

March 2016

Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation

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Recommended Citation

Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 Fordham Urb. L.J. 1493 (2013).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol40/iss4/6>

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**RECONSIDERING THE STANDARDS OF
ADMISSION FOR PRIOR BAD ACTS
EVIDENCE IN LIGHT OF RESEARCH ON
FALSE MEMORIES AND WITNESS
PREPARATION**

*Jason Tortora**

Introduction	1494
I. Prior Bad Acts Admissibility and the Incentives It Creates.....	1498
A. Origins of the Bar Against Prior Bad Acts Evidence and Its Exceptions.....	1498
B. Modern Jurisprudence and the Bar Against Prior Bad Acts Evidence	1501
1. <i>Huddleston v. United States</i>	1501
C. Situating the Bar Against Prior Bad Acts Evidence Among the Rules of Evidence: A Story of Prejudice	1506
1. Limiting Prejudice Is at the Roots of Many Rules of Evidence, and Is Effectuated Through Witness Preparation.....	1506
2. The Bar Against Prior Bad Acts Evidence: Limiting Prejudice	1507
D. Courts Divided Along Fears of Undue Prejudice: <i>Huddleston</i> Leniency Versus Higher Standards	1510
E. Higher Standards of Proof of Commission Require Greater Amounts of Detail by Witnesses	1515
II. The Risk of False Memories and Misinformation.....	1517
A. Witness Preparation: Foundation of Trial Preparation and Potential Source of Falsehood	1517
1. Witness Preparation Is Fundamental to Litigation ...	1517
2. The Ethics of Witness Preparation.....	1519

* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2009, Columbia University. I would like to thank my Note advisor Professor Bruce Green for his sage guidance and feedback, and Professor James Kainen for his insightful and thoughtful edits. This Note would not have been possible without them.

1494	<i>FORDHAM URB. L.J.</i>	[Vol. XL
	B. Risks of Witness Preparation in Creating False Testimony.....	1520
	1. Analysis from Legal Scholarship: The Risks of Even Careful Witness Preparation.....	1520
	2. Psychological Research on Memory and Witnesses: Reason for Concern About False Testimony and More Questions	1524
	III. Adopting <i>Huddleston</i> to Reduce the Risk of Prejudice	1530
	A. The Minimal Benefits Requiring a Higher Standard of Proof of Prior Bad Acts.....	1532
	B. The Risk of False Testimony Created by Requiring Greater Specificity by Witnesses.....	1534
	C. Witness Preparation and the Rules of Evidence: Is Adopting <i>Huddleston</i> the Best Solution to a Difficult Problem?	1535
	Conclusion.....	1537

INTRODUCTION

A prosecutor is handed a complaint charging harassment and a harrowed woman follows him into his office. The charges stem from an ex-boyfriend repeatedly making threatening calls to her over a recent weekend. She saved a voicemail where her ex-boyfriend said he expected to see her at a funeral. She then explains that two weeks earlier, he showed up at her door uninvited, called her names, and threatened her life before leaving when she threatened to call the police. On more than a dozen other instances over the past six months, she says he followed her by car, called and hung up, or waited outside her house. She can't give exact dates, and adds that when they were dating a year earlier, her ex-boyfriend hit her but she never reported it.

The prosecutor knows that the defendant is entitled to a jury trial on the harassment charge, reducing that charge is not an option, and it is a weak case. Having spoken with defense counsel, he knows that the defendant is not interested in taking any plea that would involve an order of protection for the complainant, and that he can't rightly plead the case without securing an order of protection. The case needs to go to trial, and yet it will require a Herculean feat to convince a jury to convict a man of harassment on the sole basis of a few phone calls and an ambiguous voicemail.

2013] *RECONSIDERING PRIOR BAD ACTS* 1495

In order to convict the defendant, the prosecutor will need to show the jury evidence of the defendant's prior uncharged conduct towards the complainant to explain their relationship and the hostility of the phone calls. The People will be unable to prove the defendant's intent to terrorize without evidence of his prior phone calls and conduct towards the complainant. The complainant's memory is unclear, however, and she does not provide specific details or dates for the defendant's prior conduct. The prosecutor informs the complainant of the prospects at trial. He knows that the credibility, detail and likelihood of the prior conduct will determine whether the prior bad acts evidence will be admitted in his jurisdiction.¹ Whether the prior bad acts are clear and particularized may therefore decide the case before it is even begun. The prosecutor never suggests that the complainant do anything other than be truthful; the prosecutor does not even tell the complainant about the law on prior bad acts evidence's admissibility, obviating any incentive for the complainant to tailor her testimony. Nonetheless, the prosecutor tries to help the complainant remember more, probing deeper and deeper into the dates and circumstances of the prior events:

When the defendant followed you, were you working at the time?

Would you have remembered if something unusual happened on your regular commute?

When the defendant struck you, did he bruise you?

Would someone at work have noticed if you were bruised?

Would the bruise have been covered up because it was cold outside (i.e., winter)? And so on.

While interviewing a witness, such as this hypothetical complainant, the prosecutor balances trying to gather information by probing the extent of the witness's recollection of past events with trying not to influence the witness's memory by introducing distortions.² The goal is ultimately to elicit as strong a recollection as the witness's memory will support so that the witness may testify confidently and honestly, and so that the prosecutor will be able to establish the necessary foundation for the evidence. In the above example, the issue is elucidating the victim's memory of uncharged prior bad acts by the defendant.

1. See *infra* notes 162–72 and accompanying text.

2. See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *CARDOZO L. REV.* 829, 851 (2002).

Prior bad acts evidence is any evidence or testimony regarding acts by the defendant that is not included in the conduct which brought about the criminal charges or civil claim.³ This Note examines which standard of proof should apply to the commission of prior bad acts for their admission in criminal cases. The focus is on criminal cases because of the unique responsibilities of prosecutors, particularly in that they do not represent individual clients and instead seek convictions on behalf of the government.

Such evidence is generally referred to as “prior bad acts”⁴ evidence, “uncharged misconduct”⁵ evidence, or evidence of a “crime, wrong, or other act.”⁶ Prior bad acts evidence is governed by Federal Rule of Evidence (FRE) 404(b) in federal courts, and by varying approaches in state courts.⁷ Jurisdictions have adopted different standards of proof for the commission of prior bad acts: some require that the prior bad acts be proven beyond a reasonable doubt or by clear and convincing evidence; others, including the Supreme Court, require only that a hypothetical reasonable juror be able to find by a preponderance of the evidence that the prior bad acts were committed by an opposing party.⁸ Jurisdictions that require a greater showing of proof tend to argue that a higher standard is necessary to reduce the risk of prejudice.⁹ In determining whether prior bad acts have been sufficiently proven, courts consider the detail of the testimony alleging the prior bad acts.¹⁰

The purpose of this Note is to further the debate among jurisdictions as they decide what standard of proof to adopt for prior

3. *See generally* FED. R. EVID. 404(b).

4. *See, e.g.,* Ayagarak v. State, No. A-8066, 2003 WL 1922623, at *1 (Alaska Ct. App. Apr. 23, 2003).

5. *See, e.g.,* Mitchell v. State, 865 P.2d 591, 594, 597 (Wyo. 1993).

6. *See, e.g.,* FED. R. EVID. 404(b).

7. FED R. EVID. 404(b) states:

Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Compare id., and LA. CODE EVID. ANN. art. 1104, *with* State v. Terrazas, 944 P.2d 1194, 1196 (Ariz. 1997) (rejecting the Federal Courts’ approach to prior bad act admissibility as laid out in *Huddleston v. United States*, 485 U.S. 681 (1988)). For a discussion of the varying approaches states employ, *see infra* Part I.D.

8. *See infra* notes 100–44 and accompanying text.

9. *See infra* notes 145–49 and accompanying text.

10. *See infra* notes 167–74 and accompanying text.

bad acts evidence by discussing a source of prejudice to defendants that courts have not addressed. Specifically, this Note argues that jurisdictions should consider the risk of prejudice created by witness preparation as they decide the appropriate standard of proof for the commission of prior bad acts.¹¹ A higher standard of proof can incentivize more probing of a witness's incomplete memory during witness interviewing and preparation, which introduces a risk of false testimony through memory distortions that can outweigh the risk of prejudice from juries hearing evidence of prior bad acts that cannot be proven.¹² As a result, this Note argues that jurisdictions should adopt a minimal standard of proof to limit the risk of prejudice to the defendant.

The risk of prejudice created by witness preparation through the genesis of false memories is certainly not limited to instances when prosecutors and witnesses discuss a defendant's commission of prior bad acts. Insofar as witness preparation creates such false testimony, it implicates, arguably, every single rule of evidence.¹³ This Note, however, focuses solely on the interplay of the prejudice of witness preparation and the standard of proof for prior bad acts evidence for two reasons. First, the latter is an unsettled area of law and is ripe for analysis. Second, this Note engages this one rule of evidence to draw attention to how the prejudicial risks of witness preparation may be included in future debates that reconsider other rules of evidence.¹⁴

This Note is concerned with the prejudicial risks of witness preparation that result when a defendant is confronted by witnesses who have developed false memories about prior bad acts because of extensive witness preparation.¹⁵ Such witnesses are more difficult to

11. For a discussion of the risks of unintentionally creating false testimony through witness preparation, see *infra* Part II.

12. See *infra* notes 164–70 for a discussion of how a higher standard of proof implicates witness preparation, *infra* Part I.C.2 for a review of the prejudice created by prior bad acts evidence, and *infra* Part II for a discussion of the risks creating false testimony through witness preparation.

13. See generally Bruce A. Green, “*The Whole Truth?*”: *How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699 (1992) (discussing the relationship between the rules of evidence and witness preparation).

14. This Note does not argue that more prior bad acts evidence should or would be admitted because of this change. Rather, instead of focusing on proof of commission, courts should continue to limit the admission of prior bad acts evidence by weighing its probative value against its prejudicial impact. See *Huddleston v. United States*, 485 U.S. 681 (1988).

15. This Note assumes that in jurisdictions that require a higher standard of proof, attorneys are aware that detail has a corroborating effect for prior bad act allegations and that attorneys therefore ask their witnesses more probing questions to elicit

cross-examine¹⁶ and may seem more convincing to the jury—all as the result of a rule¹⁷ that is intended to reduce prejudice. This Note will review legal scholarship and social psychology research to discuss how probing questions during witness interviews and preparation can introduce prejudice by creating false memories and memory distortions in the minds of witnesses.

Part I of this Note will discuss the history and nature of the rules of evidence surrounding prior bad acts evidence. Part II will discuss witness preparation and its risk of prejudice, particularly in the context of prior bad acts evidence. Part III will argue that state courts that have rejected the federal courts' approach to prior bad acts admissibility should instead adopt the federal approach to minimize the risk of prejudice to the defendant.

I. PRIOR BAD ACTS ADMISSIBILITY AND THE INCENTIVES IT CREATES

A. Origins of the Bar Against Prior Bad Acts Evidence and Its Exceptions

The bar against evidence of a defendant's uncharged prior bad acts has been in existence at common law in some form since the seventeenth century.¹⁸ Initially, it emerged as a reaction to treason prosecutions in the "Star Chamber" in Great Britain.¹⁹ In 1810, the judges in *Rex v. Cole* held that "in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted."²⁰ *Rex v. Cole*

specifics from their witnesses' memories that can increase the likelihood of the evidence's admissibility. Obviously, if prosecutors' behavior is not influenced at all by the rules of evidence, then changes to the rules of evidence will have no impact on witness preparation techniques. For a discussion of how the rules of evidence and ethics affect witness preparation, see *infra* Part I.C.1. And for a discussion of how the admissibility of prior bad acts testimony is affected by its specificity, see *infra* Part I.E.

16. See *infra* notes 246–49 and accompanying text.

17. The higher standard of proof of commission of prior bad acts evidence.

18. See Christopher M. Joseph, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455*, 49 U. KAN. L. REV. 145, 151 (2000) (citing Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 716–17 (1981)).

