was written into Rule 404(b) itself.[195] The amended rule now states:

> In a criminal prosecution, such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal

193. State v. Bolte, 530 N.W.2d 191, 196 (Minn. 1995).
194. State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006).
195. MINN. R. EVID. 404(b).

> procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.[196]

The first requirement—that of pre-trial notice—is drawn from *Spreigl* itself.

The fourth requirement probably does nothing other than restate the general relevance requirement of Rules 401 and 402 that applies to all evidence.[197] The second requirement is also possibly superfluous—a party offering evidence has a general obligation to indicate its relevance (at least if the admission is contested).[198] But arguably the "clearly indicates" language imposes some heightened level of precision on the prosecution.

The third requirement—the clear and convincing standard—is more concrete. It marks a departure from federal law, under which questions regarding the existence and participation of the other act are governed by Federal Rule of Evidence 104(b) and the standard developed in *Huddleston v. United States*.[199] The *Huddleston* standard merely requires evidence sufficient to support a finding that the previous act occurred.[200] Minnesota's clear and convincing standard is much more stringent. Of course, in cases where the other act resulted in a conviction, and has thus already been proven beyond a reasonable doubt, the standard makes no difference.

The fifth requirement also marks a departure from federal law. Under federal law, the balancing test for 404(b) evidence is drawn from Rule 403. Rule 403 allows exclusion only if the potential for unfair prejudice "substantially outweigh[s]" the probative value of

196. *Id.*; *see also id.* advisory committee cmt. (2006).

197. *See* MINN. R. EVID. 401, 402.

198. *See* FED. R. EVID. 103(a) (stating that in order to preserve a claim of error for excluding evidence, a party must make "the substance of the evidence . . . known to the court"); MINN. R. EVID. 103(a) (restating the corresponding federal rule); MUELLER & KIRKPATRICK, *supra* note 5, § 1.5, at 17 ("[A]n offer of proof should indicate the nature or content of the evidence and describe its purpose and why it is relevant (at least if there is room for doubt).").

199. 485 U.S. 681 (1988); *see also* NEW WIGMORE, *supra* note 7, § 4.8, at 294 (discussing state law departures from *Huddleston*).

200. *Huddleston*, 485 U.S. at 685.

the evidence.[201] By contrast, Minnesota Rule of Evidence 404(b) employs a specialized and more restrictive version of the balancing test: one that eliminates the modifier "substantially."[202] The Minnesota Advisory Committee intentionally adopted this "more stringent test" to make clear that a "slight balance in favor of unfair prejudice requires exclusion."[203]

The more restrictive balancing test is meant to favor criminal defendants. But the test can function properly only if courts are clear about what is weighed on each side of the scale—about what counts as legitimate probative value, and what counts as unfair prejudice. If the underlying substantive issues are not handled with care, then the balancing test breaks down, and removing the word "substantially" does nothing to fix the problem. Minnesota courts do not carefully analyze the various competing inferences at stake. As a result, they approve propensity inferences under the guise of *Spreigl* evidence, and the propensity inference ends up weighed on the wrong side of the scale.

In the *Spreigl* decision itself, the Minnesota Supreme Court recognized substantial problems with the character evidence rule, but rather than addressing the substantive issues, it sought a procedural solution.[204] The court and the Advisory Committee have continued to pursue the same strategy ever since. They have provided heightened procedural protections, but they have left the substantive doctrines of admissibility untouched. The result is that evidence of uncharged misconduct is broadly admissible in Minnesota criminal cases despite the procedural safeguards. The procedural safeguards are certainly well-intentioned, and perhaps they are sensible on the merits, but they do nothing to address the legal fictions that dominate the *Spreigl* doctrine. The focus on procedure may even be affirmatively harmful in that it distracts courts from the more important substantive issues.

III. THE FUTURE: A CANDID POLICY DEBATE

The current *Spreigl* doctrine in Minnesota is not very sensible. Courts admit evidence to prove 404(b) purposes, but because they do not carefully examine the routes of relevance, they allow

201. FED. R. EVID. 403; MINN. R. EVID. 403.
202. MINN. R. EVID. 404(b).
203. *See id.* advisory committee cmt. (2006).
204. State v. Spreigl, 272 Minn. 488, 493–97, 139 N.W.2d 167, 171–73 (1965).

propensity inferences in many such cases. In one sense, that confusion is an understandable result of the history of the character evidence rule, which at least in Minnesota, does not reveal a clear stance on the propensity inference. But while history provides some explanation, it does not provide any justification for continued failings. In light of the character rule's modern rationale, and in light of the nearly uniform teaching of evidence law authorities, Minnesota's doctrine makes little sense.

