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BALANCING THE SCALES: LIMITING THE PREJUDICIAL EFFECT OF EVIDENCE RULE 404(b) THROUGH STIPULATION

I. Introduction

American jurisprudence is grounded in the theory that we try cases rather than persons.¹ Accordingly, Federal Rule of Evidence 404(a) prohibits the use of evidence regarding a person's character or trait of character if offered strictly for the purpose of proving that the defendant acted in conformity with such character on a particular occasion.² In addition, Rule 404(b)³ incorporates common law rules prohibiting the introduction of other crimes, wrongs,

1. *People v. Allen*, 420 N.W.2d 499, 503-04 (Mich. 1988).

2. FED. R. EVID. 404(a) provides:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Evidence of the character of a witness as provided in Rules 607, 608, and 609.

3. FED. R. EVID. 404(b) provides:

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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

At the time of this writing, the United States Senate has passed Amendment No. 1105 to the Violent Crime Control and Law Enforcement Act of 1993, S. 1607, which provides for two new Rules of Evidence, Rules 413 and 414, essentially amending Rule 404(b) in sexual assault and child molestation cases. In relevant part Rule 413 states:

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any manner to which it is relevant.

Rule 414 is identical in all respects to Rule 413 except that the words "child molestation" are inserted wherever "sexual assault" appears.

or acts⁴ if offered to prove the character of a person or action in conformity with such character.⁵

A basic exception to Rule 404(b), however, expressed in the second sentence of the rule, provides that evidence of prior bad acts is admissible to prove, among other things, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"⁶ Even if evidence of prior bad acts is relevant and satisfies one or more of the Rule 404(b) "good purposes,"⁷ such evidence may nevertheless be excluded under Rule 403⁸ if the trial judge, balancing the probative value of the evidence against the potential unfair prejudice to the accused, finds such evidence unduly prejudicial.⁹

4. Referred to in this Note as "prior bad acts."

5. See *United States v. Lynn*, 856 F.2d 430, 434 (1st Cir. 1988) ("Rule 404(b) codifies the common law prohibition against the admission of propensity evidence - that is, evidence presented to encourage the inference that because the defendant committed a crime once before, he is the type of person to commit the crime currently charged.").

6. FED. R. EVID. 404(b). The prior bad acts evidence need not portend criminal liability. Rather, the evidence is admissible if there is sufficient evidence to support a finding by a jury that the defendant committed the acts. *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (holding that there is no requirement that the prior criminal activity result in a conviction). Nor does prior bad act evidence need to constitute criminal behavior in order to be admissible as prior "bad acts." RICHARD O. LEMPert & STEPHEN A. SALTzBURG, *A MODERN APPROACH TO EVIDENCE* 216 n.44 (1982).

7. Rule 404(b) does not limit the purposes for which prior bad acts evidence can be offered to those enumerated in the Rule (motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident). Rather, it expressly provides that the good purposes contained therein are neither exhaustive nor conclusive and that other non-for character purposes may justify admission of prior bad acts evidence. See FED. R. EVID. 404(b).

8. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

The Rule 403 balancing test was designed to override all other evidentiary rules. JACK WEINSTEIN & MARGARET A. BERGER, 1 WEINSTEIN'S EVIDENCE § 403[01] (1982). Yet, the use of Rule 403 in conjunction with Rule 404(b) by the federal judiciary has generally not entailed any major limitations on the admission of prior bad act evidence. Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 116 (1984). "The reason lies in the balancing process itself. Rule 403 requires the court to weigh prejudice to the accused against the probative value of the evidence to the prosecution. Logically, therefore, the stronger the probative value of the evidence the more likely such evidence will be admitted, despite the risk of substantial prejudice to the defendant." *Id.*

9. See *United States v. Beechum*, 582 F.2d 898, 914-15 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). Unfair prejudice, in this context, means an undue tendency

The danger of prejudice is heightened in those cases where the government seeks to introduce prior-bad-act evidence to prove a criminal defendant's intent, notwithstanding a defendant's offer to stipulate that the defendant possessed the requisite intent for the commission of the charged crime.¹⁰ Despite a trial court's instruction to the jury that the prior bad acts are to be considered only for non-character purposes, such as intent, rather than as an inference that because the defendant committed an act in the past he is more likely to have committed the act presently charged, it can no longer be presumed that juries follow instructions regarding prior bad acts evidence. "[T]he practical and human limitations of the jury system cannot be ignored."¹¹ Jurors tend to draw a "complete, integrated image of personality" from negative, fragmented information about a person, and "it appears certain that when the law requests jurors to give character evidence a restricted use, it demands 'a mental gymnastic which is beyond, not only the jury's power, but anybody else's.'"¹²

Admission of prior-bad-act evidence in the face of an intent stipulation is, therefore, highly prejudicial because it tends to weigh so heavily as to over-persuade a jury to convict a defendant, not because she is guilty of the crime charged, but because she has committed bad acts in the past. This result conflicts with the firmly rooted notion that a person ought not to be convicted of doing a specific bad act because she is a bad person generally;¹³ rather, the accused need only answer for the crime with which she is currently charged.¹⁴

to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. See FED. R. EVID. 403 advisory committee's note.

10. In such cases, the defense essentially states that if the trier of fact believes the accused committed an act, the accused will stipulate to having the requisite intent for the commission of the crime.

11. *Bruton v. United States*, 391 U.S. 123, 135 (1968).

12. Robert G. Lawson, *Credibility and Character: A Different Look at an Intermittent Problem*, 50 NOTRE DAME LAWYER 758, 774 (1975) (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)). While consciously deciding whether to infer the accused's subjective bad character from the accused's prior bad acts, at a subconscious level the jurors may be tempted to punish the accused for the other crimes. John T. Johnson, *The Admissibility of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69 (1973).

13. *United States v. Fierston*, 419 F.2d 1020, 1022 (7th Cir. 1970).

14. See Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 731 (1981); Kathleen E. Weidner, *State v. Ellis: The Other Wrongful Acts Rule, Survey of Nebraska Law—Evidence*, 15 CREIGHTON L. REV. 281, 284 (1981).

It is undeniable, however, that some prior bad acts are relevant to prove a defendant's intent to commit the crime with which she is charged.¹⁵ A defendant faced with such unquestionably relevant, yet prejudicial evidence may find it beneficial to stipulate to intent in order to preclude the admission of prior-bad-act evidence at trial. For defendants, the choice to enter into such a stipulation is premised on the theory that once intent is stipulated, or at least not formally contested, any evidence of prior-bad-act has no probative value on the issue of intent, is cumulative, and remains highly prejudicial, thus signalling exclusion of the evidence under Rule 403.¹⁶

The Second Circuit has taken the lead in limiting the prejudicial effect of prior-bad-act evidence under Rule 404(b) by permitting a defendant to stipulate to the requisite intent for the crime charged, thereby excluding prior-bad-act evidence offered to prove intent.¹⁷ Conversely, prosecutors in the Ninth Circuit are *per se* permitted to introduce prior-bad-act evidence pursuant to Rule 404(b) regardless of a defense offer to stipulate intent. The Ninth Circuit reasons that, where intent is an element of the crime, the prosecution must affirmatively prove intent beyond a reasonable doubt, and that "[t]his burden is not relieved by a defendant's promise to forego argument on an issue," or by stipulation.¹⁸

The United States Supreme Court passed on an opportunity to resolve the troubling issue of whether a stipulation or promise by a defendant not to contest intent can preempt the government from offering prior-bad-act evidence for the purpose of proving intent.¹⁹ At the same time, the admissibility of prior-bad-act evidence is the single most important issue in contemporary criminal evidence law,²⁰ and the effect of stipulations on the admission of Rule 404(b) evidence is confronting courts more frequently.²¹ The numbers confirm the importance. Rule 404(b), which is in effect in over

15. See, e.g., *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993); *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990); *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989) (discussing admissibility of prior bad acts for purposes stated in Rule 404(b)).

