BACK TO THE FUTURE?

THE ADMISSIBILITY OF POST-OFFENSE UNCHARGED MISCONDUCT TO PROVE CHARACTER

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Though this be madness, yet there is method in't.[2]

I. Introduction

The general prohibition against the use of character evidence in courts-martial is deceptively simple on its face: character evidence is not admissible for the sole purpose of proving that the person acted in conformity therewith on a particular occasion.[3] In many cases, however, the exceptions to the rule[4] all but eviscerate the general prohibition, often to the clear detriment of the accused.[5] Appellate courts interpreting the rules have further complicated matters by applying varied reasoning and reaching inconsistent decisions. As a result, proper application of the rules at the trial level has become an inordinately complex task.[6]

The general prohibition against character evidence found in Military Rule of Evidence (MRE) 404 is essentially the same as its federal counterpart and is grounded in American common-law practice since the late nine-

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2. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2.

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404 (2002) [hereinafter MCM].

teenth century.[7] Although the prohibition is not universally recognized, at its heart, character evidence is propensity evidence by another name.[8] American courts have acknowledged that while such evidence is almost

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4. *Id*. The rule provides, in part, as follows:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
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> (1) *Character of the accused*. Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.
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> (2) *Character of victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;
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> (3) *Character of witness*. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.
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> (b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

5. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 527 (4th ed. 1997) (describing the general prohibition as "virtually subsumed" by the second sentence of Military Rule of Evidence (MRE) 404(b)); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrine That Threatens to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 46 (1990) (citing cases); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 182 (1998) ("[d]ecisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence").

6. *See generally* United States v. Reynolds, 29 M.J. 105, 108 (1989) (commenting that "enough litigation has been generated concerning these rules to justify a substantial survey of the cases and statutes dealing with uncharged misconduct"); Major Victor M. Hansen, *New Developments in Evidence 2000*, ARMY LAW., Apr. 2001, at 41 (describing the scope of appellate evidentiary issues as "daunting" and commenting on the difficulty of "reaching that level of sophistication in the context of a trial").

always relevant, it is also usually highly prejudicial, time consuming, and confusing to the finder of fact.[9] As a fundamental proposition in a system of justice that provides a presumption of innocence, an accused should be convicted of committing a specific criminal offense, not for having a particular personal history or allegedly evil character.[10] The general prohibition against the admission of character evidence preserves this constitutionally based guarantee.[11]

In virtually all cases, the government seeks to introduce character evidence under MRE 404 that predates the charged offense, and, not surprisingly, the majority of appellate decisions analyzing the rule are devoted to instances of prior uncharged misconduct. On those limited occasions in which the admissibility of post-offense uncharged misconduct has been raised at the appellate level, courts have largely applied the same analysis used for prior uncharged misconduct, and found the evidence admissible.[12]

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7. *See* SALTZBURG, *supra* note 5, at 526; Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1558-60 (1998) (tracing the common law development of the present Rule 404(b)).

8. Acknowledging the reality of character evidence as propensity evidence, even the English, from whom the American common-law basis of Rule 404(b) derives, have abandoned it entirely in favor of simply applying Rule 403-like balancing test weighing probativeness and prejudicial effect. Morris, *supra* note 5, at 205-07; *see also* Michelson v. United States, 335 U.S. 469, 476 (1948); Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 400 (1997) (noting that "the entire criminal history and psychological history of an accused is the very first item of evidence admitted in a French, German, Swiss or Austrian criminal prosecution, before the story of the crime itself is told by the fact witnesses"); Paul F. Rothstein, *The Federal Rules of Evidence in Retrospect: Observations from the 1995 AALS Evidence Section: Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264 (1995) (describing prohibited character evidence as "just one type of propensity"); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981) (discussing the difficulty to distinguish between propensity and otherwise permissible character inferences).

9. *Michelson*, 335 U.S. at 476.

10. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (2d ed. 2001).

11. *See, e.g.*, Dowling v. United States, 493 U.S. 342 (1990) (recognizing that Federal Rule of Evidence 404(b) may implicate both double jeopardy and due process in certain limited circumstances, but declining to find a constitutional violation on the facts presented); United States v. Wright, 53 M.J. 476 (2000) (discussing the constitutional implications of MRE 413); *see also* MCCORMICK ON EVIDENCE § 190 (John W. Strong ed., 5th ed. 1999) (citing cases).

12. *See, e.g.*, United States v. Young, 55 M.J. 193, 196 (2001); United States v. Crowder, 141 F.3d 1202, 1208 (D.C. Cir. 1998); United States v. Latney, 108 F.3d 1446, 1449 (D.C. Cir. 1997); United States v. Bradley, 5 F.3d 1317, 1321 (9th Cir. 1993). *But see* United States v. Matthews, 53 M.J. 465, 469 (2000).

Similarly, legal scholars have offered limited specific analysis of post-offense misconduct, apparently finding no basis for excluding the evidence if it otherwise appears to satisfy the requirements of the rules.[13]

Contrary to these general positions, this article specifically argues that post-offense uncharged misconduct should be inadmissible to prove mens rea under MRE 404(b). First, the article briefly explains the general operation of the character evidence rules in courts-martial. Second, it analyzes the still unsettled issue of the admissibility of post-offense uncharged misconduct in military courts after *United States v. Matthews,*[14] *United States v. Young*,[15] and *United States v. Wright*.[16] Third, the article closely examines the theories that courts have relied on to admit post-offense misconduct evidence. Fourth, the article then argues that the theories for admitting post-offense uncharged misconduct to prove intent or knowledge allow otherwise prohibited propensity evidence to taint the court-martial process and make application of the character rules at the trial level unnecessarily complex. Finally, the article recommends amending MRE 404(b) to exclude specifically post-offense uncharged misconduct as proof of intent or knowledge.

