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JUSTICE AND OTHER CRIMES EVIDENCE: THE SMORGASBORD PLOY

*Kenneth Graham**

If published cases are any indication, other crimes evidence is a prominent feature of criminal cases in both state and federal courts. It seems likely that such evidence can produce false convictions by leading judges and jurors to the view expressed by Captain Renault (in the movie *Casablanca*): “Round up the usual suspects!”¹

The smorgasbord ploy probably plays only a minor role in the admission of other crimes evidence. But it offers us a nice window into the uses and abuses of Rule 404(b) of the Federal Rules of Evidence (“the Rules”) and its state clones.²

Rule 404(b)’s drafters may have supposed that trial judges would look among the illustrative uses in Rule 404(b) and select the one or two that seem most apropos to the case before them. However, the practitioners of smorgasbordism do not make any choices but instead list all (or most) of the illustrative uses to support the admission of the other crimes.³

We can surmise the judge calculates that this will avoid appellate reversal by giving appellate judges more grounds for affirming a decision to admit other crimes evidence. Moreover, it saves work; the judge need not put in as much effort to use the ploy as she would have to in deciding which of the adversaries has analyzed admissibility correctly.⁴

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1. CASABLANCA (Warner Bros. 1942).

2. FED. R. EVID. 404(b) (making evidence related to the defendant’s criminal history admissible for limited purposes).

3. *See, e.g.*, United States v. Jenkins, 904 F.2d 549, 555 (10th Cir. 1990); United States v. Cook, 745 F.2d 1311, 1317 (10th Cir. 1984); United States v. Haskins, 737 F.2d 844, 848 (10th Cir. 1984); United States v. Cotner, 657 F.2d 1171, 1173 (10th Cir. 1981); United States v. Logan, 641 F.2d 860, 863 (10th Cir. 1981); United States v. Mucci, 630 F.2d 737, 743 (10th Cir. 1980); United States v. Askew, 584 F.2d 960, 963 (10th Cir. 1978); United States v. Bridwell, 583 F.2d 1135, 1140 (10th Cir. 1978); United States v. Gano, 560 F.2d 990, 993 (10th Cir. 1977); United States v. Gamble, 541 F.2d 873, 877–78 (10th Cir. 1976); United States v. Pennick, 500 F.2d 184, 187 (10th Cir. 1974); United States v. Hampton, 457 F.2d 299, 302–03 (7th Cir. 1972); *see also* 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 144 (Supp. 2016).

4. As the sophisticated reader will have grasped, the trial judge does not do the work. Instead, she dumps it off on the proponent of the other crimes evidence. While some might argue that overburdened prosecutors lack the resources to do such work, we can respond that they can save their time, as well as that of judges and jurors, by not relying so much on other crimes evidence to prejudice the defense.

While a few state and federal judges have criticized the practice,⁵ most appellate judges do as trial judges expect.⁶ How can we account for appellate judges' acceptance of a practice that some judges see as an abuse?

There are many possible explanations. The first is the idea of an "old boys club" among judges, making appellate judges reluctant to criticize by name a lower court judge they may run into at the next judicial conclave. Ambition may also be a factor—given the key role the Department of Justice plays for the Senate in vetting proposed judicial appointments,⁷ any judge who hopes to move up the ranks of the judiciary can hardly afford to offend prosecutors by making it harder to get other crimes evidence before a jury.

Judges may also suffer from class bias. Most judges come from the upper strata of society; those against whom other crimes evidence is admitted appear to them as losers and perhaps members of some despised minority.⁸ Prosecutors seldom go after what Theodore Roosevelt called "malefactors of great wealth."⁹ Finally, judges may find it easier to go along with well-established traditions rather than to rally support for reforming the admission of other crimes evidence. Some judges may even agree with the way the present system works to admit (and occasionally exclude) other crimes evidence. The correct answer probably combines one or more of the above causes.

How might judges and rulemakers change Rule 404(b) to reduce the problems identified? First, they might require the trial judge to state on the record the reasoning she uses to admit the other crimes evidence without resorting to the forbidden propensity inference. This should not add to the trial judge's workload, as she could require the proponent of the evidence to do this for her. This might have the added benefit of deterring prosecutors from relying too heavily on other crimes evidence.

5. *United States v. Steiner*, 815 F.3d 128, 135–36 (3d Cir. 2016) (holding that it is improper for a trial court to cite all the reasons listed in Rule 404(b) as grounds for admission); *United States v. McGill*, 815 F.3d 846, 889 (D.C. Cir. 2016) (holding that it is improper to give an instruction that simply listed all the permissible purposes under Rule 404(b), as this is likely to confuse the jury about the proper use of the evidence); *United States v. Cortijo-Diaz*, 875 F.2d 13, 16 (1st Cir. 1989); *Jones v. Hamelman*, 869 F.2d 1023, 1027 (7th Cir. 1989); *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988); *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985) (requiring the proponent to state a specific purpose); *Hazel v. United States*, 599 A.2d 38, 44 (D.C. App. 1991); *People v. Golochowicz*, 319 N.W.2d 518, 523–24 (Mich. 1982).

6. *See, e.g.*, *United States v. Stevens*, 303 F.3d 711, 715–17 (6th Cir. 2002). We find it hard to document the practice because appellate opinions usually only discuss the grounds they approve and do not mention the other grounds relied upon by the trial judge.

7. *See* 28 C.F.R. § 0.23 (2016). States select and promote judges by such diverse methods that we cannot even speculate how judicial ambition plays out in the states.

8. *See, e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2177 (2015) (describing the defendant as a pimp).

9. President Theodore Roosevelt, Address on the Occasion of the Laying of the Cornerstone of the Pilgrim Memorial Monument, Provincetown, Massachusetts 47 (Aug. 20, 1907). Prosecuting corporations that rip off consumers and taxpayers raises the difficult question of whether corporations can have "character."

Second, judges and rulemakers might forbid reliance on more than one ground, except in cases where the stated uses overlap or where the evidence can justify more than one use. For an example of the first exception, “motive” can be used to prove “intent.”¹⁰ As an example of the second, that the defendant had previously stalked the victim of the charged sexual assault could show both opportunity and identity.

Finally, evidence teachers need to do a better job teaching relevance. If the leading casebooks are indicative of what goes on in the classroom, many teachers do little rigorous analysis of this topic.¹¹ As a result, many judges and lawyers cannot detect whether the relevance of another crime depends on the forbidden inference to propensity.

10. For example, where the motive for a killing is to prevent a witness from testifying.

11. Relevance applies to all forms of proof. For example, when a lawyer argues, “I just want it in to show that it was said,” a cogent response asks, “Why is the fact it was said relevant?”