19. See *id.*

20. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 959 (1933).

has been cited as the source of the bar against character and prior bad acts evidence,²¹ but decisions to that effect had taken hold in American courts as early as 1807²² and the bar ultimately became a staple of American jurisprudence.²³

In *People v. Molineux*, a highly influential decision in 1901, the New York Court of Appeals discussed the bar against prior bad acts evidence and laid out five exceptions under which prior bad acts were admissible.²⁴ The court began by adducing rationales for the general bar against prior bad acts evidence, stating that unlike countries such as France, where the entirety of the accused's life was subject to examination, "it is not permitted to show [the accused's] former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."²⁵ Further, the court reasoned that:

[i]t would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce a conviction for a single one.²⁶

Despite this potential for prejudice, the prohibition on prior bad acts evidence was not absolute.²⁷ After categorizing previous courts' admissions of prior bad acts evidence, Judge Werner, in his majority

21. See *id.*; see also David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1170 (1998).

22. See Leonard, *supra* note 21, at 1171; see also *People v. Molineux*, 61 N.E. 286, 293 (N.Y. 1901) ("The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment . . . aiding the proofs that he is guilty of the crime charged. . . . This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta.").

23. Leonard, *supra* note 21, at 1171–72.

24. *Molineux*, 61 N.E. at 293.

25. *Id.*

26. *Id.* at 294 (citing *Coleman v. People*, 55 N.Y. 81, 90 (1873)).

27. See Randolph N. Jonakait, *People v. Molineux and Other Crime Evidence: One Hundred Years and Counting*, 30 AM. J. CRIM. L. 1, 31 (2002); see also *Molineux*, 61 N.E. at 295–96 (citing *Pierson v. People*, 79 N.Y. 424 (1880); *Coleman v. People*, 58 N.Y. 555 (1874); *Copperman v. People*, 56 N.Y. 591 (1874)).

opinion, identified several exceptions to the prohibition.²⁸ The majority in *Molineux* held that the bar against evidence of prior bad acts did not apply when the evidence helped establish: the defendant's *motive*; his *intent*; that the commission of the charged conduct was deliberate and thereby the *absence of accident or mistake by the defendant*; the defendant's *identity*; or that the defendant had committed prior bad acts as a part of a larger criminal enterprise which included the charged conduct, uniting the charged and uncharged conduct in a *common scheme or plan*.²⁹ Prior bad act evidence was ruled inadmissible unless it served one of these enumerated purposes.³⁰

Judge Parker, concurring in the judgment, but dissenting as to the discussion of prior bad acts evidence, wrote an arguably even more influential opinion in *Molineux*.³¹ Judge Parker eschewed the five exceptions to the general bar against prior bad acts evidence, reasoning that no precedent had suggested that there was a finite set of clearly defined exceptions.³² Instead, Judge Parker argued that the prohibition against prior bad acts evidence focused on preventing the evidence from being offered to prove nothing more than a criminal propensity, and that the evidence should be admissible if it was otherwise relevant to proving the charged crime.³³

While Judge Werner's majority opinion remains good law in New York,³⁴ the Federal Rules of Evidence, adopted in 1975, used Judge Parker's inclusive model of admissibility as the template for Federal Rule of Evidence 404(b), which governs prior bad act admissibility.³⁵

28. See Jonakait, *supra* note 27, at 30.

29. *Molineux*, 61 N.E. at 294.

30. Interestingly, the entirety of Judge Werner's substantial discussion of prior bad acts evidence was dicta, as the appeal was decided on the grounds of improperly admitted hearsay evidence. Junakait, *supra* note 27, at 27.

31. *Molineux*, 61 N.E. at 314 (Parker, J., concurring) ("Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved. . . . [I]t has never been held by any court of responsible authority that the people cannot prove the facts constituting another crime, when those facts also tend to establish that the defendant committed the crime for which he is on trial."); see also Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201 (2005).

32. See *Molineux*, 61 N.E. at 314.

33. *Id.*

34. See, e.g., *People v. Rojas*, 97 N.Y.2d 32 (2001).

35. See Reed, *supra* note 31, at 204–12.

Forty-one states have since adopted the Federal Rules of Evidence with limited modifications.³⁶

B. Modern Jurisprudence and the Bar Against Prior Bad Acts Evidence

1. *Huddleston v. United States*

Since *People v. Molineux*, jurisdictions have gradually evolved and expanded the admissibility of prior bad acts evidence. For example, in the early twentieth century, Ohio required that prior bad acts be proven beyond a reasonable doubt.³⁷ The Ohio Supreme Court overturned that requirement in 1923, thereafter requiring only that the proof of commission be “substantial.”³⁸ The New York Court of Appeals, which had identified five categorical exceptions to the prohibition of prior bad acts evidence in *Molineux*, has similarly expanded admissibility. Additional exceptions to the prohibition against prior bad acts evidence have been identified³⁹ for evidence that establishes the nature of the relationship between the victim and the defendant,⁴⁰ that is inextricably interwoven with the charged conduct,⁴¹ that is necessary to complete a narrative of conduct,⁴² or that is necessary as background information.⁴³

Despite these incremental changes broadening the admission of prior bad acts, however, the nation’s most significant single change resulted from the Supreme Court’s decision in *Huddleston v. United States* in 1988.⁴⁴ Prior to the Court’s decision, the circuits were split on whether Rule 404(b) required trial courts to make a preliminary finding that “the Government has proved the ‘other act’ by a

36. See Reed, *supra* note 31, at 212.

37. See Baxter v. State, 110 N.E. 456, 458 (Ohio 1914).

38. Scott v. State, 141 N.E. 19, 26 (Ohio 1923).

39. See People v. Alvino, 519 N.E.2d 808, 812 (N.Y. 1987).

40. See, e.g., People v. Valath, 867 N.Y.S.2d 186, 187 (App. Div. 2008).

41. See, e.g., People v. Higgins, 784 N.Y.S.2d 232, 235 (App. Div. 2004).

42. See, e.g., People v. Rojas, 760 N.E.2d 1265, 1268 (N.Y. 2001).

43. See, e.g., People v. Sceravino, 598 N.Y.S.2d 296, 297 (App. Div. 1993). A common use of this exception is for evidence of prior conduct that resulted in an order of protection (i.e. a restraining order). This evidence is presented to explain a charge of criminal contempt against the defendant for violating the order. See, e.g., People v. Rock, 882 N.Y.S.2d 907, 907 (App. Div. 2009).

44. 485 U.S. 681 (1988).

preponderance of the evidence before it submits the evidence to the jury.”⁴⁵

Guy Huddleston, the defendant, was charged with selling stolen goods and possessing stolen property, both in interstate commerce.⁴⁶ He was accused of trying to sell a shipment of stolen tapes.⁴⁷ The issue was whether he knew that the tapes were stolen.⁴⁸ The Government sought to introduce evidence of two prior similar incidents in which the defendant sold goods at a drastic markdown.⁴⁹ The Government argued these sales, one of which was of televisions from the same “suspicious” source as the stolen tapes, indicated that the goods in all three sales were stolen.⁵⁰ The Government argued that the other acts, then, were relevant to showing that the defendant had knowledge that the tapes in question were stolen because he had sold similar, presumably stolen, goods in the past.⁵¹ The relevance, and thus admissibility, of the prior sales ultimately turned on whether goods in the prior sales were stolen.

The trial court admitted the evidence of the prior sales, but the Sixth Circuit reversed the conviction, concluding that the Government had the burden to prove that the goods sold in the prior sales were stolen by a clear and convincing standard of evidence.⁵² In a rehearing, the Sixth Circuit concluded that a trial court could admit prior bad act evidence “if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act.”⁵³

The defendant argued to the Court that prior bad acts evidence should be subject to a preliminary fact finding by a trial court pursuant to FRE 104(a), thus requiring that a judge find that the prior bad acts were proven by a standard of proof at least as high as a preponderance of the evidence.⁵⁴ The Court rejected this argument,

45. *Id.* at 682.

46. *Id.*

47. *Id.*

48. *Id.* at 683.

49. *Id.*

50. *Id.* at 686.

51. *Id.*

52. *See* *United States v. Huddleston*, 802 F.2d 874, 877 (6th Cir. 1986).

53. *United States v. Huddleston*, 811 F.2d 974 (6th Cir. 1987) (emphasis omitted) (quoting *United States v. Ebens*, 800 F.2d 1422, 1432 (6th Cir. 1986)) (internal quotation marks omitted).

54. *See* FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”); *Huddleston*, 485 U.S. at 687.

holding that a trial court only needed to screen the evidence pursuant to FRE 104(b).⁵⁵ This determination marked a significant change for prior bad act admissibility.

For background, the Federal Rules of Evidence distinguish between two types of preliminary facts: those determining the competence of evidence and those determining its conditional relevance.⁵⁶ Preliminary facts determining competence receive a preliminary fact-finding by a trial judge under FRE 104(a).⁵⁷ Preliminary facts determining relevance do not receive a preliminary fact-finding by a court, but are submitted to the jury, subject to admission under FRE 104(b).⁵⁸ An example of a preliminary fact that determines, or conditions, the competence of evidence is where a party seeks to offer a hearsay statement pursuant to the excited utterance exception to the bar against hearsay evidence.⁵⁹ In that case, the preliminary fact determining competence is whether the statement was an excited utterance.⁶⁰ Pursuant to FRE 104(a), a judge would perform a preliminary fact-finding and hear the evidence as to whether the speaker of the out of court statement was experiencing nervous excitement. The judge would then determine if the statement was admissible under the excited utterance hearsay exception pursuant to 104(a).⁶¹ An example of a preliminary fact which conditions the relevance of evidence would be where a party seeks to introduce a statement to prove that the intended audience of the statement was put on notice. Naturally, the statement is only relevant if the audience of the statement actually heard it, and thus was put on notice.⁶² Pursuant to 104(b), a judge would allow the statement to be entered into evidence and submitted to the jury if, given all the facts surrounding the statement, a reasonable juror could

55. See FED. R. EVID. 104(b) (“When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”); *Huddleston*, 485 U.S. at 689–90.

56. See FED. R. EVID. 104 advisory committee’s note.

57. See *id.*

58. See *id.*

59. See 1 EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:6 (2012); see also FED. R. EVID. 803(2).

60. See 1 IMWINKELRIED, *supra* note 5, § 2:6.

61. See *id.*

62. See FED. R. EVID. 104(b) advisory committee’s note.

find that the statement was heard by a preponderance of the evidence.⁶³

In *Huddleston*, the Court held that under FRE 104(b), a trial court should examine all of the available information and submit the prior bad acts evidence to the jury if the court concludes that a reasonable juror would be able to find any necessary conditional fact by a preponderance of the evidence (in *Huddleston*, that the prior sales were of stolen goods).⁶⁴ Importantly, a trial court is not to consider the credibility of the evidence when it considers the evidence's admission.⁶⁵

The Court held that a fact-finding pursuant to FRE 104(a) would be inconsistent with the legislative history surrounding FRE 404(b).⁶⁶ The Court cited the House Report which stated that the rule was intended to "plac[e] greater emphasis on admissibility than did the final Court version"⁶⁷ and the Senate Report, which stated that "[t]he use of the word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge."⁶⁸ The Court concluded that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."⁶⁹ Tellingly, the Court acknowledged that admitting the evidence pursuant to FRE 104(b) was prioritizing the admission of evidence with less restriction over its "potential prejudicial effect."⁷⁰ The two goals are not necessarily mutually exclusive,⁷¹ but prior bad acts evidence has consistently been recognized as having a substantial prejudicial risk.⁷²

After citing legislative intent, the Court proceeded to explicitly acknowledge a fear that "unduly prejudicial evidence might be introduced under Rule 404(b),"⁷³ anticipating a criticism of its decision.⁷⁴ The Court, however, rejected that a higher standard of

63. See *Huddleston v. United States*, 485 U.S. 681, 689–90 (1988).

64. See *id.* at 690.

65. See *id.*

66. See *id.* at 688.

67. *Id.* at 688 (citing H.R. REP. NO. 93-650, at 7 (1973)).

68. *Id.* (citing S. REP. NO. 93-1277 at 24 (1974)).

69. *Id.* at 688–89.

70. *Id.* at 688.

71. See discussion *infra* Part III.A.

72. See discussion *infra* Part I.C.2.

73. *Huddleston*, 485 U.S. at 691.