16. See, e.g., *Hadley*, 918 F.2d at 848 (defendant arguing that an intent stipulation removes intent as a controverted issue, and probative value of proof evidencing intent is overshadowed by prejudice, signaling exclusion of evidence per Rule 403).

17. See *Colon*, 880 F.2d at 650.

18. *Hadley*, 918 F.2d at 852.

19. The Supreme Court, after granting certiorari in *Hadley v. United States*, 112 S. Ct. 1261 (1992), and after hearing oral arguments, dismissed the writ of certiorari as improvidently granted, 113 S. Ct. 486 (1992) (*per curiam*).

20. Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, 1 CRIM. JUST. 6,7 (1986).

21. *United States v. Garcia*, 983 F.2d 1160, 1175 (1st Cir. 1993).

thirty states as well as federal practice,²² has generated more published opinions than any other subsection of the Federal Rules of Evidence.²³ Moreover, the circuit courts that have addressed the matter are not in complete accord.²⁴

This Note argues that, in a prosecution for a violation of a specific intent criminal statute, the government must accept a defendant's clear and unambiguous stipulation to possessing the requisite intent for the crime charged. The trial court must ensure that the proffered stipulation is voluntarily given, unambiguous, and comprehensive, so as not to deprive the prosecution from presenting forceful, significant, and probative evidence. Once a defendant offers such an acceptable stipulation, however, the government's introduction of prior bad acts to prove intent becomes extremely prejudicial, while any probative value the evidence may have is dissipated entirely.

Part II of this Note examines the disparate circuit court decisions regarding the use of stipulations in lieu of prior-bad-act evidence, and discusses the United States Supreme Court's view on the policy of liberally admitting prior-bad-act evidence. Part III resolves this issue by proposing to exclude prior-bad-act evidence to prove intent when intent is clearly stipulated.

II. Disparate Decisions Regarding Prior Bad Acts Evidence

Since the enactment of Rule 404(b), circuit courts have been divided as to whether a stipulation of intent by a defendant precludes admission of prior-bad-act evidence pursuant to Rule 404(b).²⁵

A. The Second Circuit's Approach

The Second Circuit has taken the lead in balancing the interests of defendants and prosecutors with regard to Rule 404(b) evi-

22. RONALD L. CARLSON ET AL., *MATERIALS FOR THE STUDY OF EVIDENCE* 2 (Supp. 1989).

23. STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 361 (2d ed. 1986) ("heavily litigated in federal and military courts"); JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* § 404[08], at 404-56 (1989).

24. *United States v. Manner*, 887 F.2d 317, 322 n.2 (D.C. Cir. 1989) ("[T]he circuits remain divided as to whether stipulations or concessions by the defense can take intent out of the case."); *see also* *United States v. United States v. Doherty*, 675 F. Supp. 714, 716 (D. Mass. 1987) ("The circuit courts that have addressed the matter are not in complete accord.").

25. *Compare* *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989) (holding that a clear and unambiguous stipulation precludes prior bad act evidence) *with* *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990) (holding that, notwithstanding stipulation, prosecution may still offer prior bad act evidence to prove intent).

dence. It has held that evidence of prior-bad-act is not admissible to prove intent unless intent is actually controverted.²⁶ Accordingly, the Second Circuit affirmatively permits the accused to stipulate to possessing the required intent and, thereby, to remove the issue from deliberation. Thus, the accused may prohibit the admission of prior-bad-act evidence to prove intent.²⁷

In *United States v. Colon*,²⁸ the defendant was charged with distributing heroin. The government alleged that an undercover police detective approached Colon and asked if he had any "D" (a street name for heroin). Colon pointed, and said, "Wait over there." The detective looked in the direction Colon was pointing and saw Luis Alvarado observing the two men. Alvarado motioned with his head—a gesture the detective interpreted as an invitation to approach. Without any statement by the detective, Alvarado asked, "How many?" and the undercover agent responded that he wanted two. Alvarado then removed two glassine envelopes containing heroin from inside his pants and gave them to the agent and, in return, was given pre-recorded money.²⁹ Once the agent returned to his car, other detectives and backup officers moved in and arrested Colon and Alvarado.³⁰

One of Colon's defenses was that he had not 'steered' the undercover agent to a *specific* drug seller; rather, he had merely responded to the buyer's request for drugs by innocently pointing to the general direction of drug activity down the street.³¹ "Colon would have pointed one way if asked where the Statue of Liberty was, and another if asked where drug activity was."³²

The government attempted to admit testimony concerning Colon's two prior drug steering convictions, arguing that the evidence was admissible under Federal Rule of Evidence 404(b) to establish Colon's intent and knowledge.³³ Colon's counsel, in turn, offered a

26. See *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979).

27. See, e.g., *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989) (stating that in appropriate cases a defendant may remove intent as an issue by a clear stipulation admitting intent).

28. *Id.*

29. *Id.* at 653.

30. *Id.*

31. Counsel for Colon stated that the defendant "happened to be there. Someone approached him and asked him, do you know where you can buy drugs, and he said down the block someplace, I guess. That doesn't make him a steerer. He doesn't know Alvarado, he never knew Alvarado in his life and he maintains his innocence." *Id.*

32. Daniel J. Capra, *The Supreme Court and Use of Prior Bad Acts to Prove Intent*, N.Y. L.J., May 8, 1992, at 3.

33. 880 F.2d at 653.

stipulation stating that if “the government proves that [Colon] knew Alvarado and was in fact directing [the detective] to Alvarado specifically, in saying that you can buy the drugs from him, then [Colon] will acknowledge that he intended to violate the federal narcotics law and intended to aid in the sale of drugs.”³⁴

Over the defendant’s objection, and notwithstanding the defendant’s proffered stipulation, the trial court permitted the prosecution to introduce evidence concerning Colon’s prior convictions for narcotics steering.³⁵ After the trial judge instructed the jury that the prior-bad-act evidence was offered only to prove intent, knowledge, and motive, and not to show Colon’s character or propensity to commit the charged crime, Colon was convicted.³⁶

On appeal, the Second Circuit noted the danger of unfair prejudice associated with the use of prior-bad-act evidence. The court stated that trial courts must exercise great care to ensure that juries are not persuaded to convict a defendant merely because the defendant has committed a similar crime before.³⁷ In some cases, the court suggested, defendants may specifically offer to stipulate intent and thereby remove it as an issue.³⁸ The court wrote:

A defendant may completely forestall the admission of the other act evidence on the issue of intent by express[ing] a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed.³⁹

Nonetheless, the Second Circuit held that Colon’s proffered stipulation was properly rejected by the trial court because it was illusory.⁴⁰ The court reasoned that Colon’s proffered stipulation conceded nothing on the issue of intent, as the government would still have to prove that Colon meant to point the detective specifically to Alvarado and not generally down the street.⁴¹ In effect, the stipulation said, “if you can prove I did it, I admit that I in-

34. *Id.* at 654.