It could be, however, that the decisions of Minnesota courts are not a reflection of any confusion regarding the rule, but are instead a reflection of a policy disagreement regarding the rule. Despite the lofty aspirations that underlie the character evidence rule, it is not universally admired. Legislatures around the country have chipped away at the rule, creating explicit exceptions for sex crimes and certain other offenses.[205] Many other legal systems operate without any character evidence ban,[206] and some scholars have called for its repeal.[207] Their arguments are not without force. Courts' willingness to allow disguised propensity evidence might reflect their tacit agreement with the rule's critics.

Before deciding whether and how to fix Minnesota's *Spreigl* doctrine, then, it is necessary to decide whether to have a character evidence rule at all. The policy question is primary. It is time for that question to be presented and debated openly.

The rule should not be maintained for tradition's sake. The tradition is both less old and less sensible than many believe. The rule should not be maintained simply to draw a line of separation

205. *See* FED. R. EVID. 413–15; CAL. EVID. CODE §§ 1108–09; *see also* FISHER, *supra* note 10, at 208 (listing eight jurisdictions that have created explicit exceptions to the character evidence rule for sex crimes).

206. *See generally* Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55 (1994); see also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 464 (1992).

207. David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 35 (1994); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1620–26 (1998); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (arguing that "character evidence cannot and should not be banished from the field of proof"). The Justice Department has also campaigned against the rule. *See* Office of Legal Policy, *Report to the Attorney General on the Admission of Criminal Histories at Trial, 'Truth in Criminal Justice' Report No. 4*, 22 U. MICH. J.L. REFORM 708 (1989); William P. Barr, Attorney General, U.S. Dept. Justice, *Recommendations for State Criminal Justice Systems*, 51 CRIM. L. REP. 2315, 2326 (1992) (Recommendation 13).

between Anglo-American and Continental systems of justice.[208] Continental legal systems might be correct in their approach to this particular problem, and in any event, it can no longer be seriously maintained that our criminal justice system is more protective of criminal defendants than European systems.[209]

The rule should be maintained only if it promotes accuracy in criminal adjudications. If the system would reach accurate resolutions of guilt or innocence more often without the character evidence rule, then it should be scrapped. Abolishing the rule would presumably lead to more convictions—convictions in cases that would produce acquittals without propensity evidence. Some of those convictions would be inaccurate, but some would be accurate.

The framework of the cost-benefit analysis is straightforward. The benefit of abolishing the rule would be a reduction in false negatives; the cost would be an increase in false positives.[210] The ultimate cost-benefit analysis rests on two underlying judgments: (1) an empirical judgment about what ratio of reduced false negatives to increased false positives the rule's abolition would produce, and (2) a normative judgment about what ratio would make such a change worthwhile.

Those judgments are not easily made. Empirical data about the former judgment will be difficult or impossible to come by.[211] It may be, therefore, that the outcome of the debate will ultimately depend on the latter moral-normative point.[212] Blackstone said "it is better that ten guilty persons escape, than that one innocent

208. *See* WIGMORE, *supra* note 17, § 194, at 233 (stating that the character rule "represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of evidence"); Imwinkelried, *supra* note 16, at 432 ("The rule distinguishes our criminal justice system from both Continental and totalitarian legal systems.").

209. *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (Oxford Univ. Press 2003).

210. *See* Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. (forthcoming 2009).

211. Testing the accuracy-producing benefits of various rules is extremely difficult in part because designing and running effective jury simulations is difficult. *See, e.g.*, Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997).

212. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (arguing that though policy debates are often framed in empirical terms, underlying normative and moral judgments tend to drive the debates).

suffer,"[213] but reasonable people can disagree about whether ten-to-one is the right ratio.[214] Reasonable people can likewise disagree about whether it makes sense to maintain the character evidence rule. But it is a debate worth having. And it is a debate worth having candidly,[215] in an open fashion, rather than in the hidden and somewhat duplicitous common law fashion where courts fashion a rule and then habitually ignore it.[216]

It is a debate best suited for the legislature. The judiciary has no special institutional competence that makes it best suited for the empirical and moral judgments that drive the cost-benefit analysis described above.[217] The debate will depend on balancing a variety of competing considerations, and it will depend heavily on assessments of societal values—it is precisely the sort of debate better handled by legislatures than courts.[218] Balancing all of the competing considerations, the legislature could decide to repeal Rule 404. It could decide to maintain it. Or it could seek a compromise solution, such as repealing the rule for sex crimes cases but maintaining it for others, as the Federal Rules currently do.[219] As a policy matter, each possible outcome is arguably

213. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

214. Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

215. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 296–97 (1990); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 666–68 (1983); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987).