74. See, e.g., *People v. Garner*, 806 P.2d 366, 372 (Colo. 1991).

evidence through a preliminary finding of fact pursuant to FRE 104(a) was necessary to reduce this risk of prejudice. Instead, the Court identified four sources of insulation from prejudice:

[F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . . ; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.⁷⁵

Requiring trial courts only to screen prior bad acts evidence under a minimal standard of proof instead of having them perform a preliminary fact-finding subsequently rippled throughout the states and created a stark contrast with states that continued to apply a higher standard of evidence,⁷⁶ as supported initially by the Sixth Circuit in *United States v. Huddleston*.⁷⁷

Aside from this preliminary fact-finding, jurisdictions rejecting and those adopting *Huddleston* employ functionally similar approaches to prior bad acts admissibility.⁷⁸ Courts inquire as to whether the evidence is being offered for a purpose other than proving a propensity for criminality.⁷⁹ Courts then evaluate whether the evidence is relevant.⁸⁰ Federal courts and jurisdictions that have adopted the Federal Rules of Evidence perform this inquiry pursuant to FRE 402.⁸¹ Finally, courts determine whether the prejudicial risk

75. *Huddleston*, 485 U.S. at 691–92. The first protection refers to the requirement that the evidence not be offered to prove a propensity for criminality, a concern that initially gave rise to the prohibition against prior bad act evidence. For a discussion of the policy rationales underlying the prohibition against prior bad act evidence, see discussion *infra* Part I.C.2.

76. See discussion *infra*, Part I.D.

77. 802 F.2d 874 (6th Cir. 1986).

78. Compare *Huddleston*, 485 U.S. at 691–92, with *State v. Hernandez*, 784 A.2d 1225, 1222 (N.J. 2001) (holding that courts must examine whether the prior bad acts evidence is being offered for a proper purpose and if its probative value outweighs its “apparent prejudice”).

79. See, e.g., *Huddleston*, 485 U.S. at 691; *Hernandez*, 784 A.2d at 1222.

80. See, e.g., *Hernandez*, 784 A.2d at 1222.

81. See, e.g., *Huddleston*, 485 U.S. at 687–88.

of the evidence substantially outweighs its probative value, in which case the evidence would be excluded.⁸²

C. Situating the Bar Against Prior Bad Acts Evidence Among the Rules of Evidence: A Story of Prejudice

1. *Limiting Prejudice Is at the Root of Many Rules of Evidence and Is Effectuated Through Witness Preparation*

FRE 102 states that the goals of the rules of evidence are to aid in ascertaining truth and “securing a just determination.”⁸³ The Rules proscribe a number of forms of evidence as inadmissible, including testimony that is “legally irrelevant information, speculation, opinion and hearsay.”⁸⁴ For obvious reasons, a limiting instruction to the jury that they should disregard testimony they have already heard can only mitigate so much of the prejudice inherent in hearing a witness offer hearsay statements that address a material fact in dispute or speculation as to the ultimate issue of a case.⁸⁵ To limit such prejudicial and inadmissible testimony, attorneys must engage in witness preparation.⁸⁶ To avoid prejudicing the opposing party, attorneys are expected not to elicit inadmissible testimony from their witnesses, whether intentionally or not, and deliberately doing so is expressly unethical.⁸⁷ Avoiding prejudice is the policy rationale for numerous rules of evidence, which in turn is addressed as a preliminary matter by witness preparation. The underlying assumption is that more prejudice is avoided by excluding the evidence through rule and preparation than is inadvertently created by the ensuing witness preparation.

82. See, e.g., *id.* at 688; see also FED. R. EVID. 403.

83. FED. R. EVID. 102.

84. Green, *supra* note 13, at 706 (footnotes omitted).

85. See Edward J. Imwinkelried, “Where There’s Smoke, There’s Fire”: Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?, 42 ST. LOUIS U. L.J. 813, 822–23 (1998). *But see* Bruton v. United States, 391 U.S. 123, 135 (1968) (“Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge’s instructions to disregard such information.”).

86. See discussion *infra* Part II.

87. See Green, *supra* note 13.

2013] *RECONSIDERING PRIOR BAD ACTS* 1507

2. *The Bar Against Prior Bad Acts Evidence: Limiting Prejudice*

A similar desire to minimize undue prejudice underlies the prohibition against prior bad acts evidence.⁸⁸ Unsurprisingly, differing evidentiary philosophies regarding the prejudice caused by prior bad acts evidence is a primary reason that some courts have followed *Huddleston* and others have rejected it.⁸⁹ Therefore, to distinguish the respective courts' decisions, it is important to elucidate the theories of prejudice undergirding the prohibition of prior bad acts evidence generally.

In 1894, the bar against prior bad act evidence was formulated specifically in terms of protecting the defendant from evidence that established nothing more than a propensity to commit crime and that did not address facts in issue. In *Makin v. Attorney-General for New South Wales*, Lord Herschell held,

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew [sic] that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.⁹⁰

American courts had asserted the bar against prior bad acts evidence well before Lord Herschell in *Makin*,⁹¹ but the policy reasoning enunciated in *Makin* succinctly describes the pervasive and highly influential fear of such evidence's prejudicial impact.⁹² The policy concerns of admitting uncharged prior bad acts have since been further elucidated into three general concerns.

First, there is a fear of what has been termed "the danger of overvaluation."⁹³ Justice Jackson described this concern in *Michelson v. United States*:

88. See 1 IMWINKELRIED, *supra* note 59, § 1:3.

89. See generally *Ayagarak v. State*, No. A-8066, 2003 WL 1922623 (Alaska Ct. App. Apr. 23, 2003) (quoting *Makin v. Attorney-Gen. for N.S.W.*, [1894] A.C. 57 (P.C.)).

90. Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances: Relying on the Concept of Relative Frequency to Admit Uncharged Misconduct Evidence*, 7 CRIM. JUST. 16, 16 (1992).

91. See *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901).

92. See, e.g., IMWINKELRIED, *supra* note 59, § 1.2.

93. Thomas J. Leach, "Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction, 68 TENN. L. REV. 825, 828 (2001).

The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.⁹⁴

Specifically, it is the fear that character or uncharged prior bad act evidence would be so effective that the jury would have difficulty discerning between the evidentiary burden for the charged conduct and the defendant's guilt for collateral uncharged misconduct.

Second, there is a fear of what has been termed "the danger of unwarranted punishment."⁹⁵ This has also been termed the "nullification prejudice,"⁹⁶ and refers to the concern that a jury may conclude that the defendant deserves punishment for his character or for his prior uncharged bad acts, and would convict him on that basis, irrespective of the evidence pertaining to the charged conduct.⁹⁷

Third, there is a fear that the evidence will confuse the issues for the jury. Courts fear that the evidence may lead to the "overcomplication of issues" and that "particularly if there is a dispute about whether the defendant committed the other acts, introduction of evidence concerning those acts could be time-consuming and distract the factfinder from the central issues in the case."⁹⁸

In sum, these three policy concerns are different manifestations of potential prejudice to the defendant. There is a base of research indicating that evidence of criminal propensity may be impactful in practice. Perhaps the most famous study of juror deliberations, the Chicago Jury Project, found that "the presumption of innocence operates only for defendants without prior criminal records."⁹⁹ Furthermore,

94. 335 U.S. 469, 475–76 (1948).

95. See Leach, *supra* note 93.

96. Leonard, *supra* note 21, at 1184.

97. See, e.g., *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991) ("Proof of character is excluded not because it has no probative value, but because it sometimes may lead a jury to convict the accused on the ground of bad character deserving punishment irrespective of guilt. In addition, defendants should not be placed in a position of defending against crimes for which they are not charged.").

98. Leonard, *supra* note 21, at 1185–86 (citing Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981)).

99. 1 IMWINKELRIED, *supra* note 59, § 1.2 (citing KALVEN & ZEISEL, *THE AMERICAN JURY* 179 (1966)).

2013] *RECONSIDERING PRIOR BAD ACTS* 1509

[e]vidence of uncharged misconduct strips the defendant of the presumption of innocence. If the judge admits a defendant's uncharged misconduct and the jury thereby learns of the record, the jury will probably use a "different . . . calculus of probabilities" in deciding whether to convict. The uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty.¹⁰⁰

Other studies, however, have suggested that prior bad act evidence is not so damning. In a meta-analysis of mock jury studies, Larry Laudan and Ronald Allen found that the results were "all over the map."¹⁰¹ Some reported studies found that evidence of prior convictions increased conviction rates by upwards of fifty percent, while others found that "inadmissible priors evidence was utilized by mock jurors only when it was favorable to defendants," and that after deliberation, there was no difference in conviction rates based upon exposure to prior bad act evidence.¹⁰²

Studies of real trials, instead, consistently found that defendants with prior convictions were more likely to be convicted at trial.¹⁰³ These results persisted, however, even when jurors *were not told* about the defendant's prior bad acts.¹⁰⁴

Despite the mixed empirical findings, legal scholars and jurists have rearticulated the three aforementioned policy reasons while selectively highlighting studies to assert that there is a prevailing prejudice inherent to prior bad acts evidence.¹⁰⁵

Nonetheless, requiring a preliminary finding of fact by a judge at a level at least as high as a preponderance of the evidence for the

100. *Id.* § 1.2 nn.11–13 (citing KALVEN & ZEISEL, *THE AMERICAN JURY* 179 (1966); Thomas J. Pickett, *Admissibility of Evidence as to Separate and Distinct Crimes*, 18 NEB. L. BULL. 336 (1939); and *People v. Smallwood*, 722 P.2d 197, 205 (Cal. 1986) ("the most prejudicial evidence imaginable against an accused")).

101. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 500 (2011).

102. *Id.*

103. *See id.* at 503.

104. *See id.*

105. *See, e.g.*, *People v. Allen*, 420 N.W. 499, 508–10 (Mich. 1988); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68, 80 (1984) (colorfully comparing criminals to leopards in the minds of jurors in that neither are expected to change their spots); Edward Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 47–48 (1990); Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221, 224–25 nn.32–35 (1998).

admissibility of prior bad acts evidence ultimately creates a need for witness preparation similar to that created by other rules of evidence.¹⁰⁶ While, for example, hearsay, speculation, and opinion rules of evidence require witness preparation to purge those lines from prospective witness testimony, a preliminary showing of fact requires witnesses to recall and offer prior bad act testimony with such detail and specificity that it satisfies the pertinent standard of evidence.¹⁰⁷

D. Courts Divided Along Fears of Undue Prejudice: *Huddleston* Leniency Versus Higher Standards

The division between courts about what standard to apply to the admission of prior bad acts evidence largely corresponds to how concerned courts are about its prejudicial value and whether they view a higher standard of evidence of the act's commission as an effective prophylactic.¹⁰⁸

Federal courts, naturally, follow *Huddleston*, but states are divided on which model to follow. A number of states have chosen to follow *Huddleston*, including Alaska,¹⁰⁹ Alabama,¹¹⁰ California,¹¹¹ Connecticut,¹¹² Georgia,¹¹³ Idaho,¹¹⁴ Kentucky,¹¹⁵ Indiana,¹¹⁶ Louisiana,¹¹⁷ Maine,¹¹⁸ Massachusetts,¹¹⁹ Michigan,¹²⁰ Mississippi,¹²¹

106. See *supra* notes 86–90 and accompanying text.

107. See discussion *infra* Part II.E for further treatment of the incentives for greater witness preparation through a need for detailed testimony created by higher standards of evidence for prior bad act admissibility.

108. See Imwinkelried, *supra* note 85, at 831–36.

109. See *Ayagarak v. State*, No. A-8066, 2003 WL 1922623, at *5 (Alaska Ct. App. Apr. 23, 2003).

110. See *Ex parte Hinton*, 548 So. 2d 562, 567 (Ala. 1989).

111. See *People v. Virgil*, 253 P.3d 553, 593 (Cal. 2011).

112. See *State v. Aaron L.*, 865 A.2d 1135, 1151 (Conn. 2005) (“We find the United States Supreme Court’s reasoning persuasive. Much like the Federal Rules of Evidence, under our Code of Evidence, the protection against unfair prejudice emanates not from a requirement of a preliminary finding of fact by the trial court, but from four other sources.”); see also *State v. Holly*, 941 A.2d 372, 377 (Conn. App. Ct. 2008) (holding that the jury must reasonably be able “to find that the defendant in fact had committed the uncharged act”).