35. *Id.*

36. *Id.* at 655.

37. *Id.* at 656.

38. *Id.* at 657.

39. *Id.*

40. *Id.*

41. *Id.*

tended it."⁴² Since the stipulation sought to restrict the government's ability to prove intent by prohibiting use of prior-bad-act evidence, while conceding nothing, the trial court's refusal to accept the proffered stipulation was proper.⁴³

Despite the outcome in *Colon*, the Second Circuit's position of accepting clear and unambiguous stipulations in specific intent crimes in lieu of prior-bad-act evidence is well established and dates back to at least 1978. In the case of *United States v. Manafzadeh*,⁴⁴ the defendant was convicted on two counts of unlawfully transporting or causing to be transported falsely made checks in interstate commerce.⁴⁵ At trial, Manafzadeh denied any involvement in the creation or negotiation of the fraudulent checks.⁴⁶ The prosecution attempted to introduce evidence that, approximately four months after the events forming the basis of the indictment, Manafzadeh used a false name and passport while attempting to deposit \$10,000 in a bank.⁴⁷

Manafzadeh's counsel objected to the admission of the prior-bad-act evidence as irrelevant, arguing that the only issue in the case was whether the defendant had participated in the creation or deposit of the forged checks in the case at trial.⁴⁸ Defense counsel repeatedly offered to stipulate that, if the jury found that Manafzadeh had participated in the creation or deposit of the forged checks, the defense would concede that the acts had been done with the necessary criminal intent, thereby removing any dispute as to this issue.⁴⁹ The trial judge nevertheless admitted the prior-bad-act evidence and instructed the jury that the evidence was to be used only for deciding the question of the defendant's guilty intent in the crime charged in the indictment.⁵⁰

The Second Circuit reversed Manafzadeh's conviction,⁵¹ stating that while the prior-bad-act evidence was relevant to intent, the

42. Capra, *supra* note 32, at 3.

43. *United States v. Colon*, 880 F.2d 650, 658 (2d Cir. 1989). Although the court refused to accept Colon's proffered stipulation, his conviction was nonetheless reversed and the matter remanded for a new trial. The court reasoned that it was reversible error for the trial court to admit Colon's prior bad act evidence in the government's opening and case-in-chief. Rather, admission of such evidence should await presentation of the defendant's case.

44. 592 F.2d 81 (2d Cir. 1978).

45. *Id.* at 83.

46. *Id.* at 85.

47. *Id.* at 81.

48. *Id.* at 85.

49. *Id.*

50. *Id.* at 86.

51. *Id.* at 91.

issue before the jury was not Manafzadeh's intent, but whether Manafzadeh was involved in the creation or deposit of the six fraudulent checks alleged in the indictment.⁵² Since the issue of intent was uncontroverted, and since any doubt about its *non-existence* as an issue was dispelled by the offered stipulation,⁵³ the court rejected the admissibility of prior-bad-act evidence to prove intent.⁵⁴ *Manafzadeh*, more clearly than any other case, sets forth the proposition that a defendant's stipulation to possessing the required intent eliminates intent as a triable issue.⁵⁵

52. *Id.* at 87.

53. *Id.*

54. *Id.* "Defense counsel did not argue the issue of intent to the jury, having already informed the district court that if the jury found the defendant had created the checks or caused them to be deposited, which was the Government's theory of the case, Manafzadeh would stipulate to the requisite intent." *Id.* (citing *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978)).

55. The Second Circuit has also held that a defendant's choice of defense may remove intent from the case. Under this approach, if the defense proceeds solely on a theory that the defendant did not commit the charged act, evidence of prior bad acts is inadmissible to prove intent. Alternatively, if the defendant proceeds on a theory that he or she did the act *innocently* or *mistakenly*, or if the defendant merely pleads not guilty and contests the strength of the prosecution's evidence, an issue of intent is raised, and prior bad act evidence is admissible. See *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978); *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978) (holding that where defendants did not claim that they took the money innocently or mistakenly, but rather claimed they did not take the money at all, intent and knowledge were not raised as issues); *United States v. DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970) (holding that a claim of non-participation in the charged crime does not raise an issue of intent). Even in *Manafzadeh*, the court held that had the defendant not offered to stipulate to intent, but merely denied involvement in the crime, intent would not be disputed and the government would be precluded from introducing other acts evidence to prove intent. 592 F.2d at 87; see *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (defendant's desire to defend on grounds of mistaken identity did not raise an issue of intent).

United States v. Colon, 880 F.2d 650 (2d Cir. 1989), is also instructive on this aspect of the Second Circuit's analysis of prior bad act evidence. In *Colon*, the defendant alternatively argued that he was never approached by an undercover detective, and never engaged in a discussion about drugs with anyone. The court held that use of this "denial defense" did not raise the issue of intent. It is for this reason that introduction of prior bad act evidence should await presentation of the defendant's case. Since the trial court admitted Colon's prior bad act evidence to prove intent before hearing Colon's defense (which did not raise the issue of intent), his conviction was reversed. For a critique of the Second Circuit's position, see Bruce Green, "The Whole Truth?": *How Rules of Evidence Make Lawyers Deceitful*, 25 LOYOLA L.A. L. REV. 699 (1992).

The Second Circuit's position on this issue is mirrored by the Third, Fourth, and Fifth Circuits. See *United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986); *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992); and *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); *United States v. Adderly*, 529 F.2d 1178 (5th Cir. 1976).

The Fifth Circuit is in accord with the Second Circuit's position in *Colon* and *Manafzadeh*. In *United States v. Merkt*,⁵⁶ for example, the Fifth Circuit held that a defendant can make an "appropriate stipulation to avoid the introduction of extrinsic offense evidence."⁵⁷ Similarly, in *United States v. Roberts*,⁵⁸ the Fifth Circuit wrote that where a defendant unequivocally removes intent by stipulation, prior-bad-act evidence cannot be admitted for the purpose of proving intent.⁵⁹ This is so, the court wrote, because a stipulation dissipates any probative value of the prior-bad-act evidence so that the remaining probative value is nominal and is outweighed by the danger of unfair prejudice.⁶⁰ The First,⁶¹ Eighth,⁶² Eleventh,⁶³ and District of Columbia Circuits⁶⁴ also allow stipulated intent to prevent the prosecution from proving intent through the use of prior-bad-act evidence.

B. The Ninth Circuit's Rejection of Stipulations

*United States v. Hadley*⁶⁵ is the paradigmatic case that presents the Ninth Circuit's approach to prior-bad-act evidence. In 1989 Verl Hadley was convicted of several violations of the Sexual

56. 794 F.2d 950 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

57. *Id.* at 963 (quoting *United States v. Roberts*, 619 F.2d 379, 383 n.2 (5th Cir. 1980)).

58. 619 F.2d 379 (5th Cir. 1980).

59. *Id.* at 383.

60. *Id.*

61. *See, e.g.*, *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (holding that defendant's offer to stipulate intent will prevent the admission of prior bad act evidence by removing the issue from the case; government must therefore accept proffered stipulation); *United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990) (holding that since no formal stipulation had ever been offered, evidence of uncharged misconduct was properly admitted to prove intent).