II. Making Sense of the Character Evidence Rules

A. The Problem of Defining Character Evidence

To understand how the general prohibition against the use of character evidence operates in courts-martial requires a workable concept of the type of evidence the rules are designed to proscribe. Although not specifically defined, the term *character* in the rules appears synonymous with *propensity*.[17] The resulting dichotomy makes the rules both complicated to apply and inherently contradictory.[18] On the one hand, the common understand-

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13. *See, e.g.*, STEPHEN A. SALTZBURG, MICHAEL A. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 517 (7th ed. 1998) [hereinafter MARTIN] (although the authors acknowledge that the rule seems to imply prior acts); IMWINKELRIED, *supra* note 10, § 5:04.

14. 53 M.J. 465 (2000).

15. 55 M.J. 193 (2001).

16. 53 M.J. 476 (2000).

17. *See* MCM, *supra* note 3, MIL. R. EVID. 404(a)-(b); *see also* Kuhns, *supra* note 8, at 780. *Webster's Dictionary* defines the word *character* as "[t]he combination of emotional, intellectual, and moral qualities distinguishing one person or group from another." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988). The definition of *propensity* is "an inherent inclination." *Id*.

ing of the term character requires reference to the tendency of an accused to commit bad acts. On the other, the finder of fact is not permitted to consider character evidence for that purpose. This inherent contradiction, coupled with the acknowledged power of character evidence,[19] has made the character evidence rules the subject of more published opinions than any other evidentiary issue.[20]

Legal scholars have devoted substantial effort to defining the acceptable limits of character evidence within the rules.[21] Unfortunately, the type of evidence the character rules permit is not what one would expect from the commonly understood use and definition of the term. There is an apparent consensus that the term character has a "moral overtone, which connotes something good or bad about a person."[22] At the same time, finders of fact are specifically prohibited from using evidence admitted under the character rules to determine that the accused is a bad person, and that because the accused is a bad person, that he acted as such on the occasion in question.[23] If the fact that the accused is a bad person—his moral character—is not to be taken into account, of what possible relevance is character evidence to the finder of fact for MRE 404(b) purposes?[24] A review of how the character evidence rules operate illustrates the counterintuitive

18. *See* Melilli, *supra* note 7, at 1549; *see also* Rothstein, *supra* note 8, at 1259.

19. Professor Edward Imwinkelried, arguably the leading scholar in this area, calls the admissibility of uncharged misconduct evidence under Rule 404(b) "the single most important issue in contemporary criminal evidence law." Imwinkelried, *supra* note 5, at 42.

20. *See* IMWINKELRIED, *supra* note 10, § 1:04. Professor Imwinkelried cites the following statistics: "[I]n the mid-1980s a WESTLAW search of key numbers revealed 11,607 state cases . . . and 1,894 federal cases. Virtually every regional reporter advance sheet contains a new uncharged misconduct opinion, and the federal advance sheets ordinarily contain two or three new decisions on the topic." *Id. Accord* Morris, *supra* note 5, at 181 n.6 (citing advisory committee and other legislative data). A LEXIS search conducted by the author on 5 November 2002 returned 391 military justice cases citing MRE 404(b).

21. Character evidence is the subject of more academic legal commentary than any other area except hearsay doctrine. IMWINKELRIED, *supra* note 10, § 1:04 (citing what he terms a "staggering" number of law review articles).

22. Kuhns, *supra* note 8, at 778. *See also* Rothstein, *supra* note 8, at 1264 (distinguishing between a "moral" propensity, the type prohibited by the rules, and a "specific" propensity, a predisposition to do certain things in certain ways repeatedly).

23. *See* MCM, *supra* note 3, MIL. R. EVID. 404(b). The instruction given to military panel members is comparable with that given to civilian juries: "You may not consider this [uncharged misconduct] evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (she)(he), therefore, committed the offense(s) charged." U.S. DEP'T. OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-13-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

inferences required to make the various types of character evidence both logically and legally relevant, and therefore admissible. The complex reasoning behind these inferences makes proper application of the rules at the trial level a difficult task, and leads to inconsistent outcomes in what should be a uniform military justice system.[25]

B. MRE 404(a): The Accused, the Victim, and the Witness

Military Rule of Evidence 404(a) begins with a blanket exclusion of the type of evidence commonly associated with the term character: evidence introduced to show the person's character, and that he therefore "acted in conformity [with that character] on a particular occasion."[26] Rule 404(a) goes on, however, to provide three specific exceptions allowing introduction of character evidence of the accused, victim, and witnesses.[27]

1. The Defense of Good Military Character Under MRE 404(a)(1): Opening the Door, or Slamming It Shut?

Military Rule of Evidence 404(a)(1) permits an accused to introduce evidence of a "pertinent" character trait.[28] Although adapted from the parallel Federal Rule of Evidence (FRE) 404(a)(1), the rule has far broader application in military courts-martial than in the federal system.[29] The expansive use of the provision derives from the rule's use as the basis for the defense of "good military character" to a wide array of court-martial offenses. The adoption of MRE 404(a)(1) from the federal rule was, on its face, a "significant departure" from the *1969 Manual* provision,[30] which

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24. Much of the discussion about character evidence refers to its power because despite the prohibitions surrounding it, most people have a gut feeling or common-sense basis for believing in its relevance. *See, e.g.*, Melilli, *supra* note 7, at 1554.