113. See *Freeman v. State*, 486 S.E.2d 348, 351 (Ga. 1997).

114. See *State v. Kay*, 927 P.2d 897, 905 (Idaho Ct. App. 1996) (“[W]e find the Supreme Court’s analysis in *Huddleston* to be persuasive.”).

115. See *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997).

116. See *Hicks v. State*, 690 N.E.2d 215, 220–21 (Ind. 1997).

117. See *State v. Barnes*, 2011-1421, pp.15–16 (La. App. 4 Cir. 9/19/12); 100 So. 3d 926, 936 (“The burden of proof in a pretrial hearing held in accordance with *State v.*

2013] *RECONSIDERING PRIOR BAD ACTS* 1511

North Carolina,¹²² South Dakota,¹²³ Vermont,¹²⁴ Virginia,¹²⁵ Wisconsin,¹²⁶ and Wyoming.¹²⁷ Often the rationale is agreement with the Supreme Court's reasoning or a desire for uniformity with the Federal Rules of Evidence.¹²⁸

States that maintain preliminary fact-finding by a judge for prior bad acts evidence generally do so for one of two reasons: they follow pre-*Huddleston* precedent and have not expressly chosen whether to follow *Huddleston*; or, they have expressly rejected *Huddleston*, either by statute or decision.¹²⁹ Texas requires that the prior bad acts be provable beyond a reasonable doubt.¹³⁰ A number of states require a preliminary showing that the defendant committed the uncharged conduct by clear and convincing evidence, including

Prieur, 277 So. 2d 126 (La. 1973), shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." (citing LA. CODE EVID. ANN. Art. 1104)).

118. *See* *State v. Dean*, 589 A.2d 929, 933 n.5 (Me. 1991) (holding that even though the defendant had been acquitted of a prior crime, previously charged conduct could still be submitted to the jury as a prior bad act in part because the standard for prior bad acts admissibility is only that a reasonable jury be able to find that the act was committed by the defendant by a preponderance of the evidence).

119. *See* *Commonwealth v. Rosenthal*, 732 N.E. 278, 280–81 (Mass. 2000).

120. *See* *People v. VanderVliet*, 508 N.W.2d 114, 126 (Mich. 1993), *amended by* 520 N.W.2d 338 (Mich. 1994).

121. *See* *Lester v. State*, 692 So. 2d 755, 779 (Miss. 1997) (“[S]ufficient evidence must be shown, not necessarily by a preponderance of the evidence, for the jury to determine that the defendant actually committed the prior acts.”), *overruled on other grounds by* *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

122. *See* *State v. Stager*, 406 S.E.2d 876, 890 (N.C. 1991) (“[W]e find the reasoning of *Huddleston* compelling.”).

123. *See* *State v. Barber*, 552 N.W.2d 817, 822 (S.D. 1996) (“This Court has previously rejected the notion that bad acts testimony must meet any standards of credibility before it may be admitted into evidence.”).

124. *See* *State v. Robinson*, 611 A.2d 852, 854 (Vt. 1992), *abrogated on other grounds as stated in* *State v. Carter*, 674 A.2d 1258 (Vt. 1996).

125. *See* *Pavlick v. Commonwealth*, 497 S.E.2d 920, 924–25 (Va. Ct. App. 1998).

126. *See* *State v. Gray*, 590 N.W.2d 918, 930 (Wis. 1999).

127. *See* *Vigil v. State*, 926 P.2d 351, 355 (Wyo. 1996).

128. *See, e.g.,* *State v. Aaron L.*, 865 A.2d 1135, 1151 (Conn. 2005); *State v. Schindler*, 429 N.W.2d 110, 113 (Wis. Ct. App. 1988), *holding mod. by* *State v. Lee*, 499 N.W.2d 250 (Wis. Ct. App. 1993).

129. *See* *Ayagarak v. State*, No. A-8066, 2003 WL 1922623, at *5 (Alaska Ct. App. Apr. 23, 2003); *supra* notes 133–55.

130. *See* *Harrell v. State*, 884 S.W.2d 154, 160–61 (Tex. Crim. App. 1994) (“[T]rial court must, under rule 104(b), make an initial determination . . . that jury could reasonably find beyond reasonable doubt that defendant committed extraneous offense.”).

Arizona,¹³¹ Delaware,¹³² the District of Columbia,¹³³ Florida,¹³⁴ Iowa,¹³⁵ Maryland,¹³⁶ Nevada,¹³⁷ New Hampshire,¹³⁸ New Jersey,¹³⁹ New York,¹⁴⁰ North Dakota,¹⁴¹ Oklahoma,¹⁴² South Carolina,¹⁴³ and Tennessee.¹⁴⁴

Minnesota and Nebraska both implemented a clear and convincing standard through statute.¹⁴⁵ A few states require that the prior bad acts be proven by a preponderance of the evidence, including Colorado,¹⁴⁶ Illinois,¹⁴⁷ West Virginia,¹⁴⁸ and Washington.¹⁴⁹

Because this Note is focused on the admission of prior bad acts evidence that a witness cannot fully recall, it is focused on how

131. See *State v. Terrazas*, 944 P.2d 1194, 1196 (Ariz. 1997).

132. See *Getz v. State*, 538 A.2d 726, 734 (Del. 1988) (“The other crimes must be proved by evidence which is ‘plain, clear and conclusive.’” (quoting *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974))).

133. See *Johnson v. United States*, 683 A.2d 1087, 1100 n.18, 1101 (D.C. 1996).

134. See *Phillips v. State*, 591 So. 2d 987, 989 (Fla. Dist. Ct. App. 1991).

135. See *State v. Howell*, 557 N.W.2d 908, 911 (Iowa Ct. App. 1996) (requiring “clear proof”).

136. See *Harris v. State*, 597 A.2d 956, 960 (Md. 1991).

137. See *Winiarz v. State*, 820 P.2d 1317, 1321 (Nev. 1991) (“Before evidence of prior bad acts may be admitted, there must be clear and convincing evidence that such acts actually occurred.”).

138. See *State v. Michaud*, 610 A.2d 354, 356 (N.H. 1992) (requiring “clear proof that the defendant committed the prior offense”).

139. See *State v. Hernandez*, 734 A.2d 1225, 1235 (N.J. 2001).

140. See *People v. Robinson*, 503 N.E.2d 485, 487 (N.Y. 1986) (“other crime evidence” must be “established by clear and convincing evidence” when it is used to prove the *Molineux* exception of identity through a defendant’s distinctive modus operandi).

141. See *State v. Schmeets*, 2009 ND 163, ¶15, 772 N.W.2d 623, 629.

142. See *Welch v. State*, 2000 OK Crim. App. 8, ¶8, 2 P.3d 356, 365.

143. See *State v. Smith*, 387 S.E.2d 245, 247 (S.C. 1989).

144. See *State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996).

145. See *State v. Wilson*, 556 N.W.2d 643, 652–53 (Neb. Ct. App. 1996); *Ture v. State*, 353 N.W.2d 518, 521 (Minn. 1984).

146. See *People v. Garner*, 806 P.2d 366, 372 n.4 (Colo. 1991) (“Given the clearly recognized potential for prejudice inherent in other-crime evidence, it seems more reasonable to us . . . to require the trial court to be satisfied by a preponderance of the evidence of the conditionally relevant facts . . . and not merely to determine whether the jury ‘could reasonably find’ the conditionally relevant facts by a preponderance of the evidence.” (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988))).

147. See *People v. Oaks*, 662 N.E.2d 1328, 1348 (Ill. 1996), *abrogated on other grounds in In re G.O.*, 727 N.E.2d 1003 (Ill. 2000) (requiring “more than a mere suspicion”).

148. See *State v. McGinnis*, 455 S.E.2d 516, 526–28 (W. Va. 1994).

149. See *State v. Hartzell*, 237 P.3d 928, 935 (Wash. Ct. App. 2010).

different standards of proof affect the admission of evidence based, in part, on the credibility of the witness and evidence. It is therefore important to note that some jurisdictions that have rejected *Huddleston*, such as Texas and South Carolina, nonetheless exclude the credibility of prior bad acts testimony from the trial judge's evaluation of the sufficiency of the evidence, just as in *Huddleston*.¹⁵⁰ Meanwhile, others, such as Nebraska and West Virginia, reserve credibility for the trial judge under the higher standard of proof.¹⁵¹ For example, while New Jersey and Delaware both require that a trial court find that the prior bad acts evidence be shown by clear and convincing evidence,¹⁵² a New Jersey court may consider the credibility of the witness alleging the prior bad acts evidence in making that preliminary determination, but a Delaware court may not.¹⁵³

Courts that have rejected *Huddleston* often cite concerns for prejudicing the defendant by admitting prior bad acts evidence. In an en banc decision, the Arizona Supreme Court supported its rejection of *Huddleston*'s use of 104(b) in lieu of a preliminary finding of clear and convincing evidence of commission by reasoning that

[prior bad acts] evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge. . . . Because of the high probability of prejudice from the admission of prior bad acts, the court must ensure that the evidence against the defendant

150. See *Huddleston*, 485 U.S. at 690; *State v. Wilson*, 545 S.E.2d 827, 830 (S.C. 2001) (holding that credibility of prior bad acts testimony "was an issue for the jury's consideration"); *Gonzales v. State*, 929 S.W.2d 546, 551 (Tex. App. 1996) ("The conditional fact at issue in this case was whether Gunnlaugsson made the racially defamatory statement attributed to him by Taylor. . . . To the extent that the court made its own determination of Taylor's credibility rather than leaving that determination to the jury, it exceeded the scope of its discretion under rule 104(b).").

151. See *State v. Floyd*, 763 N.W.2d 91, 98 (Neb. 2009) (affirming trial court's admission of prior bad acts evidence where trial court considered witness's credibility); *McGinnis*, 455 S.E.2d at 527 n.16 (holding that the trial court should weigh the credibility of prior bad acts evidence) (quoting *Daniels v. United States*, 613 A.2d 342, 347 (D.C. App. 1992)).

152. See *supra* notes 132, 139 and accompanying text.

153. Compare *State v. Dennis*, Nos. A-1055-07, A-3147-07, 2011 WL 709721, at *11 (N.J. Super. Ct. App. Div. Mar. 2, 2011) (affirming the admission of prior bad acts testimony where the trial court determined that the witness who offered it was sufficiently credible to satisfy the clear and convincing evidence standard), with *Monroe v. State*, 28 A.3d 418, 427-28 (Del. 2011) ("[S]worn testimony [of prior bad acts] constitutes clear and convincing evidence for purposes of admissibility, with credibility to be decided by the trier of fact.").

directly establishes “that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon ‘highly circumstantial inferences.’” . . . To allow a lesser standard in a criminal case is to open *too large a possibility of prejudice*.¹⁵⁴

Ultimately, the Arizona Supreme Court’s decision was based upon a fear of prejudice to the defendant, and the higher standard was treated as a way to insulate against prejudice. Similarly, the New Jersey Supreme Court reasoned that the clear and convincing standard “is a necessary component of the fortification against the possibility of unfair prejudice when a court determines whether relevant other-crime evidence should be admitted in the trial of an accused.”¹⁵⁵

Colorado and West Virginia both adopted a preponderance of the evidence standard for the admission of prior bad acts evidence, but rejected *Huddleston* in doing so.¹⁵⁶ In an en banc decision, the Colorado Supreme Court reasoned that using FRE 104(b) was likely to create undue prejudice for the defendant.¹⁵⁷ The court held that the problem with such a standard was that “regardless of the jury’s ultimate determination of the conditional fact, the jury might well convict the defendant not on the basis of the strength of the prosecution’s case but because the defendant is a person of bad character.”¹⁵⁸ In other words, if the jury were given the evidence, it might be prejudiced *even if* it did not find the conditional fact that the defendant was responsible for the prior bad acts. West Virginia’s Supreme Court echoed these concerns, holding that

[t]o expose the jury to Rule 404(b) evidence before the trial court has determined by a preponderance of the evidence that the acts were committed and that the defendant committed them would in our view subject the defendant to an unfair risk of conviction *regardless of the jury’s ultimate determination of these facts*.¹⁵⁹

“These facts” refer to the conditional facts that the defendant was the perpetrator of the prior bad acts offered into evidence. These courts,

154. *State v. Terrazas*, 944 P.2d 1194, 1198 (Ariz. 1997) (en banc) (emphasis added) (quoting Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(B): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 457 (1993)).