62. *See, e.g.*, *United States v. Burkett*, 821 F.2d 1306 (8th Cir. 1987) (concluding that uncharged misconduct evidence properly admitted to prove intent even though defendant notified government of his intent to offer alibi defense as this was insufficient indication that he would stipulate intent).

63. *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1224 (11th Cir. 1993) (quoting *United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991)) (stating it is well settled that the government may introduce evidence of the defendant's extrinsic acts to prove intent if the defendant does not "affirmatively take the question of intent out of contention by stipulation . . . [to] the requisite intent"), *cert. denied*, 112 S. Ct. 2289 (1992); *United States v. Russo*, 717 F.2d 545 (11th Cir. 1983) (holding that if a defendant enters into a stipulation concerning intent, any nominal probative value of the extrinsic evidence would undoubtedly be outweighed by the danger of unfair prejudice).

64. *See, e.g.*, *United States v. Manner*, 887 F.2d 317 (D.C. Cir. 1989) (uncharged misconduct admissible to prove intent where there was no explicit offer to stipulate intent), *cert. denied*, 493 U.S. 1062 (1990).

65. 918 F.2d 848 (9th Cir. 1990).

Abuse Act of 1986.⁶⁶ Complaints of sexual molestation led to an investigation of Hadley, which resulted in an indictment charging him with sexual abuse involving minors.⁶⁷

At trial, one victim testified to three separate incidents of sexual molestation that were not listed in the indictment.⁶⁸ In addition, over Hadley's objection and pursuant to Rule 404(b), the district court admitted testimony from other victims who stated that Hadley had forcibly sodomized them when they were minors.⁶⁹ The trial court held that because violations of the Sexual Abuse Act were specific intent crimes, which required that the defendant engage in sexual contact with "intent" to "arouse the sexual desire of any person,"⁷⁰ the prior bad acts were probative of Hadley's intent to commit the charged offenses.⁷¹ The court further concluded that because the probative value of the evidence as to intent was not substantially outweighed by the prejudice to the defendant, the evidence was admissible under Federal Rule of Evidence 403.⁷²

Hadley was convicted and, on appeal to the Ninth Circuit, argued that the trial court erred in admitting the uncharged prior-bad-act testimony.⁷³ Hadley argued that, when a defendant denies participation in the act or acts that constitute a crime,⁷⁴ intent is

66. *Id.* at 850. Specifically, Hadley was charged with aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1) (1986) and abusive sexual contact in violation of 18 U.S.C. § 2244(a)(2) (1986).

67. *Hadley*, 918 F.2d at 850. These incidents were not part of the charges in the indictment alleged against Hadley.

68. *Id.*

69. *Id.*

70. To demonstrate sexual contact, the government had to prove that Hadley acted "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2245(3) (1986).

71. Petitioner's Brief, Joint Appendix at 682-83, *Hadley*, 918 F.2d at 848 (District Court Trial Proceedings Transcript). It should be noted that the new amendment to Rule 404(b), incorporated in Rule 414, would provide automatic admissibility of prior bad acts in cases of child molestation for *any* relevant purpose.

72. *Id.* at 682-83.

THE COURT: And, intent, of course, is an element of 2244. It specifically refers to with intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person So intent is an element. . . . The prior bad acts that we were discussing . . . have to do with the alleged activities of Mr. Hadley, of a sexually gratifying nature. So I think those acts, prior acts, would be relevant in the jury's consideration, not necessarily limited to whether Mr. Hadley did the acts, but his purpose in doing them as well.

73. *Hadley*, 918 F.2d at 850.

74. In the alternative, Hadley argued on appeal that intent was an uncontroverted issue because intent was evident from the nature of the alleged acts alone. Petitioner's Reply Brief at 1, *Hadley*, 918 F.2d at 848. Hadley argued that the requisite intent was necessarily inferred from the act of touching someone on their sexual organs. At trial, Hadley's counsel stated:

not a material issue for the purpose of applying Rule 404(b).⁷⁵ Thus, Hadley claimed the uncharged misconduct evidence was ir-

I believe that there is no question that if somebody touches somebody else's penis, there is a sexual motive in it. We are not going to argue otherwise. It would be absurd to argue that if someone touches someone else's sexual organs he did so innocently. The intent can be inferred from the act, if the jury believes it.

Petitioner's Brief, Joint Appendix at 662, *Hadley*, 918 F.2d at 848 (District Court Trial Proceedings Transcript). In support of this argument, Hadley relied on *United States v. Gruttadauro*, 818 F.2d 1323, 1328 (7th Cir. 1987), which held that evidence of prior bad acts is inadmissible in cases where the mental state can be inferred from the surrounding circumstances. *Id.* at 1328; see also *United States v. Hudson*, 884 F.2d 1016 (7th Cir. 1989), *cert. denied*, 469 U.S. 939 (1990); *United States v. Harrod*, 856 F.2d 996 (7th Cir. 1988); *United States v. Manganellis*, 864 F.2d 528 (7th Cir. 1988); *United States v. Shackleford*, 738 F.2d 776 (7th Cir. 1984) (where intent can be inferred from act, government need not prove this element of the crime). The Ninth Circuit rejected this argument, however, finding that in a specific intent prosecution, the prosecution must prove intent beyond a reasonable doubt. *Hadley*, 918 F.2d at 852 (quoting *In Re Winship*, 397 U.S. 358 (1970)). But see *Gruttadauro*, 818 F.2d at 1327-28 (stating that where the mere doing of an act demonstrates criminal intent, evidence of other misconduct offered to prove general or specific intent is immaterial); *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975) (evidence of other crimes excluded in cases involving specific intent crimes when intent required by statute could be inferred from nature of act); *Landrum v. United States*, 559 A.2d 1323 (D.C. App. 1989) (where performance of act would indisputably show criminal intent, prior bad acts are inadmissible).

Yet, most federal courts agree that a bare plea of 'not guilty' places a defendant's state of mind and intent in issue, and the prosecution is not relieved from proving this element of the charge. See, e.g., *United States v. Miller*, 974 F.2d 953 (8th Cir. 1992); *United States v. Mazzanti*, 888 F.2d at 1165 (7th Cir. 1989); *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989); *United States v. Nahoom*, 791 F.2d 841 (11th Cir. 1986); *United States v. McKoy*, 771 F.2d at 1207 (9th Cir. 1985) (discussing the proposition that a plea of not guilty does not relieve the prosecution from proving intent as an element of the crime charged). But see, Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840 - 1975*, 51 U. CIN. L. REV. 299, 307 n.62 (1982).

75. *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990) (quoting *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978)).