25. While military courts-martial are the focus of this article, the character evidence rules have caused comparable difficulty for federal and state systems operating under the Federal Rules of Evidence and analogous state counterparts.

26. MCM, *supra* note 3, MIL. R. EVID. 404(a); SALTZBURG, *supra* note 5, at 524.

27. *See* MCM, *supra* note 3, MIL. R. EVID. 404(a).

28. *Id.* MIL. R. EVID. 404(a)(1). With the exception of the defense of good military character, the pertinence of a particular character trait will vary with the offense charged. Examples include honesty for crimen falsi, and peacefulness for assaults or other violent offenses. *See generally* SALTZBURG, *supra* note 5, at 524-25.

29. SALTZBURG, *supra* note 5, at 524.

30. *Id*. at 525.

had permitted "evidence of 'general good character' of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act."[31]

The apparent intent of the drafters of MRE 404(a)(1) was to limit the admissibility of good military character evidence on the merits to duty-related offenses.[32] Instead, military courts have liberally interpreted the term *pertinent*, permitting the defense to introduce evidence of the accused's good military character for essentially all offenses.[33] Some have criticized the military courts' permissive approach, arguing that the defense of military character, by its very nature, tilts the scales in favor of acquittal for a higher-ranking accused.[34]

More problematic, at least to understanding the admissibility of character evidence generally, is the essential premise of the good soldier defense at the merits phase of a court-martial: because SGT *X* is a "good soldier," he is less likely to have committed the charged offense. Evidence of good military character, in the context of a non-military specific offense, is precisely the type of evidence the rule purports to prohibit, as it is offered to prove that the person acted in conformity therewith on a particular occasion.[35] Such evidence is deemed wholly admissible, however, and is commonplace in modern courts-martial.[36]

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31. MCM, *supra* note 3, MIL. R. EVID. 404(a) analysis, app. 22, at A22-34.

32. *See id*. ("It is the intention of the Committee . . . to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders."); *see also* SALTZBURG, *supra* note 5, at 525.

33. SALTZBURG, *supra* note 5, at 525 (citing cases).

34. *See* Elizabeth Lutes Hillman, *The 'Good Soldier' Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879 (1999) (criticizing the good soldier defense generally and discussing its effect on the outcome of former Sergeant Major of the Army Gene McKinney's 1998 court-martial for sexual harassment); *see also* Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117 (2001) (supporting the application of the defense and responding to some of Professor Hillman's concerns).

35. In civilian courts, where the definition of *pertinent* is more narrowly construed, acquittal on the basis of character witnesses alone is virtually unheard of. *See* Hillman, *supra* note 34, at 883; Katz & Sloan, *supra* note 34, at 133; Reed, *supra* note 8, at 345 (discussing *United States v. Martinez*, 924 F. Supp. 1025 (D. Or. 1996), which the author classified as the "only case since the adoption of the Federal Rules of Evidence in which the defendant was acquitted on account of good character standing by itself"); *see also* BENCHBOOK, *supra* note 23, para. 7-8-1 (describing the permissible use of good character evidence in terms of showing the "probability of innocence").

Despite this expansive approach, the defense of good military character has perils and pitfalls that can significantly outweigh its potential benefit to the accused. First, other than the accused's own testimony, proof of good military character is limited to reputation or opinion evidence, which often sounds stilted and does not permit discussion of specific instances of the accused's good conduct.[37] Second, once the accused places a specific character trait in issue, MRE 404(a)(1) permits the prosecution to present evidence in rebuttal.[38] Although military courts liberally interpret the word *pertinent* to permit the defense of good military character, they apply an equally liberal standard to the scope of government rebuttal, and have rejected multiple defense attempts to limit direct testimony.[39] Given the sweeping on- and off-duty nature of the term *good military character*, an accused offers the defense at the substantial risk that every minor pre-trial infraction will become the subject of potentially damaging cross-examination.[40]

2. Character of the Victim: MRE 404(a)(2)

As is the case with evidence of his own character under MRE 404(a)(1), the accused controls whether evidence of the victim's character may be introduced at court-martial.[41] Military Rule of Evidence 404(a)(2) generally permits the accused to introduce evidence of a pertinent character trait of the victim.[42] In cases of homicide and assault, the rule specifi-

36. *See* SALTZBURG, *supra* note 5, at 526 n.58; *see also* Hillman, *supra* note 34, at 892 (discussing what Hillman says is the faulty reliance of military courts on the reasoning of Dean Wigmore, a World War I judge advocate, for admitting good soldier evidence in virtually all cases).

37. *See* MCM *supra* note 3, MIL. R. EVID. 405(a). The MRE permit testimony as to specific instances of conduct only when character is an essential element of the offense or defense. *Id.* MIL. R. EVID. 405(b). *See generally* SALTZBURG, *supra* note 5, at 570 (providing a more expansive discussion of foundational requirements).

38. MCM, *supra* note 3, MIL. R. EVID. 404(a)(1).

39. *See*, *e.g.*, United States v. Trimper, 28 M.J. 460, 466 (1989)**;** *see also* SALTZBURG, *supra* note 5 at 524; Hansen, *supra* note 6, at 43.

40. Unlike MRE 404(b), extrinsic evidence is not admissible to rebut evidence of good military character under MRE 404(a)(1). Cross-examination of character witnesses, however, may include specific instances of conduct, usually in the form of "are you aware" or "have you heard" questions. MCM, *supra* note 3, MIL. R. EVID. 405(a); *see also* United States v. Humpherys, 57 M.J. 83 (2002); United States v. Pruitt, 46 M.J. 148 (1997).