155. *State v. Hernandez*, 784 A.2d 1225, 1235 (N.J. 2001).

156. *People v. Garner*, 806 P.2d 366, 372 n.4 (Colo. 1991) (en banc); *McGinnis*, 455 S.E.2d at 526–27.

157. *Garner*, 806 P.2d at 372.

158. *Id.*

159. *State v. McGinnis*, 455 S.E.2d 516, 527 (W. Va. 1994) (emphasis added).

in rejecting *Huddleston*, do not explain how a juror may actually be influenced by prior bad acts that the juror does not believe a defendant committed due to a lack of proof of commission. Their criticisms of *Huddleston* have been challenged as relying on incomplete and flawed reasoning and for being conclusory.¹⁶⁰

In addition to the arguments offered by courts that have rejected *Huddleston*,¹⁶¹ there are other circumstances in which a *Huddleston* standard may result in greater prejudice against the defendant.¹⁶² A defendant may be especially prejudiced by prior bad acts evidence under *Huddleston*'s minimal standard of proof when the prior bad acts are being offered with little proof but through a chorus of multiple witnesses.¹⁶³ Even though a jury may be instructed that it should not consider prior bad acts evidence unless the prior bad acts have been proven by a preponderance of the evidence,¹⁶⁴ jurors "would naturally be inclined to ascribe significance to the fact of multiple accusations even if they find the foundational testimony inadequate to prove up the accusations."¹⁶⁵ The defendant would be unable to disprove accusations that were untrue and could not be proven, but were nonetheless credible in the eyes of the jury purely due to quantity.

E. Higher Standards of Proof of Commission Require Greater Amounts of Detail by Witnesses

Under *Huddleston*, the bar for the admissibility of prior bad acts evidence is low with regards to proof of commission; the evidence is evaluated by the jury pursuant to FRE 104(b), and the trial judge intervenes only to screen the prior bad acts if, given all of the available evidence, proof of commission does not clear a "minimal standard of proof."¹⁶⁶ As a result, in jurisdictions that have adopted *Huddleston*, even vague or unparticularized prior bad acts may be offered as testimony and may be admissible if they are offered for a non-propensity reason and if their prejudicial value does not

160. See Imwinkelried, *supra* note 85, at 832–36.

161. See, e.g., *State v. Terrazas*, 944 P.2d 1194, 1196 (Ariz. 1997); *Garner*, 806 P.2d at 372; *McGinnis*, 455 S.E.2d at 527.

162. See generally Imwinkelried, *supra* note 85.

163. See *id.* at 843–44.

164. See 2 IMWINKELRIED, *supra* note 59, § 9:64.

165. Imwinkelried, *supra* note 85, at 844.

166. See *Huddleston v. United States*, 485 U.S. 681, 690 (1988). For a discussion of prior bad act admissibility under 104(b) see *supra* Part I.B.1.

substantially outweigh their probative value.¹⁶⁷ The trial court does not even consider the credibility of the witnesses offering the evidence.¹⁶⁸ A witness, therefore, can testify to the incompleteness of his or her memory as to prior bad acts without suffering any evidentiary consequence. A lack of detail is not fatal, and can be explored on cross-examination by the defendant.

For courts that do not follow *Huddleston* and apply a higher standard of proof, however, prior bad acts evidence is scrutinized more closely, and the details or specificity a witness provides can bear on whether the testimony is deemed admissible.¹⁶⁹ For example, the clarity and certainty of a witness's testimony may have a bearing on its admissibility.¹⁷⁰ Vague, circumstantial evidence of prior bad acts has been found to be insufficient under a jurisdiction's clear and convincing standard of proof.¹⁷¹ Uncorroborated testimony of prior crimes can be insufficient, and render the allegations inadmissible, where "there are no details about the circumstances" of the prior bad acts.¹⁷²

167. See, e.g., *State v. Burdick*, No. 2008-158, 2009 WL 428058, at *4 (Vt. Feb. 4, 2009) (holding that the victim could testify to vague, unparticularized prior bad acts by the defendant under *Huddleston* "without a preliminary finding by the trial court that the act actually occurred" and that credibility was reserved for the jury to decide); *Griswold v. State*, 994 P.2d 920, 926 (Wyo. 1999) (another jurisdiction which adopted *Huddleston* held that the allegations made by former foster children with failing memories of sexual misconduct did not need to be proven by the prosecutor under FRE 404(b) to be admissible).

168. *Huddleston*, 485 U.S. at 690 ("[T]he trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.").

169. See *supra* notes 133–56 and accompanying text.

170. See, e.g., *State v. Oates*, 611 N.W.2d 580, 585 (Minn. Ct. App. 2000) (affirming the admission of uncorroborated prior bad acts testimony where the witness "provided clear and unequivocal testimony").

171. See, e.g., *State v. Anthony*, 189 P.3d 366, 371–72 (Ariz. 2008) ("The trial court concluded that there was 'circumstantial evidence that something sexual happened' and that there was a possible 'inference to be drawn' of 'untoward' activity. The appropriate question . . . however, is whether there was clear and convincing evidence."). Compare *State v. Dean*, 589 A.2d 929, 933 n.5 (Me. 1991) (a jurisdiction that has adopted *Huddleston* allowing prior bad acts evidence even where the defendant had been acquitted of the conduct), with *Kimberly v. State*, 757 P.2d 1326, 1328 (Nev. 1988) (a jurisdiction requiring clear and convincing evidence rejecting prior bad acts evidence after considering that there were circumstances that detracted from its reliability and that the grand jury had declined to indict the defendant for those acts). But see *State v. D.K.*, No. A-3688-06T2, 2008 WL 3539935, at *5 (N.J. Super. Ct. App. Div. Aug. 15, 2008) (holding that a victim of child molestation's testimony as to uncharged incidents of sexual assault, while "somewhat vague and uncorroborated," was sufficient under a clear and convincing evidence standard).

172. *State v. Timmerman*, 480 N.W.2d 411, 420 (Neb. 1992).

2013] *RECONSIDERING PRIOR BAD ACTS* 1517

Another illustrative example of the role of detail in establishing credibility is in the context of probable cause for a search warrant based on information provided by an informant. When determining if probable cause exists, courts evaluate the details an informant offers in determining the informant's credibility.¹⁷³ The detail a witness can provide thereby correlates to the witness's credibility. Although under *Huddleston* the required showing of proof of commission is "minimal" and courts are not to consider the credibility of the witnesses,¹⁷⁴ courts are more demanding in jurisdictions that require higher standards of proof.

II. THE RISK OF FALSE MEMORIES AND MISINFORMATION

In order to elicit detailed witness testimony, attorneys interview their witnesses to determine the boundaries of their witnesses' recollections and prepare their witnesses to testify effectively. The more detail that an attorney seeks to elicit, the more questions the attorney is likely to ask the witness. This Part begins by discussing the role of witness interviewing and preparation in the trial process. The ethics of witness interviewing and preparation are discussed, distinguishing between prosecutors and other attorneys. Part II.B then explores how various types of questions attorneys ask prospective witnesses during interviews and preparation can alter witnesses' memories of events and introduce prejudicial false testimony.

A. Witness Preparation: Foundation of Trial Preparation and Potential Source of Falsehood

1. *Witness Preparation Is Fundamental to Litigation*

Witness preparation is a standard, ubiquitous, and foundational aspect of litigation.¹⁷⁵ Courts themselves have recognized its role: the North Carolina Supreme Court has stated that "[i]t is not improper for an attorney to prepare his witness for trial, to explain the

173. See e.g., *People v. DiFalco*, 610 N.E.2d 352, 355 (N.Y. 1993); *People v. Hicks*, 378 N.Y.S.2d 660, 663 (App. Div. 1975); *Rohda v. State*, 2006 WY 120, ¶8, 142 P.3d 1155, 1160.

174. *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

175. John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 278–79 (1989) ("American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy.").

applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can."¹⁷⁶ The West Virginia Supreme Court has even held that "an attorney has an ethical duty to prepare a witness" for testimony.¹⁷⁷

Witness preparation can serve many purposes such as: gathering facts both about an incident and the witness's recollection; rehearsing the witness's testimony; refreshing the witness's memory as to prior statements;¹⁷⁸ and even discussing the testimony of other witnesses and offering the witness an opportunity to reconsider his testimony given that information.¹⁷⁹ The benefits to giving witnesses the content of another witness's statements is to give the witness the chance to reevaluate their own level of certainty and to prevent them from becoming flustered at trial by contrary statements or documents presented by other witnesses.¹⁸⁰

In addition, attorneys are expected to prepare witnesses to testify at trial so as to avoid any violations of the rules of evidence by eliminating potentially prejudicial and impermissible statements, such as hearsay, speculation, or opinion testimony.¹⁸¹

176. Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 140–41 (1999) (quoting *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979)).

177. *State ex rel. Means v. King*, 520 S.E.2d 875, 882 (W. Va. 1999).

178. Prosecutors, however, are actively disincentivized from recording any witness statements because any statements they record must be turned over to the defense. See Gershman, *supra* note 2, at 851–53; see also 18 U.S.C. § 3500(e) (2012) (requiring the disclosure of witness statements that (1) were signed or adopted by the witness, (2) contain a substantially verbatim recital of any oral statement made by the witness and recorded contemporaneously with the making of such statement, or (3) contain any statement made by the witness to a grand jury); *People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961), *codified at* N.Y. CRIM. PROC. LAW § 240.45 (McKinney 2013) (requiring disclosure of any recorded statement by a witness which pertains to the subject matter of the witness's testimony).

179. See Richard Alcorn, "Aren't You Really Telling Me . . . ?": *Ethics and Preparing Witness Testimony*, ARIZ. ATT'Y, Mar. 2008, at 17–18. See generally Applegate, *supra* note 175.

180. See Applegate, *supra* note 175, at 304–05.

181. See Gershman, *supra* note 2 at 857; Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 1–2 (1995); see also discussion *supra* Part I.C.1.

2. *The Ethics of Witness Preparation*

Attorneys are expected to uphold certain basic ethical behaviors when interviewing, preparing and questioning witnesses. Nearly all of the states have adopted some form of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") or other similar rules of conduct.¹⁸² Most of the states that have not done so had adopted rules of conduct before the promulgation of the Model Rules, and these states recognize standards of conduct for witness preparation and testimony that are largely similar to the Model Rules.¹⁸³ The Model Rules prohibit attorneys from offering "evidence the lawyer knows to be false."¹⁸⁴ Further, a lawyer shall not "assist a witness to testify falsely,"¹⁸⁵ "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,"¹⁸⁶ or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."¹⁸⁷

Professor Charles Wolfram has argued that advising "a witness about the law or about desired testimony before seeking the witness'[s] own version of events comes dangerously near subornation of perjury."¹⁸⁸ By that measure, telling a witness what testimony would be useful and then asking the witness about what they recall with seeming interest more in such testimony over the truth only pushes up against the farthest bounds of ethical conduct. Even though "historically the cases demonstrate that only the most egregious professional conduct violations have been disciplined, dicta

182. See Salmi, *supra* note 176, at 138.

183. *Id.* at n.12.

184. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011) ("(a) A lawyer shall not knowingly . . . (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.")

185. *Id.* R. 3.4 ("A lawyer shall not: . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law . . .").

186. *Id.* R. 1.29(d).

187. *Id.* R. 8.4(c).

188. See Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961, 967 n.10 (2003) (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.4.3 (1986)).

from some opinions suggest that the standard to which attorneys may be held is actually much higher.”¹⁸⁹

Nonetheless, for the hypothetical prosecutor from the introduction, in a jurisdiction that has rejected *Huddleston*, there is an incentive to keep asking questions of the complainant to elicit extra details until the complainant’s memory is exhausted,¹⁹⁰ and continued questioning is squarely within the ethical responsibilities of a prosecutor, and may even be paradigmatic zealous advocacy.¹⁹¹ Given the responsibilities of prosecutors as truth-seekers, in trials where the consequences are the forfeiture of a defendant’s freedom, it is of paramount importance to appreciate whether and how such questions, while ethical, may nevertheless be prejudicial to the administration of justice through unintentionally distorting the memories of witnesses.