In his appeal to the United States Supreme Court, Petitioner's Brief at 30 & 34, *Hadley*, 918 F.2d 848, Hadley based his argument on the Ninth Circuit's prior decision in *Powell*, 587 F.2d at 443. In *Powell*, the Ninth Circuit reversed the defendant's conviction of conspiracy to possess marijuana with intent to distribute, due to the trial court's error in admitting Powell's prior convictions for similar offenses to prove intent. Such admission was reversible error, the court wrote, because Powell denied participation in the crime, and therefore, intent was not a material issue for purposes of applying Rule 404(b). *Id.*

Similarly, in *Hadley*, the defendant's defense at trial was a denial of participation in the charged sexual misconduct. *Hadley*, 918 F.2d at 850. Moreover, *Hadley* went further than *Powell* by offering to formally stipulate to the requisite intent if the jury believed the acts were committed. Petitioner's Brief at 18, *Hadley*, 918 F.2d at 848. Despite this offer, the *Hadley* court held that in a specific intent crime, intent is always a material element of the case whether or not the defendant actively disputes intent. *Id.* at 852.

relevant and inadmissible. Moreover, Hadley stated that he had conceded the issue of intent approximately five months before trial⁷⁶ and had offered to stipulate intent during trial.⁷⁷

Notwithstanding the offered stipulation and the use of the “denial defense,” the Ninth Circuit upheld the trial court’s admission of the prior-bad-act evidence and affirmed Hadley’s conviction.⁷⁸ The Ninth Circuit stated that the government bore the burden of proving every element of the crime beyond a reasonable doubt. This burden, the court held, was not relieved by the defendant’s promise to forego argument on the issue of intent.⁷⁹

Applying Rule 403, the Ninth Circuit found that the evidence was “highly probative on the question of intent, especially in light of the similarity found between the prior acts and the offense charged.”⁸⁰ The court recognized that the evidence was obviously prejudicial, but stated that the district court sufficiently limited the prejudicial impact by instructing the jury that the prior-bad-act evidence could be used to establish intent only if they first found, beyond a reasonable doubt, that Hadley had committed the acts charged.⁸¹ The court concluded that the prejudice to Hadley did not substantially outweigh the probative value of the evidence.⁸²

The Ninth Circuit, thus, created a *per se* rule that permitted the government to introduce prior-bad-act evidence to prove intent, notwithstanding a defendant’s denial of involvement in the crime or offer to stipulate to intent. The Ninth Circuit recently affirmed

76. Petitioner’s Brief at 18, *Hadley*, 918 F.2d at 848.

77. Petitioner’s Brief, Joint Appendix at 687, *Hadley*, 918 F.2d at 848 (District Court Trial Proceedings Transcript):

COUNSEL FOR DEFENDANT: . . . since this evidence [uncharged prior sexual abuse] is being apparently admitted to show sexual intent, what if we stipulate that if the private parts of the individuals were in fact touched, that it was with sexual intent. And then simply have the issue about whether or not it occurred go to the jury. And that way we would officially eliminate that issue.

78. *Hadley*, 918 F.2d at 853.

79. *Id.* at 852. The Court wrote:

Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley’s choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts, and . . . admission of such proof in this case was not an abuse of discretion under the rule.

Id.

80. *Id.*

81. *Id.*

82. *Id.*

its position, stating that, "[r]egardless of the [defendant's] willingness to stipulate, the government is entitled to prove the [crime] by introduction of probative evidence."⁸³ The Seventh Circuit mirrors this approach with regard to both the "denial defense" and the stipulated intent.⁸⁴

C. The McGuire Standard

The recent United States Supreme Court case of *Estelle v. McGuire*,⁸⁵ may indicate that the Court is prepared to allow expansive use of uncharged misconduct to prove intent in criminal cases. McGuire was convicted in state court for the second degree murder of his infant daughter.⁸⁶ Over McGuire's objections, and despite his claims that he did not commit the charged act, the trial court admitted evidence that the infant had suffered extensive and serious injuries on many occasions prior to death.⁸⁷

McGuire filed a petition for *habeas corpus* relief in federal court. The Ninth Circuit granted McGuire's petition and ruled that evidence of the infant's prior injury was erroneously admitted since the prosecution could not link McGuire to the prior injuries.⁸⁸ The court concluded that admission of the evidence "rendered [Mc-

83. *United States v. Breitzkreutz*, 8 F.3d 688 (9th Cir. 1993); *see also* *United States v. Gilman*, 684 F.2d 616, 622 (9th Cir. 1982); *United States v. Kalama*, 549 F.2d 594, 596 (9th Cir. 1977). The unwillingness of courts to force the prosecution to accept a criminal defendant's stipulation is based on the long-standing rule that "the criminal accused cannot plead out an element of the charged offense by offering to stipulate to that element." Edward J. Imwinkelried, *The Right to 'Plead Out' Issues and Block the Admission of Prejudicial Evidence*, 40 EMORY L.J. 341, 357, 358 (1991).

84. *See, e.g., United States v. Kramer*, 955 F.2d 479, 492 (7th Cir. 1992) (Cudahy, J., concurring) (arguing that the specific-intent exception of the Seventh Circuit automatically precludes defendants charged with specific-intent crimes from ever removing intent as an issue in the case, even by stipulation); *United States v. Draiman*, 784 F.2d 248, 254 (7th Cir. 1986) (holding that defendant's decision not to contest intent does not relieve prosecution from burden of proving intent in a specific intent crime prosecution); *United States v. Weidman*, 572 F.2d 1199 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.) (holding that in cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case), *cert. denied* 490 U.S. 1075 (1989); *United States v. Mazzanti*, 888 F.2d at 1165, 1171 (intent must always be proven notwithstanding defendant's decision not to contest issue, by for example, defending on grounds of denial of participation in crime); *United States v. Chaimson*, 760 F.2d 798, 805 (7th Cir. 1985) ("[w]here the Government must prove specific intent as an element of the crime charged, evidence of the other acts may be introduced to establish that intent.").

85. 112 S. Ct. 475 (1991).

86. *Id.* at 478.

87. *Id.* at 478, 479.

88. *Estelle v. McGuire*, 902 F.2d 749, 753 (9th Cir. 1990).

Guire's] trial arbitrary and fundamentally unfair" in violation of due process requirements.⁸⁹

The issue presented to the Supreme Court in *McGuire* was similar to that addressed in *Hadley*: whether uncharged misconduct is relevant to intent when the defendant does not dispute intent and defends on the ground that he did not commit the crime. Answering affirmatively, the Court reversed the Ninth Circuit's decision and affirmed McGuire's conviction.⁹⁰

Although *McGuire* was a state criminal case decided on constitutional grounds, and although it did not deal with the Federal Rules of Evidence, it nonetheless evinces an expansive approach to the admissibility of prior-bad-act evidence. Chief Justice Rehnquist, writing for the Court, reasoned that the "prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."⁹¹

Because the prosecution had charged McGuire with second-degree murder, it was required to prove that the infant's death was caused by the defendant's intentional act.⁹² Proof of the prior injuries helped to do just that; although not linked by any direct evidence to McGuire, the evidence demonstrated that the infant's death was the result of an intentional act by *someone*, and not an accident.⁹³ The Court reasoned that evidence of the prior injuries helped to prove that "the child died at the hands of another and not by falling off the couch, for example."⁹⁴ Since the factor of intent was unconditionally relevant and probative on the question of the intent with which the person who caused the injuries acted,⁹⁵ the Court concluded that the evidence of prior injuries was admissible, whether directly linked to McGuire or not.

That *McGuire* dramatically expands the use of prior bad acts evidence is clear in light of the Supreme Court's previous statement on the subject in *United States v. Huddleston*.⁹⁶ In *Huddleston*, the

89. *Id.*

90. 112 S.Ct at 479.

91. *Id.* at 481. This result in *McGuire* seems to reject the Second Circuit's position that in a prosecution for a specific intent crime, a choice of defense such as non-participation in the crime relieves the prosecution from the burden of proving intent. See *supra*, note 56 and accompanying text.

92. 112 S. Ct at 480.