216. *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1223 (2006) (noting that "the law clings to the rules purporting to exclude other crimes and character evidence, despite their almost total negation in practice . . . .").

217. *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994) (outlining a theory of comparative institutional competence).

218. *See In re* Grand Jury Subpoena of Miller, 397 F.3d 964, 981 (D.C. Cir. 2005) (Sentelle, J., concurring) ("[I]f such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication?"); *In re* Grand Jury, 103 F.3d 1140, 1154–55 (3d Cir. 1997) ("Congress is able to consider, for example, society's moral, sociological, economic, religious and other values without being confined to the evidentiary record in any particular case.").

219. *See* FED. R. EVID. 413 (admitting evidence of prior sex crimes against defendants charged with sex crimes); *see also* Sherry F. Colb, *"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939 (2001) (arguing "that different categories of criminal cases . . . call for distinct rules regarding propensity evidence"); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 301–02 (1995)

justifiable.

The current case law, in its substantially incoherent form, would benefit from legislative guidance. Of course, courts might bristle at legislative intervention. The Minnesota Supreme Court has stated in the past that the creation of rules of evidence is a quintessentially judicial function, and that the court retains inherent authority to ignore or strike down legislative intervention.[220] Such claims of judicial supremacy over evidence law are somewhat dubious even in the abstract.[221] But especially in this instance, where the Minnesota Supreme Court has so often issued decisions weakening the rule, it could hardly complain if the legislature delivered a final blow of outright repeal.

As it is currently enforced by Minnesota courts, the character evidence rule is not worth having. If the propensity inference is allowed to prove all "other purposes" such as intent and identity, then Rule 404 serves no purpose. Either the fictions of the current doctrine should be abandoned, or the pretense of the rule itself should be abandoned.[222] Which course is best is debatable, but it is a debate worth having, and worth having candidly.

(arguing for experimental partial repeals of the character evidence rule).

220. State v. Gianakos, 644 N.W.2d 409, 416 n.10 (Minn. 2002) ("While we acknowledge that the legislature has taken steps to limit the power of the court with respect to certain evidentiary issues, . . . it is clear that the judicial branch has ultimate and final authority in such matters."); *see also* State v. Johnson, 514 N.W.2d 551, 553–54 (Minn. 1994); State v. Larson, 453 N.W.2d 42, 46 n.3 (Minn. 1990).

221. *See* United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) ("[W]e must recognize that Congress has the ultimate power over the enactment of rules [of evidence] . . . ."); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888–89 (1999); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1022 (1982); *see also* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L.J. 843 (2002) (discussing various views of comparative institutional competence for the creation of evidence law).
Rosanna Cavallaro has recently argued (responding to Congress's enactment of Federal Rules 413–15) that questions regarding the admission of character evidence are generally best handled by the judiciary rather than the legislature. Rosanna Cavallaro, *Criminal Law: Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31 (2007). Even Professor Cavallaro concedes, however, (contrary to the Minnesota Supreme Court's view) that the "debate is best understood not as one of constitutional power but of prudence." *Id.* at 39 n.27.

222. *See* Reed, *supra* note 117, at 250–51 ("It is time to admit that in the real world of the criminal prosecutions, the prosecutor will be able to prove relevant specific instances of the accused's uncharged misconduct by employing the 'magic words' vocabulary of Rule 404(b) . . . .").

Then again, perhaps candor is overrated.[223] Potemkin villages have a purpose, after all—they are meant to reassure. The *Spreigl* doctrine may lack logic and rigor, but it may be functionally useful precisely because it shrouds and buries the difficult policy debate about the character evidence rule. With *Spreigl* in place, we can pretend to maintain the lofty ideals of the character evidence rule while still convicting and caging the men whose malign propensities make their guilt (or at least their dangerousness) more obvious. The legal fictions of current law allow us to avoid hard choices, and for that reason, they are unlikely to disappear.

223. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).