B. Risks of Witness Preparation in Creating False Testimony

1. *Analysis from Legal Scholarship: The Risks of Even Careful Witness Preparation*

Despite the significant role of witness preparation in litigation, it presents many opportunities for the introduction of falsehood into the record.¹⁹² Attorneys and legal scholars have promulgated a number of analyses on the ways in which an attorney could deliberately or unintentionally, and with the best of intentions, play a role in a witness forming false memories or memory distortions. These analyses integrate research from social psychology, personal experiences, and “intuitive and impressionistic” conclusions.¹⁹³

The deliberate and thereby unethical methods through which attorneys can elicit false or manipulated testimony from witnesses are well-documented.¹⁹⁴ An attorney might tell a witness that particular testimony would be necessary or helpful despite knowing that it would be false. The attorney might then ask that witness about what

189. Joseph D. Piorkowski, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching”*, 1 GEO. J. LEGAL ETHICS 389, 395 (1987).

190. See *supra* notes 171–75 and accompanying text.

191. See Applegate, *supra* note 175, at 286–87.

192. See generally Applegate, *supra* note 175, Gershman, *supra* note 2; Salmi, *supra* note 176.

193. Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1092 n.18 (1975); see also Gershman, *supra* note 2; Salmi, *supra* note 175.

194. See, e.g., Wydick, *supra* note 181.

2013] *RECONSIDERING PRIOR BAD ACTS* 1521

the witness knew, expecting the witness's answer to be in conformity with what the attorney wanted to hear.¹⁹⁵ Knowingly eliciting such false testimony is both unlawful and unethical.¹⁹⁶ Of course, an attorney could more subtly achieve the same ends, without risking the same ethical and legal sanction. An oft-cited example is “the Lecture scene” in the film and book *Anatomy of a Murder*.¹⁹⁷ In this scene, an attorney is defending a client accused of murdering his wife's lover. When the defendant offers an undesirable fact, his attorney stops the interview and provides a detailed lecture on the laws of homicide and its possible defenses, until the defendant understands that he can only prevail with an insanity defense.¹⁹⁸ At that point, the client describes his state of mind at the time of the murder so as to support an insanity defense.¹⁹⁹

Returning to the case of the prosecutor and complainant from the opening passage of this Note, there are a number of ways in which the prosecutor might elicit false testimony from the complainant while believing he is helping ensure justice and secure her an order of protection. After the complainant made it clear that she could not remember details about any prior incidents with her ex-boyfriend, the prosecutor could have stopped the complainant and begun his own “Lecture scene.” He could have explained that their jurisdiction required a certain minimum amount of proof for the admissibility of prior bad acts, and then he could have provided the types of details for hypothetical bad acts which he was confident would satisfy any clear and convincing standard of admissibility. Indeed, having a witness testify to details about an event he or she cannot remember is no more ethical than having a witness change his or her recollection of one that did. Such a prosecutor is not the intended focus of this Note, however. An attorney, civil or criminal, that is willing to elicit false testimony or suborn perjury to increase the likelihood of the admission of prior bad acts, or any other evidence, is best targeted criminally and through ethical sanction, and not through a reconsideration of rules of evidence.²⁰⁰

195. *See id.* at 19. Richard Wydick has called “knowingly and overtly inducing” a witness to testify falsely “Grade One witness coaching.” *Id.*

196. *Id.* at 18.

197. *See id.* at 25.

198. ROBERT TRAVER, *ANATOMY OF A MURDER* 32 (1958); *see also* Applegate, *supra* note 175, at 302; Wydick, *supra* note 181, at 25–26.

199. *See* TRAVER, *supra* note 198, at 46–49.

200. *See generally* Wydick, *supra* note 181, at 52.

More troubling are the ways in which an attorney can unintentionally and unknowingly change a witness's testimony or recollection through witness preparation, thereby creating prejudice. At the highest level, findings by psychologists suggest that the very act of interviewing can produce "distorted and inaccurate testimony."²⁰¹

Another less sweeping concern is the unconscious impact an attorney can have on a witness through the dynamics of respect, power, and an innocuous desire to please. Because "[p]arties can hardly be expected to interview the potential witnesses in relatively detached ways . . . the future witness is likely to try to adapt himself to expectations mirrored" in the attorney.²⁰² As a result, "gaps in [a witness's] memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions."²⁰³ This mirroring can occur absent any partisan signaling from the attorney.²⁰⁴ In a review of witness preparation's common and best practices, John Applegate summarized his findings that "[e]ven without partisan motivations, people commonly try to please their audience. Thus, the witness will try to please the lawyer during witness preparation, who in turn will further encourage and reinforce the helpful tendencies in the witness's story."²⁰⁵

The prejudicial threat of such a dynamic is immediately apparent, and is particularly alarming for prosecutors. While civil attorneys are expected ethically and professionally to prepare their witnesses in developing testimony, including down to the point of word selection (in the interests of clarity and not substantive change),²⁰⁶ prosecutors are first and foremost seekers of justice and truth.²⁰⁷ Yet by simply having read a case file and formed an opinion about the case or about the culpability of the defendant, the prosecutor may impact a witness with his "one-sided attitude."²⁰⁸ For our hypothetical prosecutor and

201. J. Alexander Tanford, *The Ethics of Evidence*, 25 AM. J. TRIAL ADVOC. 487, 537 (2002).

202. Damaska, *supra* note 193, at 1094.

203. *Id.*

204. *Id.*

205. Applegate, *supra* note 175, at 332.

206. *See* Tanford, *supra* note 201, at 540–41.

207. *See* Gershman, *supra* note 2, at 851.

208. Damaska, *supra* note 193, at 1094.

complainant, the implications of this possibility are real and immediate. By believing his complainant and believing in the guilt and menacing history of the defendant, perhaps in part by having seen the defendant's criminal history, the prosecutor's earnest attempts to probe the boundaries of the complainant's memory may convey his confidence in the defendant's guilt. This could result in the complainant "unconsciously" filling out "gaps" in her memory, creating details where there were none.²⁰⁹ Prejudice against the defendant is created when the complainant testifies and she becomes certain that "these additions to memory" are her own recollection.²¹⁰ When a witness develops confidence in such false memories, it has been called "memory hardening," and is a well-recognized dynamic.²¹¹

Leading questions asked during witness preparation may also result in inaccurate testimony and prejudice. In an attorney-client, and especially a prosecutor-witness relationship, where the entire authority of the government hangs overhead, the attorney is unlikely to be challenged by the witness in how he frames questions. As a result, any leading questions he asks can be exceptionally impactful. The threat presented by leading questions is most pronounced and well-recognized for child witnesses.²¹² Even though adults have a "greater capacity to fight off such questions,"²¹³ they are still susceptible to having their recollections affected by such questions,²¹⁴ and "their hostility to them can itself lead to [memory] distortion."²¹⁵ Furthermore, questions do not have to be expressly leading to have an impact on a witness's memory. A question's "form and context" can bias memories and can be functionally leading all the same: "The very syntax of our language carries suggestion as to how events happen, including implications as to how one thing causes another."²¹⁶ Influencing witnesses through language can even "be brought about

209. *Id.*

210. *Id.*

211. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 59–60 (1987); Wydick, *supra* note 181, at 10–11.

212. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 826 (1990) (affirming the reversal of a conviction for sexual crimes and holding that the victim's allegations of abuse were based on suggestive and leading questioning by an interrogator).

213. Paul C. Wohlmut, *Jurisprudence and Memory Research*, 8 J. CONTEMP. LEGAL ISSUES 249, 255 (1997).

214. *See generally* Elizabeth Loftus, *Leading Questions and the Eyewitness Report*, 7 J. COGNITIVE PSYCHOL. 550 (1975).

215. Wohlmut, *supra* note 213, at 255.

216. *Id.*

without conscious design. . . . Thus, suggestibility and other distortion is an interactive phenomenon staged by the routine configuring of the question and answer process.”²¹⁷

Finally, offering witnesses access to the testimony of other witnesses or other evidence is a recognized practice in witness preparation.²¹⁸ As a general practice, the legal benefits of providing witnesses with this information during preparation have been discussed previously.²¹⁹ Nonetheless, there is a risk of creating false memories because “[w]hen memories are vague, people fill in the gaps with what they believe to be true or what they infer to be true. In short, the process of piecing together the past can often be highly prone to distortion.”²²⁰

2. *Psychological Research on Memory and Witnesses: Reason for Concern About False Testimony and More Questions*

While much of the scholarly literature on the prejudicial risks of witness preparation draws on social psychology research,²²¹ that research is based on experiments, often run on college students, that attempt to recreate the experience of being a witness to an incident.²²² In a series of foundational studies, psychologist Elizabeth Loftus elucidated many of the risk factors for false memories and confabulation.²²³

One important finding is that the simple phrasing of a question asked of a witness can ultimately impact the witness’s perceptions of an incident and thus his or her recollection.²²⁴ In one study, participants were shown a car accident between two vehicles.²²⁵ Participants were then asked to estimate the speed of the vehicles in the accident. When the participants were asked about the speed of

217. *Id.*

218. *See* Applegate, *supra* note 175, at 304.

219. *See supra* Part II.B.1.

220. Elizabeth Loftus, *Memory and its Distortions*, in 2 THE G. STANLEY HALL LECTURE SERIES 123, 137 (Alan Kraut ed., 1982).

221. *See generally* Damaska, *supra* note 193; Salmi, *supra* note 176; Wydick, *supra* note 181.

222. *See, e.g.*, Loftus, *supra* note 214, at 560.

223. *See, e.g.*, Elizabeth Loftus et al., *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 19 (1978); Elizabeth Loftus & John Palmer, *Reconstruction of Automobile Destruction*, 13 J. VERBAL LEARNING VERBAL BEHAV. 585 (1974).

224. *See* Loftus & Palmer, *supra* note 223, at 586.

225. *Id.*

2013] *RECONSIDERING PRIOR BAD ACTS* 1525

the vehicles when they “smashed” into each other, participants reported significantly higher rates of speed than other participants who were asked about the speed of the vehicles when they “contacted” each other.²²⁶ A week after the experiment, the experimenters followed up with the participants.²²⁷ The participants were asked whether they saw any broken glass in the accident, of which there had been none.²²⁸ The participants who were asked about the speed of the cars using the word “smashed” were significantly more likely to report having seen non-existent broken glass.²²⁹ The phrasing of the question, then, not only impacted the interpretation of the incident in terms of vehicular speed, but also permanently affected the participants’ substantive recollection of the scene itself.

Similar experiments have reinforced these findings. For example, after showing participants a video of a car accident, without any broken headlights, those asked whether they saw “the” broken headlight were more likely to report having seen it than were those asked if they saw “a” broken headlight.²³⁰ In another study, participants were shown a picture of a basketball player.²³¹ Participants were then asked either “how tall” the player was or “how short” the player was. Those asked how tall the player was reported a significantly taller player than those asked “how short” the same player was.²³² These results were also found when questioning people about their past personal experiences.²³³ For example, participants asked about how often they had headaches while using the word “frequently” in the question reported having three times as many headaches as those asked the same question that used the word “occasionally” instead.²³⁴

Questions that presuppose facts, whether intentionally or not, can significantly impact witnesses’ recollections just as a question’s

226. *Id.* The witnesses reported the speeds of the vehicles differently based on the verb used to describe the impact, with reported speeds decreasing from “smashed”, to “collided,” “bumped,” “hit,” and “contacted,” in descending order. *Id.*

227. *Id.* at 587.

228. *Id.*

229. *Id.*

230. Loftus, *supra* note 214, at 562.

231. *Id.* at 561 (citing R. Harris, *Answering Questions Containing Marked and Unmarked Adjectives and Adverbs*, 97 J. EXPERIMENTAL PSYCHOL. 399 (1973)).