41. The only exception to this rule is if the accused is charged with sexual misconduct. MRE 412 specifically excludes evidence of the victim's behavior or sexual predisposition, with limited exceptions. MCM, *supra* note 3, MIL. R. EVID. 412(a).

42. *Id*. MIL. R. EVID. 404(a)(2).

cally allows evidence of the victim's character for violence, on the theory that such a character trait would have made the victim more likely to be the aggressor in a particular case.[43] The prosecutor's response has been traditionally limited to rebuttal evidence that the victim was a peaceful person.[44] As with MRE 404(a)(1), the evidence must consist solely of reputation or opinion.[45] Cross-examination of any reputation or opinion witness, however, may include inquiry into specific instances of conduct.[46]

3. Character of the Witness: MRE 404(a)(3)

Finally, MRE 404(a)(3) permits, with reference to Rules 607, 608, and 609, limited evidence concerning the character of a witness.[47] Incorporating the rules governing impeachment of witnesses, this rule concerns itself with only one character trait: credibility. The credibility of any witness, including the accused, may be impeached in one of four ways: (1)

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43. *Id*. The comparable federal rule does not permit such evidence in assault cases. The more expansive military rule was based on the premise that assaults were more likely to occur between military members living in "close quarters." SALTZBURG, *supra* note 5, at 526 (discussing the Drafter's Analysis of MRE 404(a)(2)).

44. MCM, *supra* note 3, MIL. R. EVID. 404(a)(2); *see also* SALTZBURG, *supra* note 5, at 526. On 1 June 2002, pursuant to MRE 1102, the December 2000 amendments to FRE 404(a)(1) automatically amended MRE 404(a)(1). Under the amended rule, the accused will also place his own character in issue by introducing evidence of a pertinent character trait of the victim under MRE 404(a)(2). The change to FRE 404(a)(1) is as follows:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a specific occasion, except:
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> (1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[;] *or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.*

SALTZBURG, *supra* note 5, at 88 (2001 Cum. Supp.).

45. MCM, *supra* note 3, MIL. R. EVID. 405(a). The amended MRE 404(a)(2) will permit only reputation or opinion evidence, and not extrinsic evidence of uncharged misconduct. SALTZBURG, *supra* note 5, at 90 (2001 Cum. Supp.) (reproducing the commentary to FRE 404(a)(1)).

46. MCM, *supra* note 3, MIL. R. EVID. 405(a).

47. *Id*. MIL. R. EVID. 404(a)(3). By testifying, and therefore becoming a witness, the accused also opens the door to the introduction of admissible character evidence under this provision. *Id*. MIL. R. EVID. 608 analysis, app. 22, at A22-46.

opinion and reputation evidence of character for truthfulness;[48] (2) evidence of specific instances of conduct that attack or support the credibility of a witness;[49] (3) evidence of bias or prejudice;[50] or (4) evidence of prior felony convictions.[51]

The focus of MRE 404(a)(3) is distinct from the remaining character evidence rules. Impeachment is intended to assist the finder of fact in determining the credibility of a particular witness and assessing the weight to be given to that witness's testimony. Unlike the bulk of evidence admissible under MRE 404, impeachment evidence is not intended to bear directly on the guilt or innocence of the accused.[52] By definition, credibility evidence does not make an operative fact more or less likely; instead, it pertains to the veracity of those testifying to the operative facts at issue in any given case. As a result, even though the impeachment rules contradict the bar against propensity evidence in the same fashion as the other exceptions, their use does not pose the same potential constitutional issues for the accused.[53]

B. MRE 404(b): The Exception That Swallows the Rule

Military Rule of Evidence 404(b) is a facially simple rule of incredibly complex and potentially powerful application, especially when con-

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48. *Id*. MIL. R. EVID. 608(a). Evidence of truthful character is permitted only after the witness's character for truthfulness has been otherwise attacked. *Id*.

49. *Id*. MIL. R. EVID. 608(b). Specific instances of conduct may not be proven through extrinsic evidence, but may be the subject of cross-examination if probative of the character for truthfulness of the witness at issue. *Id*.

50. *Id.* MIL. R. EVID. 608(c).

51. *Id*. MIL. R. EVID. 609. Military Rule of Evidence 609(c) excludes a conviction more than ten years old unless the court finds its probative value substantially outweighs its prejudicial effect. *Id*. Rule 608(b) permits proof of a conviction through the introduction of extrinsic evidence. *Id*. MIL. R. EVID. 608(b). At least one author has proposed banning all character evidence with the exception of convictions in criminal cases. *See* Melilli, *supra* note 7, at 1621.

52. SALTZBURG, *supra* note 5, at 736 n.44 (citing United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984)).

53. Although he acknowledges an essential difference between the use of substantive character and impeachment evidence at trial, Professor Melilli argues that the possibility of cross-examination of the accused on specific instances of conduct under Rule 608 creates a chilling effect on a defendant's right to testify. Melilli, *supra* note 7, at 1576. Court decisions blurring the distinction between bases of admissibility under Rules 404 and 608 exacerbate this chilling effect. *See* Stephen A. Saltzburg, *Uncharged Acts: Substantive Versus Impeachment Use*, CRIMINAL JUSTICE, Spring 1993, at 35.