93. *Id.*

94. *Id.*

95. *Id.*

96. 485 U.S. 681 (1988). In this case a defendant charged with selling stolen goods in interstate commerce appealed his conviction arguing that a trial court must make a

Court held that similar act evidence is admissible pursuant to Rule 404(b) "only if the jury can reasonably conclude that the act occurred and that the *defendant* was the actor."⁹⁷ Yet, in *McGuire*, the Court found the evidence of prior injuries admissible even though the government could not prove that the *defendant* caused the injuries.⁹⁸

It should be noted, however, that *McGuire* never *formally* offered to stipulate that the infant had been intentionally injured by someone, though not him. Such a stipulation would arguably have taken intent out of the case insofar as the Supreme Court found it relevant.⁹⁹ The reasoning in *McGuire*, therefore, will not prevent the Court from holding, in a case concerning Rule 404(b), that stipulation of intent can prevent the prosecution from using prior bad acts to prove intent.¹⁰⁰

III. Limiting The Prejudicial Effect of Rule 404(b) by Implementing a *Per Se* Rule to Accept Stipulations

The differing circuit court opinions set the stage for Hadley's appeal to the Supreme Court, essentially setting forth one question: to what extent does a defendant's refusal to contest intent prevent the prosecution from proving intent through prior-bad-act evidence?¹⁰¹ Hadley relied on the Second Circuit's approach,¹⁰²

preliminary finding that the Government has proven the occurrence of prior bad act evidence by a preponderance of the evidence before such evidence was admitted pursuant to Rule 404(b). The Court concluded that such evidence be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the prior bad act, a lower standard than that proposed by the defendant. *Id.* at 683.

97. *Id.* (emphasis added). The conditioning of the evidence on a finding that a defendant committed the act is required by the conditional relevance standard in Rule 104(b) which states: "When the relevancy of evidence depends upon fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b).

98. 112 S.Ct at 480. The difference, of course, between the results is that in *McGuire*, the prior injuries were unconditionally relevant, since they proved that someone had intentionally harmed the child, and that factor itself was relevant. In contrast, in *Huddleston*, 485 U.S. at 681, the defendant was charged with knowing possession of stolen merchandise, and the uncharged misconduct concerned Huddleston's prior possession of stolen merchandise. See Capra, *supra*, note 32.

99. Capra, *supra* note 32. This was unfortunate for *McGuire*, whose defense was that his wife, and not he, had intentionally injured the child.

100. While *McGuire* and *Hadley* are thus distinguishable, *McGuire* nonetheless presents an expansive approach to the use of prior bad acts evidence to prove intent. The extent to which *McGuire* will signal courts to take an expansive view of prior bad act evidence under Rule 404(b), despite a defendant's offer to stipulate, is unclear.

101. Petitioner's Brief at i, *Hadley*, 918 F.2d at 848.

102. *Id.*

stressing that precedent in that circuit “clearly allows the defense to take the issue of intent out of the case, if they are willing to so stipulate.”¹⁰³ Hadley argued that a court should carefully review proposed stipulations focusing on the “incremental probative value of the proffered evidence, its prejudicial effect, and the availability of other means of proof.”¹⁰⁴ After granting certiorari, the Court dismissed it as improvidently granted,¹⁰⁵ leaving unresolved the question of whether the Ninth or Second Circuit has taken the correct approach to Rules 404(b) and Rule 403.

The Ninth Circuit’s approach concerning prior-bad-act evidence is erroneous because it leaves room for admission of prejudicial evidence despite a defendant’s offer to stipulate to intent. The federal courts should adopt a *per se* rule that would exclude uncharged prior-bad-act evidence offered solely to prove intent, when the defendant has clearly and unambiguously stipulated intent. Acceptance of stipulations in appropriate cases comports not only with the theory behind the Federal Rules of Evidence, but also with the scope of the Rules.

A. Relevance and the Rules

In evaluating the admissibility of prior-bad-act evidence under Rule 404(b), several circuits have developed a four-part test: (1) that a material issue has been raised for which prior-bad-act evidence is admissible under Rule 404(b);¹⁰⁶ (2) that the evidence is relevant; (3) that the jury could find that the prior-bad-act occurred and that the defendant was the actor;¹⁰⁷ and (4) that the prior act is “similar in kind and reasonably close in time to the charge at trial.”¹⁰⁸

103. *Id.*

104. *Id.*

105. 113 S. Ct 486 (1992) (certiorari dismissed as improvidently granted), *cert. denied*, 113 S.Ct 1068 (1993).

106. These are the “good purposes” listed in Rule 404(b), *see supra* notes 3 & 7 and accompanying text.

107. In light of the Supreme Court’s decision in *Estelle v. McGuire*, 112 S. Ct 475 (1991), it is questionable whether the trier of fact must still determine that the defendant committed the acts. However, *McGuire* did not directly deal with Rule 404(b), therefore this prerequisite may still be required. *See supra* notes 87-102 and accompanying text.

108. *See* *United States v. Shackelford*, 738 F.2d 776 (7th Cir. 1984); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 382 (1992); *United States v. Frederickson*, 601 F.2d 1358 (8th Cir. 1978), *cert. denied*, 444 U.S. 934 (1979) (discussing a four prong test to determine admissibility of prior bad act evidence).

A corollary to this four-step requirement is that the probative value of the prior-bad-act evidence must not be substantially outweighed by undue prejudice.¹⁰⁹ Rule 403 makes evidence inadmissible if the evidence tends to induce juries to think illogically and employ an improper basis in reaching convictions.¹¹⁰ Prior-bad-act evidence often leads a jury to convict an otherwise innocent defendant on the theory that she is a "bad person" deserving of punishment.¹¹¹ Where an issue is uncontested, the probative value of evidence regarding the issue is substantially outweighed by the risk of prejudice. Therefore, Rule 403 mandates that the prior-bad-act evidence be excluded in favor of a defendant's clear stipulation to possessing the requisite intent.¹¹²

An admission of intent by stipulation, therefore, should preclude the use of prior-bad-act evidence to prove intent. Once intent is stipulated, the prior-bad-act evidence is of minimal probative value to prove intent and remains highly prejudicial, thus mandating exclusion of that evidence under Rule 403.¹¹³

The same conclusion is mandated by other rules of evidence. The Federal Rules of Evidence were designed "to the end that the truth may be ascertained and the proceedings justly determined."¹¹⁴ A central theme of the Rules is that the fact-finder as-

109. *Miller*, 959 F.2d at 1538; see FED. EVID. R. 403.

110. FED. R. EVID. 403. Unfair prejudice, in this context, means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. See FED. R. EVID. 403 advisory committee's note. Furthermore, evidence is prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence. See FED. R. EVID. 403 advisory committee's note; STEPHEN SALTZBURG & KENNETH R REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 43 (2d ed. Supp. 1978). The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact *not properly in issue* or unfairly to excite emotions against the defendant. *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980).

In addition, the Advisory Committee Notes to Rule 404(b) expressly require that the trial court consider less prejudicial alternatives to proving intent than prior bad act evidence. 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. FED. R. EVID. 403 advisory committee's note.

111. See *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985) ("The exclusion of bad acts evidence is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excess weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.").

112. *Id.*

113. *United States v. Grassi*, 602 F.2d 1192 (5th Cir. 1979).