232. *Id.*

233. *Id.*

234. *Id.* Participants were asked either “Do you get headaches frequently, and, if so, how often?” or “Do you get headaches occasionally, and, if so, how often?” *Id.*

phrasing can.²³⁵ Participants shown footage of a car accident were then asked whether they recalled seeing a yield sign.²³⁶ Many participants who were not shown a yield sign but had its existence suggested by the question ultimately recalled seeing the sign.²³⁷ Furthermore, they provided longer descriptions of the sign they never actually saw than did those who were shown a scene with a yield sign.²³⁸

Studies have found, however, that participants discriminate between sources of information when accepting presupposed facts as true. When questioning included presupposed and false facts (such as when asked about a yield sign that didn't exist), whether participants remembered the presupposed facts varied based upon how biased the provider of the presupposed facts seemed.²³⁹ In particular, where participants were given presupposed information about a car accident from a neutral bystander, they "remembered" the presupposed facts, just as in previous experiments.²⁴⁰ When the information came from the driver responsible for the accident, however, the witnesses did not remember the presupposed information.²⁴¹ The implication is that people have the ability to filter information based upon the appearance of objectivity. As a result, an attorney reading from a file or presenting an objective perspective may have the ability to influence a witness's memory differently from one presenting himself as a partisan.

With regards to presenting witnesses with evidence or other witnesses' testimony, empirical data presents mixed results on the benefits and risks of creating false memories. The testimonial and legal benefits of the practice as well as its possible impact on creating false memories has been discussed previously.²⁴² It is important to note additionally that experiments have found that cued recall can help people more fully access their stored memories, such that access to additional information may unlock otherwise unavailable

235. See generally Loftus, *supra* note 223; Jonathon Schooler et al., *Qualities of the Unreal*, 12 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 175 (1986).

236. Schooler et al., *supra* note 235, at 175.

237. See *id.*

238. See *id.*

239. See David Dodd & Jeffrey Bradshaw, *Leading Questions and Memory: Pragmatic Constraints*, 19 J. VERBAL LEARNING & VERBAL BEHAV. 695 (1980).

240. *Id.* at 695-701.

241. *Id.*

242. See *supra* notes 180, 220 and accompanying text.

memories.²⁴³ In one study, participants were able to recall four times as many news stories from the previous night along with supporting details when they were provided with the headline of the stories as a cue as opposed to when they were asked an open-ended question about how many stories they could recall.²⁴⁴

Applying these psychology experiments directly to a real world dialogue between an attorney and client, or prosecutor and complainant such as those described in the opening passage of this Note, is fraught with complication. The impact of phrasing, presupposed facts, and cued recall doubtlessly plays a significant role in recall and memory formation.²⁴⁵ Returning to our hypothetical prosecutor and complainant, however, parsing out the impact of a question's phrasing from the emotional impact of having been harassed, or from the visual stimuli surrounding the complainant as she navigated the lobby and offices of the prosecutor's office, is far from straight-forward.²⁴⁶ For example, adrenaline and other stress hormones have been found to impact memory during an incident, with moderate amounts enhancing it and large amounts potentially impairing it.²⁴⁷ Moreover, having experienced stalking may have affected the complainant's memory of prior incidents in ways that college students wouldn't necessarily share in a laboratory setting.²⁴⁸

Among the most troubling and important aspects of memory research are the findings on how witnesses regard their own false memories. In the words of Elizabeth Loftus, "Memory is malleable. . . . You might relate a story to a friend but unwittingly include some

243. See Loftus, *supra* note 220, at 129–30.

244. *Id.* at 130–31.

245. See *supra* notes 222–42. See generally, Loftus, *supra* note 220.

246. See, e.g., Rick E. Ingram, *External Validity Issues in Mood and Memory Research*, 4 J. SOC. BEHAV. & PERSONALITY 57–62 (1989) (discussing external validity issues in research on the interaction between mood and memory).

247. See NEURAL PLASTICITY AND MEMORY: FROM GENES TO BRAIN IMAGING ch. 13.3 (Federico Bermúdez-Rattoni ed., 2007), available at <http://www.ncbi.nlm.nih.gov/books/NBK3907/>.

248. Some studies have attempted to measure people's ability to recall their own lives in the face of questioning. Studies have identified a dynamic called "forward telescoping," where individuals project life events forward in their lives to correspond to a target date range being inquired into. See Loftus, *supra* note 220, at 134. One such study involved the National Crime Survey, which entails calls to individuals to ask them about prior experiences of victimization that occurred within a given reference period. *Id.* A check of prior known victimizations indicated that up to twenty percent of victimizations reported to having occurred within the reference period occurred before it. *Id.* This could have implications for witnesses trying to fit a memory of a prior bad act into a certain time frame.

mistaken details. Later as you attempt to recall the episode, you might come across your memory of the scrambled recall attempt instead of your original memory.”²⁴⁹ Where “you” are the witness, and are describing what has become a false memory due to any number of previously explored reasons, there is a significant amount of empirical evidence suggesting that your false memories will be held with significant confidence, even to the point of being virtually indistinguishable from memories of actual perceptions.²⁵⁰ Furthermore, descriptions of false memories, or suggested objects, are likely to be very detailed.²⁵¹ The prejudicial implications are enormous.

Cross-examination of a witness is often the defense’s best opportunity to highlight weaknesses in a witness’s recollection and to impeach the witness’s credibility. It is, perhaps, “the greatest legal engine ever invented for the discovery of truth.”²⁵² If a witness has adopted a false memory and believes it to be true, however, a defense attorney is significantly hindered in his ability to contradict or impeach the witness through cross-examination, such that “[i]n the absence of demonstrably more reliable evidence” to the testimony being offered, “opposing lawyers will remain unable to discredit such testimony [on cross examination] because the witness sincerely believes the testimony is true.”²⁵³

Trial attorneys work with witnesses regularly, and by necessity have every reason and opportunity to develop skill in distinguishing between mendacity and honesty. Yet even the most scrutinizing attorney may be vulnerable to a witness who describes a false memory with as much confidence as a memory of an actual perception, yet with even more detail. Even more problematically, at trial, juries have been found to respond to the amount of detail and confidence of witnesses.²⁵⁴ In one study, “detailed testimony influenced judgments of guilt even when the detail was unrelated to the culprit. . . . When eyewitnesses provided more detail, they were generally judged to be more credible, to have better memory for the

249. Elizabeth Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 NATURE 231 (2003).

250. *Id.* at 232.

251. *Id.*

252. See Applegate, *supra* note 175, at 301 n.151. (quoting 5 J. WIGMORE, EVIDENCE § 1367, at 32 (J. Chadbourn rev. ed. 1974)).

253. *Id.* at 309.

254. Brad Bell & Elizabeth Loftus, *Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details*, 56 J. PERSONALITY & SOC. PSYCHOL. 669 (1989).

culprit's face and for details, and to have paid more attention to the culprit."²⁵⁵ And these findings have been replicated, such that "many jury studies have indicated that the 'confidence of the witness, rather than accuracy, [is] the major determinant of juror belief."²⁵⁶ Given that witnesses have a great deal of confidence in false memories,²⁵⁷ and that they report false memories with more, albeit non-sensory, details than they do actual memories,²⁵⁸ the risks of juries being swayed by falsehood are enormous. Even if people are able to prefer genuine memories to false memories, evidence suggests that repeated retrieval of generated or false memories may diminish that preference.²⁵⁹

All hope is not lost, however. Aside from the effects of the rules of evidence on incentivizing witness preparation, in the decades since memory research first emerged, legal scholars have identified a number of best practices for witness preparation that could reduce prejudice.²⁶⁰ For example, beginning by asking witnesses open-ended questions gives them a chance to provide all of the information they can recall and it gives the attorney the chance to create a starting point against which future changes in testimony can be measured against to detect distortions.²⁶¹ The goal of such an initial open-ended question is to elicit a narrative from the witness.²⁶² Then, the attorney can identify the major parts of the narrative and cover each of them, one by one, with open-ended questions that are not as likely to create memory distortions.²⁶³ After the witness has thus provided a thorough recount of each aspect of his or her recollection, it can be useful to review the witness's story with the witness, giving him or her an opportunity to correct any errors or fill in any missing details.²⁶⁴

255. *Id.* at 669.

256. *See* Salmi, *supra* note 176, at 163 (quoting Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1089 (1991)).

257. Loftus, *supra* note 249, at 232.

258. *See id.*; Schooler, *supra* note 235, at 174.

259. *See* Loftus, *supra* note 220, at 147.

260. *See generally* Applegate, *supra* note 175; Gershman, *supra* note 2; Salmi, *supra* note 176; Wydick, *supra* note 181.

261. *See* Wydick, *supra* note 181, at 48–50; Salmi, *supra* note 176, at 171.

262. *See* Wydick, *supra* note 181, at 48–50.

263. *See id.*

264. *Id.*

III. ADOPTING *Huddleston* TO REDUCE THE RISK OF PREJUDICE

The policy goal underlying the exclusion of prior bad acts evidence is to avoid prejudice.²⁶⁵ Employing a preliminary fact-finding that requires a higher standard of proof for the commission of the acts, however, presents a risk of introducing false testimony through witness preparation. This Note's focus is elucidating that risk of prejudice, which has not been considered by courts when deciding whether or not to adopt *Huddleston*.

In determining whether to admit prior bad acts evidence, courts weigh the evidence's prejudicial risk against its probative value by performing a number of inquiries: whether the evidence is not overly prejudicial because it is being offered for a reason other than to prove criminal propensity; whether the prejudicial risk of the evidence substantially outweighs its probative value; and, to a varying degree, whether the prior bad acts have been proven, and thus have any probative value.²⁶⁶ Ultimately, then, admissibility is governed by a multi-step balancing of the evidence's prejudicial risk and probative value. Were courts to consider the risk of prejudice created by witness preparation and interviewing, however, their determination as to how best to reduce prejudice might lead to the broader adoption of *Huddleston*.

The hypothetical prosecutor and complainant whose interaction began this Note illustrate this possibility. Testimony as to the prior incidents of harassment and abuse is important to explain the charged conduct, a handful of vague phone calls to the complainant by her ex-boyfriend, the defendant. The calls were clearly threatening given the nature of the relationship between the complainant and the defendant, but absent that background, they leave more questions than answers for a jury and don't prove much at all. The complainant cannot initially recall many specifics about the defendant's prior abusive behavior, however. After eliciting that incomplete initial recollection during the course of interviewing and preparing the witness, the prosecutor will then be presented with a different situation depending upon whether the jurisdiction has adopted *Huddleston*. If the jurisdiction has adopted *Huddleston*, then the prosecutor has no additional incentive, beyond an overarching one to have engaged in diligent preparation, to keep asking questions about

265. See discussion *supra* Part I.B.2.

266. See discussion *supra* Part I.B.1.

2013] *RECONSIDERING PRIOR BAD ACTS* 1531

the witness's incomplete memory of incidents that occurred weeks and months in the past. Admission is not determined by the prosecutor's ability to prove the prior bad acts through detail and specificity, which lends it credibility, because the testimony's credibility is not even considered by the trial judge.²⁶⁷ If the jurisdiction has rejected *Huddleston* and adopted or maintained a higher standard of proof where credibility is reserved for consideration by judges, then the prosecutor is incentivized to follow up with additional questions and to elicit as much specificity as the witness can provide in the hopes of clearing the applicable evidentiary standard.²⁶⁸

Of course, rehearsing testimony and gathering information from a witness are both fundamental aspects of witness preparation.²⁶⁹ Further, a witness's difficulty in providing details for important evidence, prior bad acts or otherwise, would be explored in the course of normal preparation by a skilled attorney²⁷⁰—especially if the attorney were aware of the empirical research on the impact of detail on jurors.²⁷¹ A clear and convincing standard of evidence for the commission of prior bad acts does not, in itself, create an entirely unique demand for preparation that is absent under jurisdictions adopting *Huddleston*. Rather, the risk of prejudice arising from probing the limits of a witness's memory about prior bad acts is intrinsically bound with the subtle, lingering, and inadvertent risks of false memories and confabulation inherent to interviewing witnesses generally and questioning them in all but the most precise and careful ways.²⁷² Nonetheless, adopting *Huddleston* represents one opportunity to mitigate the need for preparation on prior bad acts, *at little risk* of prejudice due to the admission of prior bad acts evidence.²⁷³ Furthermore, evaluating *Huddleston* in light of the impact of witness preparation draws attention to the larger issue of

267. See *supra* notes 150–54 and accompanying text.

268. See *supra* notes 149–53 and accompanying text.

269. See discussion *supra* Part II.B.1.

270. See generally Alcorn, *supra* note 178.

271. See *supra* notes 255–57 and accompanying text.

272. Even then, there are the concerns that the very act of interviewing alters recollections. See Tanford, *supra* note 201, at 537.