trasted with the real limits of MRE 404(a).[54] Rule 404(a) provides narrowly drawn, specific situations in which character evidence may be considered precisely to prove that the person acted in that manner.[55] Although cross-examination into specific instances of conduct is permitted, MRE 404(a) evidence is largely limited to the testimony of witnesses in the form of reputation or opinion.[56] More importantly, MRE 404(a) limits the government to rebuttal of facts that the accused chooses to put in issue.[57]

In contrast, MRE 404(b) permits the prosecution to offer extrinsic evidence of an accused's other uncharged crimes, wrongs, or acts as substantive evidence for an open-ended list of other purposes.[58] To the Rule's many critics, the purported distinction between these permissible and non-permissible purposes is an artificial, largely academic inferential distinction with little practical effect.[59] Despite these criticisms, there has been no significant movement to amend MRE 404(b) and its federal and state counterparts.[60] Understanding the particular problem of post-offense uncharged misconduct requires examination of both the nature of MRE

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54. There is all but universal consensus on the complexity and power of Rule 404(b) in military, federal, and state criminal courts. *See, e.g.*, SALTZBURG, *supra* note 5, at 529; IMWINKELRIED, *supra* note 10, § 1:02 (citing cases).

55. *See supra* pp. 52-56.

56. MCM, *supra* note 3, MIL. R. EVID. 405.

57. SALTZBURG, *supra* note 5, at 528.

58. MCM, *supra* note 3, MIL. R. EVID. 404(b). Proper purposes include: "proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident." *Id.*

59. *See, e.g.*, Melilli, *supra* note 7; Reed, *supra* note 8; Rothstein, *supra* note 8; Kuhns, *supra* note 8.

60. Instead, the federal and state trend appears to be to create either specific exceptions or new rules of evidence for particular classes of crimes. *See* MCM, *supra* note 3, MIL. R. EVID. 413 (an analogous provision to the federal rule providing for the admissibility of evidence of similar crimes in sexual assault cases); *see, e.g.*, Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1126 (1993) (discussing crime-specific trend); Linell A. Letendre, Comment, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 992 (2000) (arguing that Washington state adopt an evidentiary rule specifically permitting evidence of prior assaults in domestic violence cases, and discussing other states, including California, Colorado, and Minnesota, that have passed similar legislation).

404(b) evidence and the logical bases of the inferences its admissibility relies on.

1. Proper Purpose and the Permissible Inference Under MRE 404(b)

The prohibition in the first sentence of MRE 404(b) creates a "forbidden theory of logical relevance."[61] That forbidden theory is the classic formulation of the ban on character evidence: that it may not be used "to show action in conformity therewith."[62] For evidence to be admissible under MRE 404(b), the proponent must offer a non-character theory of logical relevance that will not call upon the finder of fact to make the forbidden character inference about the accused's guilt.[63] Those non-character theories include, but are not limited to, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,"[64] a seemingly unrelated group of purposes taken almost wholesale from the pre-rules era common law of evidence.[65] Regardless of the specific purpose articulated, the permissible non-character inference of a particular item of evidence admitted under MRE 404(b) hinges on the aspect of the crime it is offered to prove: the actus reus or mens rea.[66]

Whether offered to prove actus reus or mens rea, the permissible use of character evidence under MRE 404(b) is counterintuitive, and legal scholars disagree both on its basis and whether the distinction can or should be made.[67] In his extensive writings on the subject, Professor Imwinkelried argues that the non-character purpose distinction depends on the nature of the "intermediate inference" the finder of fact must make.[68] Using illustrations, he argues that the forbidden theory requires the finder

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61. IMWINKELRIED, *supra* note 10, § 4:01.

62. MCM, *supra* note 3, MIL. R. EVID. 404(b).

63. IMWINKELRIED, *supra* note 10, § 4:01.

64. MCM, *supra* note 3, MIL. R. EVID. 404(b).

65. *See* IMWINKELRIED, *supra* note 10, § 1:01; H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877 (1982) (discussing the historical basis, and calling Rule 404(b) "an exception without a respectable name, a mongrel of diverse strains joined, it seems, by no more serious principle than happenstance").

66. *See* IMWINKELRIED, *supra* note 10, §§ 4-5; *see also* Uviller, *supra* note 65, at 878.

67. *See* IMWINKELRIED, *supra* note 10, §§ 4-5; Uviller, *supra* note 65; Kuhns, *supra* note 8, at 781; Rothstein, *supra* note 8, at 1264.

68. *See, e.g.*, IMWINKELRIED, *supra* note 10, §§ 4.01, 5.06; Imwinkelried, *supra* note 5, at 41; Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIMINAL JUSTICE, Fall 1992, at 16; Imwinkelried, *supra* note 60, at 1125.

of fact to draw an impermissible intermediate inference about the defendant's character.[69] From that inference, the finder of fact is asked to infer that the accused acted consistently with his character in committing the crime at issue.[70] Conversely, the purposes allowed by the rule call upon the finder of fact to make a non-character based intermediate inference. From that permissible intermediate inference, the finder of fact may derive the ultimate inference as to either the accused's commission of the actus reus, or his relevant mens rea. Although Professor Imwinkelried's construct is conceptually descriptive and logically consistent, the model also illustrates the complex and largely artificial nature of the required distinction.[71]

Moreover, Professor Imwinkelried's illustration of permissible purposes does nothing to ease the difficulty of applying Rule 404(b) in the courtroom.[72] The court-martial evidentiary instruction for MRE 404(b) calls upon panel members to abdicate the very common sense and life experience that they are selected for[73] and that other instructions specifically call upon them to use.[74] The permissible inference requires the finder of fact not to use MRE 404(b) evidence for the purpose for which it seems most logically relevant—character. Instead, the panel is called upon to divest the evidence of its character qualities and consider it for some other purpose in a manner that lawyers themselves often have difficulty under-

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69. IMWINKELRIED, *supra* note 10, § 4.01. Although this citation is to the chapter on actus reus, Professor Imwinkelried uses the same analysis in Chapter 5 dealing with mens rea. *See id*. § 5.06.