114. FED. R. EVID. 102.

certain the truth through the evaluation of relevant evidence,¹¹⁵ or as the Supreme Court explained in *Huddleston v. United States*,¹¹⁶ through evidence that makes the existence of any fact *at issue* more or less probable.¹¹⁷ This concept stems from the application of the relevancy doctrine encompassed in Rules 401 and 402, under which evidence is not admissible unless it is relevant,¹¹⁸ probative of a point of consequence, and material to an action.¹¹⁹ Federal Rule of Evidence 401 explicitly codifies this premise by defining relevant evidence as evidence having a tendency to make the existence of any fact *that is of consequence* to the determination of the action more or less probable.¹²⁰ Yet, a stipulation as to intent admits the issue and removes it as a material issue of consequence.¹²¹ Admitting prior-bad-act evidence in the face of a stipulation, therefore, has no tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the stipulation. This conclusion stems from the fact that the stipulation *admits* the contested issue—intent—thereby dissipating any probative value inherent in the use of prior-bad-act evidence on the issue of intent.¹²² Since intent is not “truly in dispute”,¹²³ and because the defendant has “affirmatively taken the issue of intent out of the case”¹²⁴ through an effective stipulation, the admission of prior-bad-act evidence to prove intent pursuant to Rule 404(b) must be precluded.

B. Stipulations and the Rules

The next issue to consider is whether the Federal Rules of Evidence can be read to give the defendant the right to stipulate intent. The Advisory Committee’s Notes on the Proposed Federal Rules of Evidence imply that the Rule 403 balancing process can require a party to accept his opponent’s stipulation.¹²⁵ In addition, the Advisory Committee Note to Rule 404(b) expressly requires

115. Respondent’s Brief at 17, *Hadley*, 918 F.2d at 848.

116. 485 U.S. 681 (1988).

117. *Id.* (emphasis added).

118. See FED. R. EVID. 402.

119. WEINSTEIN & BERGER, *supra* note 8, § 404[09].

120. FED. R. EVID. 401.

121. Federal Evidence Rules 401 and 402 state that admissible evidence is evidence that is relevant; that is, evidence must be material to an issue of consequence.

122. WEINSTEIN & BERGER, *supra* note 23, § 190, at 452 n.52.

123. *United States v. O’Connor*, 580 F.2d 38, 43 (2d Cir. 1978).

124. *United States v. Williams*, 577 F.2d 188, 191 (2d Cir.), *cert. denied*, 439 U.S. 868 (1978).

125. FED. R. EVID. 403 advisory committee’s note.

that the trial court consider alternatives to proving intent that are less prejudicial than prior-bad-act evidence.¹²⁶ A reasonable alternative is the use of stipulations.

The utility of judicial admissions and stipulations is well established, and they are used broadly in civil litigation as well as in criminal cases.¹²⁷ Indeed, the prevailing practice is to accept stipulations.¹²⁸

Although Rule 404(b) does not limit admissibility of evidence to "issues in dispute," it is implicitly limited by the relevancy standard of Rules 401 and 402.¹²⁹ The Advisory Committee's Note concerning Rule 401 states that while evidence can be relevant if offered for undisputed matters,¹³⁰ it directs that "situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent."¹³¹ The Note further states that a rule excluding evidence in such a situation can be justified under Rule 403.¹³² The Committee's reasoning is that if a point is undisputed, and evidence is nonetheless offered to prove the point, the evidence becomes cumulative; therefore, the probative value is minimal since the proponent's case is not significantly advanced.¹³³

In considering the significance of an offer to stipulate intent, a court must place emphasis not on "the form of words used by counsel but on the consequences that the trial court may properly attach to those words."¹³⁴ Courts must be satisfied that the intent

126. 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. FED. R. EVID. 404(b) advisory committee's note.

127. Patrick M. Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 J. CRIM. L., CRIMINOLOGY 15, 19, 25-26 (1962).

Allowing stipulations in civil litigation, but refusing to allow them in criminal cases, creates a "classification" triggering the equal protection clause. The differential treatment accorded to criminal defendants by the unfair classification runs afoul of the equal protection guarantee and is, therefore, unconstitutional. See also Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341 (1991).

128. WEINSTEIN & BERGER, *supra* note 8, § 404[09]; EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 8:11 (1984).

129. See FED. R. EVID. 401, 402 (only evidence probative of controverted issues is relevant and therefore admissible).

130. FED. R. EVID. 401 advisory committee's note.

131. *Id.*

132. *Id.*

133. See *United States v. Colon*, 880 F.2d 650 (2d Cir. 1989); *supra* notes 27-30, 42-43 and accompanying text.

134. *Colon*, 880 F.2d at 657 (quoting *United States v. Figueroa*, 618 F.2d 939, 942 (2d Cir. 1980)).

stipulation meets two requirements. First, the offer must express a clear and unequivocal intention to remove the issue from controversy—unlike the illusory stipulation in *Colon*. Second, the stipulation must cover the necessary substantive ground to remove the issue from the case.¹³⁵ Moreover, the court must ascertain, outside the presence of the jury, that the defendant is competent to enter into a stipulation and that the stipulation is made knowingly and voluntarily.¹³⁶ Once a stipulation has been approved, the court must instruct the jury that it must resolve the issue of intent against the defendant because it is not disputed.¹³⁷

C. The Prosecutor's Burden: An Unfounded Fear

Despite the well-established acceptability of stipulations, the Seventh and Ninth Circuits continue to admit uncharged, prior-bad-act evidence to prove intent¹³⁸ notwithstanding the defendant's offer to stipulate intent.¹³⁹ These courts stress that a stipulation is a voluntary agreement between parties¹⁴⁰ and, as such, the prosecution has no obligation to accept a stipulation¹⁴¹ and should not be compelled to do so.¹⁴² These courts contend that a defense offer to stipulate cannot deprive the prosecution of the right it would otherwise have to introduce prior-bad-act evidence,¹⁴³ and therefore, such an offer does not bind the prosecution. Moreover,

135. *United States v. Garcia*, 983 F.2d 1160, 1174 (1st Cir. 1993).

136. *United States v. Salery*, 830 F. Supp. 596 (N.D. Ala. 1993).

137. *United States v. Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980) (such an instruction would be appropriate where defendant expresses with sufficient clarity, by stipulation or otherwise, a decision not to contest the element of intent; error to admit prior bad act); *see also*, *United States v. Gill*, 490 F.2d 233, 237-38 (7th Cir. 1973) (trial court correctly declined to instruct jury on definition of interstate commerce where parties stipulated that element was satisfied), *cert. denied*, 417 U.S. 968 (1974).

138. Curiously, the Ninth Circuit, prior to *Hadley*, had required the government to accept appropriate stipulations in criminal cases. As early as 1976, just one year after the adoption of the Federal Rules of Evidence, the Ninth Circuit in *United States v. Durcan*, 539 F.2d 29, 30 (9th Cir. 1976), held that the government should have accepted the defendant's proffered stipulation to having committed prior burglaries. The court wrote that "[i]n the interest of fairness the trial court should have compelled the prosecution to accept the pertinent stipulation. The prejudice to the defendant by not accepting [the stipulation] so far outweighed the proof's probative value that the evidence should have been excluded."

139. *State v. Smith*, 644 S.W.2d 700, 701 (Tenn. Crim. App. 1983); *State v. Clemons*, 643 S.W.2d 803 (Mo. 1983). *See generally*, Paul C. Giannelli & Edward J. Imwinkelried, *Stipulations in Criminal Cases*, CRIM. DEF. 4 (May-June 1983).