273. See discussion *infra* Part III.A. If a jury does not believe that the defendant committed the prior bad act, then they cannot logically be expected to hold it against the defendant. Further, a witness's vague or incomplete memories can be explored on cross-examination only if the witness has not “fill[ed] in the gaps.” Loftus, *supra* note 220, at 137.

how rules of evidence place an emphasis on witness preparation that implicitly presumes a choice courts and legislatures have made about the lesser of prejudicial evils.²⁷⁴ Additionally, doing so presents an opportunity to consider how future reconsiderations of different rules of evidence may be elucidated by discussion of the risks inherent to witness preparation.

Where jurisdictions have required a higher standard of proof for prior bad acts evidence, they have cited concerns about prejudice.²⁷⁵ Their goals, however, are ill-served by their adoption of a higher standard of proof. The prejudicial impact—from the creation of false memories, of motivating prosecutors to ask additional questions, to push the boundaries of a witness's recollection even with the most care and the best of intentions—outweighs the benefits of limiting prejudice by excluding prior bad acts evidence that the prosecutor cannot prove by clear and convincing, or even a preponderance of the evidence.

This Part will balance the benefits of a higher standard of evidence with the prejudice such a standard creates. This Part will first review the benefits, and then examine the potential for prejudice created by it. Finally, this Part will also examine the ways that adopting *Huddleston* could reduce prejudice to the defendant.

A. The Minimal Benefits Requiring a Higher Standard of Proof of Prior Bad Acts

States that have retained a higher standard of evidence for the admission of prior bad acts have referred to the risk of prejudice inherent in prior bad acts evidence.²⁷⁶ The reasoning is that prior bad acts evidence is highly prejudicial²⁷⁷ and that there must be sufficient evidence of commission to limit the risk of the admission of evidence for which the defendant could be convicted, regardless of his culpability for the charged conduct.²⁷⁸ The benefit to keeping the evidence from the jury in the instances where it cannot be proven, then, protects the defendant from undue prejudice. A second, related line of reasoning offered by courts is that even if the jury does not believe that the defendant is responsible for the conduct, the verdict

274. For a discussion of other strategies to reduce the prejudice of witness preparation, see *supra* notes 265–74 and accompanying text.

275. See *supra* notes 154–60 and accompanying text.

276. See *supra* notes 154–60 and accompanying text.

277. See discussion *supra* Part I.C.2.

278. See, e.g., *State v. McGinnis*, 455 S.E.2d 516, 527 (W. Va. 1994).

2013] *RECONSIDERING PRIOR BAD ACTS* 1533

may still be affected “regardless of the jury’s ultimate determination of the [preliminary] fact.”²⁷⁹ As has been noted, however, both arguments have been criticized, and they clearly fall apart upon closer examination.²⁸⁰

The difference between FRE 104(a) and (b) is that the former pertains to preliminary facts which condition evidence’s competence and the latter pertains to preliminary facts which condition evidence’s relevance.²⁸¹ It is a significant distinction. If preliminary facts conditioning competence were submitted to a jury, the jury could still be influenced by the evidence even if it found that the evidence was not competent. For example, it is not necessarily of any practical consequence to a juror whether a hearsay statement is technically admissible pursuant to a hearsay exception if it addresses a material fact at issue. And there is a reasonable concern that if a jury were responsible for determining such a statement’s competence, it would be influenced by the substance of the hearsay statement regardless of the jury’s finding as to its admissibility.²⁸² If a jury is given evidence and told to disregard it if there is insufficient proof that the evidence is relevant, however, there is little reason to believe that there would be any risk of prejudice.²⁸³ Taking the example of prior bad acts under *Huddleston*, if a jury were given evidence of the conduct, but did not find that the defendant committed the acts, it is hard to imagine how there would be a risk of prejudice because any reasonable juror could be expected to ignore bad acts committed by someone other than the defendant. “[C]ommon sense and an elementary sense of fairness should prompt even a lay juror to put aside testimony about an act of uncharged misconduct if there is inadequate proof that ‘the defendant was the actor.’”²⁸⁴

The arguments for reducing prejudice by conditioning prior bad acts evidence’s admission on a preliminary fact-finding by a judge are therefore marginal at best and specious at worst. There is no risk of prejudice if the jury disregards irrelevant evidence, and there is no empirical or logical reason to believe that the jury would be

279. *Id.*

280. *See supra* note 161 and accompanying text.

281. *See supra* notes 56–63 and accompanying text.

282. *See* Imwinkelried, *supra* note 85, at 822–23.

283. *See* 2 IMWINKELRIED, *supra* note 59, § 9:64.

284. *Id.* at 834.

prejudiced “regardless of [its] ultimate determination” of commission.²⁸⁵

There is a risk of prejudice to the defendant resulting from the admission of allegations from multiple witnesses, none of which are supported by much proof.²⁸⁶ This risk should not be overvalued, however.²⁸⁷ Any risk presented by the admission of such evidence under *Huddleston* could be addressed by scrutinizing the offered evidence under Rule 403, which bars cumulative or unfairly prejudicial evidence.²⁸⁸ Furthermore, under *Huddleston*, there would be no risk where there was only one prior bad act, where there weren’t numerous witnesses alleging prior bad acts, or where the alleged prior bad acts are dissimilar.²⁸⁹

Finally, it is important to note that lowering the standard of evidence for commission of the prior bad acts does *not* imply lowering the overall standard of admissibility. Under *Huddleston*, a court still must inquire as to whether the prior bad acts evidence is being offered for a proper purpose and whether the probative value outweighs any risk of prejudice.²⁹⁰ This protects the defendant from evidence that would be cumulative, misleading, or confusing.²⁹¹ Even when adopting *Huddleston*, courts may maintain the same rigor in scrutinizing prior bad acts evidence for its prejudicial impact, while concomitantly mitigating one source of inadvertent memory distortions caused during witness preparation.

B. The Risk of False Testimony Created by Requiring Greater Specificity by Witnesses

By rejecting *Huddleston*, courts run up against the risks of prejudice inherent in witness preparation: the creation of false testimony and the diminishment of effective cross-examination. When there is a minimum bar for admissibility of which an attorney is aware, there is a fundamental need to determine whether the

285. State v. McGinnis, 455 S.E.2d 516, 527 (W. Va. 1994).

286. See *supra* notes 163–65.

287. See Imwinkelried, *supra* note 85, at 840–44.

288. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”)

289. See Imwinkelried, *supra* note 85, at 840–43.

290. See *Huddleston v. United States*, 485 U.S. 681, 682 (1988).

291. See *United States v. Bergrin*, 682 F.3d 261, 277 (3d Cir. 2012).

complainant or witness is capable of providing testimony that can clear that preliminary bar. Focusing on the issue of recollection during witness preparation activates many sources of memory distortion.²⁹² For example, the attorney's unconscious desire for the witness to recall the prior bad acts in greater detail can lead to the witness detecting the attorney's goal and "fill[ing] in gaps" in their memory.²⁹³ This poses an obvious risk of prejudice when witnesses testify falsely. It also poses a risk of prejudice, however, insofar as defendants are limited in their ability to draw out the distortions in the witness's memory and to sufficiently impeach the witness's credibility.

Cross-examination has long been viewed as the mechanism for addressing witness bias²⁹⁴ and for "ferreting out truth."²⁹⁵ Yet it is an imperfect tool, the efficacy of which must be questioned in light of science's growing knowledge of memory.²⁹⁶ For example, people are susceptible to "memory hardening," whereby once-unclear memories can become solidified in their recollections through repeated retrieval.²⁹⁷ In addition, witnesses tend to become as confident in false memories as they are in memories based on actual perception, and will provide more details of the former than the latter.²⁹⁸

C. Witness Preparation and the Rules of Evidence: Is Adopting *Huddleston* the Best Solution to a Difficult Problem?

Witness preparation remains a fundamental and universal aspect of American litigation.²⁹⁹ Any prejudice resulting from the creation of false memories certainly needs to be taken in the larger context of the benefits witness preparation provides in purging inadmissible statements from testimony, and in making witnesses comfortable and able to testify completely, among other benefits.³⁰⁰ Although those benefits have long been recognized, the rules of evidence and its use of witness preparation as a first step in mitigating testimonial

292. See discussion *supra* Part II.B.

293. See *supra* note 271–72 and accompanying text.

294. See *supra* notes 252–53 and accompanying text.

295. *Perry v. Leeke*, 488 U.S. 272, 283 (1989) (quoting *United States v. DiLapi*, 651 F.2d 140, 149–51 (2d Cir. 1981) (Mischler, J., concurring)).

296. See *Applegate*, *supra* note 175, at 309–15.

297. See *supra* notes 252–53 and accompanying text; see also *Rock v. Arkansas*, 483 U.S. 44, 59–60 (1987); *Wydick*, *supra* note 181, at 11.

298. See *supra* Part II.B.2.

299. See *supra* Part II.B.1.

300. *Id.*

prejudice were developed in the decades before research on memory burgeoned and created an awareness of the risks of preparation.³⁰¹

The Model Rules do not provide significant guidance on witness interviewing or preparation. For many civil or criminal defense attorneys, a duty of zealous representation marginalizes the benefits of scrutinizing their own clients or witnesses for any potential false memories because it may undermine the attorney-client relationship. However, for prosecutors, who are responsible for seeking truth, whose witnesses bear an additional credibility through mere association with the Government, and whose trials result in the forfeiture of a defendant's freedom, purging witness interviewing and preparation of sources of false memories is a pressing concern. State legal systems may attempt to reduce the introduction of false memories by implementing several complementary reforms.³⁰²

Adopting *Huddleston* would reduce the pressure on prosecutors and witnesses to provide details that are simply not within the powers of recollection for the witness. In addition, providers of continuing legal education should create and encourage attendance at lessons that review best practices for witness preparation based on current understandings of memory.³⁰³ Similar lessons could also be integrated into law school curricula. Finally, best practices could be codified in the Model Rules as the proper method of interviewing and preparing witnesses.

Another solution may be for prosecutors to take careful note of any changes in a witness's testimony.³⁰⁴ If testimony changes as a result of the interview in potentially substantive ways, a lawyer should "prep it back to the way it was."³⁰⁵ Recording the witness's initial account can aid in this process.³⁰⁶ Such a requirement, however, would be deeply complicated by requirements that such records be turned over to a defendant in criminal proceedings.³⁰⁷ Prosecutors are

301. The Federal Rules of Evidence were adopted in 1975, based on debates and practices that predated them by decades. *See* Imwinkelried, *supra* note 85. Research on memory began developing primarily in the 1970s. *See generally* Loftus, *supra* note 220.

302. *See generally* Applegate, *supra* note 175; Gershman, *supra* note 2; Salmi, *supra* note 176; Wydick, *supra* note 181.

303. For a review of some best practices, see *supra* notes 260–64 and accompanying text.

304. *See* Salmi, *supra* note 176, at 173.

305. Tanford, *supra* note 201, at 541.

306. *See* Salmi, *supra* note 176, at 173.

307. *See supra* notes 260–64 and accompanying text.

2013] *RECONSIDERING PRIOR BAD ACTS* 1537

acutely disincentivized from recording witness's statements for that very reason³⁰⁸—the concern being that defense counsel could gain materials with which to impeach the prosecution's witness.³⁰⁹

CONCLUSION

Witness interviewing and preparation, though necessary and beneficial, pose many risks of creating false testimony. Psychological and legal research continue to elucidate these risks. Current understandings of memory make it clear, however, that entirely ethical and scrupulous practices can nonetheless result in the distortion of a witness's recollections. As a result, the jurisdictions that have rejected the Court's holding in *Huddleston* out of a fear of prejudicing the defendant should instead adopt it. Adopting *Huddleston* will remove an additional incentive for prosecutors to prepare witnesses with a focus on eliciting detail that a witness may be incapable of recalling. Such a reform would not singularly eliminate the prejudicial risks of even careful witness preparation. Nonetheless, if courts were to consider the risks inherent in witness preparation, the balance of risks would favor adopting *Huddleston*.

308. See Gershmann, *supra* note 2, at 851–53.

309. *Id.*