70. *Id.*

71. Professor Imwinkelried relies on variations of the doctrine of chances for his intermediate inference in both actus reus and mens rea contexts. *See id*. §§ 4.01, 5.06. The doctrine of chances is discussed in more detail *infra* pp. 83-88.

72. Melilli, *supra* note 7, at 1569.

73. UCMJ art. 25(d)(2) (2000). Article 25 requires the convening authority to detail "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id*.

74. After restating the item of evidence and the limited purpose for which it was introduced, the uncharged misconduct instruction directs the panel members, "You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (she)(he) therefore committed the offense(s) charged." BENCHBOOK, *supra* note 23, para. 7-13-1. The instruction on findings, in contrast, reads, "In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world." *Id*. para. 8-3-11.

standing. The fact-finder's potential impermissible use of the evidence is what makes MRE 404(b) such a powerful prosecutorial tool.[75]

2. The Reynolds *Test: MRE 404(b) Evidence in Courts-Martial*

Precisely because of the potential danger for misuse of MRE 404(b) evidence, it is not enough that the government articulate a legitimate non-character theory of logical relevance. To be admissible, the government must also show that the accused actually committed the alleged act offered, and more importantly, the military judge must find that the act is legally relevant.[76] The Court of Appeals for the Armed Forces (CAAF) specified these requirements for admissibility in *United States v. Reynolds*,[77] setting forth a specific three-part test based on precedent.[78] When looking at evidence of uncharged misconduct under MRE 404(b), the military judge must determine (1) whether the evidence "reasonably support[s]" a finding that the accused committed the uncharged misconduct;[79] (2) whether the evidence is logically relevant under MRE 401; and (3) whether the evidence is legally relevant under MRE 403.[80] Of these factors, legal relevance is both the most critical and the most difficult to apply, as the more facially probative the evidence appears the more susceptible it likely is to misuse.[81]

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75. *See* IMWINKELRIED, *supra* note 10, § 1:02.

76. United States v. Reynolds, 29 M.J. 105, 109 (1989). The standard for legal relevance under MRE 403 provides for the exclusion of otherwise relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice." MCM, *supra* note 3, MIL. R. EVID. 403.

77. 29 M.J. at 105.

78. *See id.* at 109.

79. *Id.* The fact-finder, not the military judge, must determine if the act itself occurred. Until relatively recently, there was some argument that the judge should make a preliminary finding that the accused had committed the uncharged act by a preponderance of the evidence. The Supreme Court held otherwise in *Huddleston v. United States*, 485 U.S. 681 (1988). Under *Reynolds*, the military judge merely determines whether there is sufficient evidence to support the fact-finders' conclusion. *Reynolds*, 29 M.J. at 109.

80. *Reynolds*, 29 M.J. at 109.

81. *See* IMWINKELRIED, *supra* note 10, § 1:02 (discussing the impact of uncharged misconduct evidence in a number of high-profile criminal cases). The concern over prejudicial effect extends beyond the fact-finder using the evidence to draw an impermissible character inference in determining the guilt of an accused for a particular crime. Other potential prejudice includes the possibility of the fact-finder, even subconsciously, punishing the accused for the other crimes, or according the uncharged misconduct too much evidentiary weight. *Id.* § 1:03.

Unfortunately, MRE 403 analysis is necessarily a case-by-case inquiry, subject to a high level of appellate court deference,[82] and is often done without supporting rationale on the record.[83] Trial and appellate courts frequently reach seemingly inconsistent results, a matter of particular concern considering the unique context and purpose of the military justice system.[84] A pattern of confusing and even contradictory precedent results, making an already complicated rule even more difficult to apply at the trial level.[85] The relatively narrow issue of the admissibility of post-offense uncharged misconduct illustrates these difficulties, and is one area where a per se rule instead of a case-by-case determination is both possible and warranted.

III. The Particular Problem of Post-Offense Uncharged Misconduct

In the recent case of *United States v. Matthews*,[86] the CAAF dealt directly with the issue of the admissibility of post-offense uncharged misconduct to prove knowledge under MRE 404(b). In *Matthews*, the majority held that evidence of a second, uncharged post-offense positive urinalysis was inadmissible under MRE 404(b) to prove knowledge of the charged, preceding use.[87] The decision is unclear whether the prohibition is limited to urinalysis cases or applies to all cases involving post-offense uncharged misconduct.[88] The CAAF muddied the already cloudy waters in this area even further in *United States v. Young*,[89] holding, ostensibly on other than MRE 404(b) grounds, that a tape recorded conversation discuss-

82. United States v. Sullivan, 42 M.J. 360 (1995).

83. This trend may be changing, as the CAAF recently said in dicta that they would give evidentiary rulings less deference "when the judge does not articulate the balancing analysis on the record." United States v. Dewrell, 55 M.J. 131, 138 (2001).

84. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MCM, *supra* note 3, preamble para. 3.

85. *See* Hansen, *supra* note 6.

86. 53 M.J. 465 (2000).

87. *Id*. at 470.

88. *See* United States v. Tyndale, 56 M.J. 209 (2001) (allowing evidence of a 1994 positive urinalysis under MRE 404(b) to rebut an innocent ingestion defense for a 1996 drug offense).