140. *State v. Smith*, 644 S.W.2d at 701.

141. *Id.*

142. *United States v. Lowe*, 569 F.2d 1113 (10th Cir.), *cert. denied* 435 U.S. 932 (1978).

143. *Id.*; *Smith*, 644 S.W.2d at 701.

these courts argue that a bare intent stipulation, without facts detailing the nature of the prior bad acts, can deprive the government of the legitimate force of its evidence and unfairly limit the flow and quantity of evidence.¹⁴⁴

Furthermore, the fear may be that an offer to stipulate, if required to be accepted as a matter of law, would require the government to accept any stipulation offered by the defendant and, thus, would allow the defendant an unlimited ability to control the proof presented by the government at trial.¹⁴⁵ These concerns, however, are unfounded. The Supreme Court in *Huddleston* held that Rule 104(a) provides that "questions concerning the qualification of . . . admissibility of evidence shall be determined by the court,"¹⁴⁶ based solely on the discretion of the trial judge.¹⁴⁷ Therefore, the trial judge, pursuant to Rule 104, ultimately controls the admissibility of stipulations.

Moreover, Rule 611(a) explicitly grants the trial judge broad discretion over the "mode" of evidence so as to make the presentation of evidence "effective for the ascertainment of the truth."¹⁴⁸ Given this broad authority, the trial court can exercise its power to ensure that a defendant's stipulation fully concedes a controverted issue, so as not to prevent the prosecution from presenting incriminating evidence. Indeed, *Colon* is an example of this proposition—the Second Circuit upheld the trial court's refusal to accept the proffered stipulation because it was illusory and conceded nothing on the issue of intent.¹⁴⁹

The Seventh and Ninth Circuits also rely on the "plain meaning" analysis of the Federal Rules of Evidence to preclude stipulations with respect to prior-bad-act evidence.¹⁵⁰ The "plain meaning"

144. *United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979), *cert. denied*, 450 U.S. 956 (1981).

Yet, the Fifth Circuit seems to support the petitioner's position in *Hadley*. In *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976), the defendant was charged with escape from federal custody. One element of the crime is that the defendant must have been in custody pursuant to a judgement or conviction. Spletzer offered to stipulate to the conviction element of the crime. The Fifth Circuit held that the government must accept the proffered stipulation.

145. *Grassi*, 602 F.2d at 1197.

146. *See* FED. R. EVID. 104(a).

147. *Huddleston*, 485 U.S. at 686.

148. *Id.*

149. *See supra* notes 26-43 and accompanying text.

150. *See Huddleston*, 485 U.S. at 681; *United States v. Salerno*, 112 S. Ct 2503 (1992). In both cases, the Supreme Court espoused a literal interpretation of the Federal Rules of Evidence, demurring to provide protection to criminal defendants when those protections are not specifically in the Rules. Hence these cases stand for the

analysis notes that Rule 404(b) does not explicitly permit a defendant to prevent the admission of evidence by the use of stipulations.¹⁵¹ This reasoning, however, analyzes Rule 404(b) in a vacuum and does not take into account Rules 104(a), 403, and 611 and the relevancy standard of Rules 401 and 402.

D. A *Per Se* Proposal

The federal courts should, therefore, adopt a *per se* rule which would prohibit uncharged prior-bad-act evidence offered solely to prove intent when the defendant has stipulated to having the requisite intent. To implement the proposal offered here, the court should first determine whether the defendant wishes to stipulate to having the requisite intent.¹⁵² If the defendant agrees to so stipulate, the trial court should then ensure, pursuant to Rules 104(a) and 611(a), that a proffered stipulation is clear and unequivocal so as not to unfairly preclude the prosecution from offering relevant evidence to prove the crime. Once a stipulation clearly states that the defendant possessed the required intent, the court has the explicit authority under the Rules to direct the government to accept the stipulation,¹⁵³ and to instruct the jury that, as a result of the judicial admission, the prosecution need not prove that element of the crime. "The ultimate responsibility for the effective working of the adversary system rests with the trial judge,"¹⁵⁴ and the trial judge must exercise that power to limit the potentially prejudicial effect of evidence offered under Rule 404(b).

IV. Conclusion

The important issue concerning a defendant's proffered stipulation, highlighted by a split in the circuit courts, should be squarely addressed by the United States Supreme Court. The recent Supreme Court pronouncement in *Estelle v. McGuire* on the expansive use of prior-bad-act evidence in a criminal case¹⁵⁵ has clouded the issue and has created more questions than answers. The extent to which *McGuire* will signal the federal courts to take

"plain meaning" interpretation of the Federal Rules of Evidence; *supra* notes 66-85 and accompanying text.

151. *Id.*

152. *United States v. Garcia*, 983 F.2d 1160, 1175-76 (1st Cir. 1993) (a survey of the circuits on stipulations in the area of 404(b) evidence indicates a preference for handling the matter before trial, or early in the trial process).

153. *See supra* notes 146-50 and accompanying text.

154. FED. R. EVID. 611 advisory committee's note.

155. *See supra* notes 85-100 and accompanying text.

an expansive approach to such evidence in Rule 404(b) cases is unclear. One thing is certain, however—until a clear pronouncement is made by the Court, the uniformity of law that the Federal Rules of Evidence seek to establish¹⁵⁶ will continue to be frustrated, and results will differ depending on the court.

Instead, in cases where an accused is prosecuted for a specific intent crime, an unequivocal offer to stipulate intent should be accepted in lieu of prior-bad-act evidence showing intent. This proposal stems from the fact that a stipulation admits an element of the crime and removes the issue from contention. Evidence admitted by the prosecution to prove admissions already offered in a stipulation is cumulative, and its probative value is outweighed by prejudice. Such prejudicial evidence must be excluded because it breeds a tendency to condemn, not because an accused is believed to be guilty of the act charged, but because she has committed other offenses.¹⁵⁷ This hardly comports with the notion of fundamental fairness that "in our system of jurisprudence, we try cases, rather than persons."¹⁵⁸

The *per se* rule suggested in this Note is consistent with the notions of fairness and relevance set forth in the Federal Rules. The proposal allows the defendant to protect herself from prejudicial evidence, and yet it also allows the prosecution to present all relevant, reliable evidence on those matters that are disputed. Assuming that a stipulation is clear, the prosecution has no *bona fide* reason to reject the stipulation and has no need to use prior-bad-act evidence to prove intent. Any argument to the contrary by the government must only stem from its desire to put before the jury explicit prior-bad-act evidence in the hope that the jury's opinion of the defendant will be predisposed toward conviction. It is just such a scenario, however, that Rule 404 was intended to prohibit.¹⁵⁹ Only by approaching a case with such reasoned logic and judicial honesty can courts limit the prejudicial effect of Rule 404(b) and once again balance the scales of justice.

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156. See generally S. Rep. No. 1277, 93d Cong., 2d Sess. 8 (1974), reprinted in [1974] U.S.C.C.A.N. 7051, 7054.

157. JOHN H. WIGMORE, EVIDENCE § 194 (1904).

158. *People v. Allen*, 420 N.W.2d 499, 503-04 (Mich. 1988).

159. *United States v. Anthony*, 712 F. Supp. 112, 117 (S.D. Ohio 1988).