89. 55 M.J. 193 (2001).

ing a future drug sale was admissible to prove the existence of a prior charged conspiracy.[90]

A. *United States v. Matthews*: The Case for a Per Se Rule

Air Force Staff Sergeant (SSgt) Sherrie Matthews had over fourteen years of active duty and was the noncommissioned officer in charge of Information Management at an Office of Special Investigations (OSI) detachment when she was selected for random urinalysis on Wednesday, 24 April 1996, and told to report the next day for testing. Staff Sergeant Matthews claimed to be ill that day, returning to duty on Friday, 26 April 1996. For reasons not explained in the CAAF opinion, SSgt Matthews did not provide a urine sample until Monday, 29 April 1996. When that sample came back positive for marijuana with a concentration of fifty-seven nanograms per milliliter, the command directed a second urinalysis on 21 May 1996. The second urinalysis tested positive for marijuana at a concentration of forty-five nanograms per milliliter.[91]

The government charged SSgt Matthews based on the first urinalysis only, writing the specification to allege wrongful use of marijuana between "on or about 1 April 1996 and 29 April 1996."[92] At a members trial, SSgt Matthews raised the defense of good military character on the merits, introducing affidavits and testifying on her own behalf. She also testified briefly about the circumstances surrounding the positive urinalysis. Her defense counsel attempted to limit the scope of SSgt Matthew's testimony about the urinalysis by asking her a series of pointed, leading questions.[93] First, he asked specifically if she had used marijuana "between on or about 1 April 1996 and 29 April 1996."[94] Staff Sergeant Matthews replied, "No,

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90. *Id.* at 196; *see also* Major Charles H. Rose III, *New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!*, ARMY LAW., April 2002, at 63, 64 (acknowledging that these recent cases have "blurr[ed] the lines regarding the general admissibility of evidence under MRE 404(b)" and that "[t]he resulting confusion makes it difficult for counsel to determine when such evidence may come in").

91. *Matthews*, 53 M.J. at 467.

92. *Id*.

93. *Id*.

94. *Id.*

sir."[95] He then asked whether she had "any idea how the results came back positive," to which SSgt Matthews replied, "No, sir, I do not."[96]

Immediately following SSgt Matthews's direct examination, the trial counsel requested an Article 39(a) session, arguing that Matthews's limited statements had "opened the door" for the 21 May 1996 positive urinalysis to be used for impeachment purposes.[97] The military judge agreed, citing alternative, somewhat confusing bases for his decision. First, he found that evidence of the 21 May 1996 urinalysis was admissible to impeach SSgt Matthew's testimony that she did not use marijuana between 1 and 29 April 1996. Despite this statement, the military judge would not allow any reference to the urinalysis in either rebuttal or cross-examination of defense good military character witnesses, claiming that MRE 608 was not applicable.[98]

The military judge went on to find, however, that proof of the uncharged 21 May 1996 urinalysis was admissible under MRE 404(b) to show the "knowing and conscious" nature of the prior, charged use.[99] There is no indication from the opinion that the military judge weighed the factors on the record as required by *United States v. Reynolds*[100] in arriving at this conclusion, although he apparently applied MRE 403 and found that the probative value of the second urinalysis was "not substantially outweighed by the danger of unfair prejudice, confusion to court members, or anything else."[101]

The trial continued with cross-examination of SSgt Matthews. First, the trial counsel asked SSgt Matthews if "good military members . . . use drugs," to which she replied, "No, sir."[102] He then went on to ask if she had provided a sample and tested positive on 21 May 1996, and she replied that she had. The trial counsel then asked if SSgt Matthews was trying to imply having innocently ingested the marijuana "twice within a five-day

95. *Id*.
96. *Id*.
97. *Id*. at 468.
98. *Id*. Military Rule of Evidence 608(b) permits cross-examination regarding a specific instance of conduct of a witness, including the accused in a criminal case, if the military judge determines that it is "probative of truthfulness or untruthfulness." MCM, *supra* note 3, MIL. R. EVID. 608(b). Unlike MRE 404(b), extrinsic evidence of the alleged conduct is *not* permitted. *Id*.; *see supra* pp. 56-58.
99. *Matthews*, 53 M.J. at 468.
100. 29 M.J. 105, 109 (1989). *See supra* pp. 60-61.
101. *Matthews*, 53 M.J. at 468.
102. *Id*.

period," to which she replied, "It's possible."[103] On redirect, SSgt Matthews denied using marijuana on any occasion.[104]

The trial continued, with the military judge permitting the trial counsel to present expert testimony that it was not scientifically possible for the second positive result to have come from the first use.[105] Before deliberations began, the military judge issued a limiting instruction, directing that the members could use evidence of the 21 May 1996 urinalysis as proof of "knowledge . . . or opportunity" to commit the charged offense, as well as to evaluate "the credibility of [SSgt Matthews's] testimony before the court."[106] Despite the apparent inconsistency of this instruction with the military judge's earlier finding that the evidence was inadmissible under MRE 608, the defense counsel neither objected nor requested additional instructions.[107] The court-martial subsequently convicted SSgt Matthews of wrongful use of marijuana, sentencing her to a bad-conduct discharge and reduction to E-1.[108] The Air Force Court of Criminal Appeals (AFCCA) affirmed the conviction, finding the subsequent urinalysis admissible under both MRE 405 and 608(b).[109]

Rejecting the AFCCA's reasoning, the CAAF reversed SSgt Matthews's conviction on two distinct bases. First, the court cited two earlier urinalysis cases for the general proposition that evidence of prior positive urinalyses are inadmissible to prove wrongful use at a later date,[110] and apparently extrapolating from those cases, found that subsequent, unconnected positive urinalyses are similarly irrelevant.[111] Second, the court found that the military judge's instructions to the members allowing them to consider the evidence to evaluate SSgt Matthews's credibility were both "inadequate and incorrect" because the subsequent positive urinalysis

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 469.

107. *Id.*

108. *Id.* at 466.

109. United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).

110. *See Matthews*, 53 M.J. at 470 (citing United States v. Graham, 50 M.J. 56, 60 (1999); United States v. Cousins, 35 M.J. 70, 74 (1992)).

111. *Id.*

could not logically impeach her carefully limited direct testimony and the military judge had specifically found MRE 608 to be inapplicable.[112]

1. United States v. Matthews *Does Not Establish a General Rule for the Admissibility of Post-Offense Uncharged Misconduct to Prove Knowledge Under MRE 404(b)*

Close examination of the majority reasoning in *Matthews* reveals that the decision fails to settle the question of the admissibility of post-offense misconduct to prove knowledge or intent under MRE 404(b) in military courts. First, the CAAF's general proposition—that prior positive urinalyses are universally irrelevant to prove subsequent knowing use—is not supported by the cases it cites. Second, as it cursorily found this universal rule so readily apparent, the CAAF failed to analyze specifically the trial court's application (or lack thereof) of the *Reynolds* factors to the MRE 404(b) analysis in this case, and therefore how proper, detailed application of the factors on the record might affect the outcome of future cases. Finally, the CAAF's keen and repeated discomfort with the constitutional implications of the military's urinalysis testing program[113] support limiting the scope of the decision to urinalysis cases.[114]

a. Relevance and Urinalysis: How Sound Is the CAAF's General Proposition?

The majority relied on two distinguishable decisions[115] as authority for its sweeping assertion in *Matthews* that both prior and subsequent pos-

112. *Id.*

113. *See, e.g.*, United States v. Green, 55 M.J. 76 (2001); United States v. Campbell, 52 M.J. 386 (2000). *United States v. Graham* makes the majority opinion of the urinalysis program patently clear, as the CAAF commented in dicta,

> [O]ur service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.

Graham, 50 M.J. at 60.

114. *See* Hansen, *supra* note 6, at 44; Rose, *supra* note 90, at 65. Unfortunately, narrowing the decision to urinalysis cases only increases the complexity of the rules of evidence for trial-level practitioners and military judges.

itive urinalyses are universally irrelevant to prove knowledge of the charged offense. In *United States v. Graham*,[116] both the facts and legal basis for the decision are markedly different than those presented in *Mathews*. In *Graham*, the accused was an Air Force Master Sergeant (MSgt) charged with wrongful use of marijuana in 1995. Master Sergeant Graham testified at his court-martial that he was "shocked, upset, and flabbergasted" after being notified that his urine had tested positive.[117] Following this testimony, the military judge allowed the government to introduce rebuttal evidence that MSgt Graham had tested positive for marijuana four years earlier, in 1991.[118]

Following the 1991 urinalysis, MSgt Graham had been tried by court-martial and acquitted after raising an innocent ingestion defense, purportedly based on his unwitting consumption of a drug-laced birthday cake.[119] The military judge limited evidence of the 1991 offense to one question about the prior positive result.[120] When cross-examined about the prior result, MSgt Graham replied that he had tested positive, then volunteered that he had been acquitted of that offense.[121] The panel found MSgt Graham guilty, and sentenced him to a bad-conduct discharge, six months'

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115. *Graham*, 50 M.J. at 56; *Cousins*, 35 M.J. at 70. Judge Sulllivan found these cases distinguishable while concurring in the result. *Matthews*, 53 M.J. at 472 (Sullivan, J., concurring).

116. 50 M.J. 56 (1999).

117. *Id.* at 57.

118. *Id.*

119. *Id*. at 57 n.1. Interestingly, MSgt Graham had initially notified the government in the 1995 case that he would be raising yet another innocent ingestion defense, this time allegedly based on the unwitting consumption of a drug-laced brownie. *Id*. at 59-60. The majority characterized MSgt Graham as thinking better of this course of action at trial, perhaps after realizing how the striking foodstuff parallel may have been used against him. The majority characterized this change of tactic as an intentional switch from "innocent ingestion" to the broader "good soldier" defense, changing the scope of permissible rebuttal. *Id*. at 60. Criticizing the majority reasoning, the dissent calls it the "brownie defense without the brownies." *Id*. at 61 n.2.

120. *Id*. at 57. The military judge's rationale for admitting the evidence appears to have been based at least in part on the doctrine of chances, discussed *infra* pages 83-88, as he instructed the members that they could consider the prior result for "the limited purpose as to what likelihood would be that the accused would test positive twice for unknowing ingesting of marijuana and for the likelihood that the accused was flabbergasted when he was informed that he tested positive at this time." *Graham*, 50 M.J. at 58.

121. *Id*.

confinement, and reduction to E-1.[122] The AFCCA affirmed the conviction.[123]

On appeal, the CAAF reversed MSgt Graham's conviction on the grounds that evidence of his 1991 positive result was not logically relevant, either to his surprise at testing positive again in 1995 or to his good soldier defense. The majority dismissed outright the possibility of admitting the evidence under MRE 404(b), finding that the prior urinalysis fit none of the "recognized exceptions."[124] Although the court did not discuss what it meant by the term *exceptions*, the general reference to MRE 404(b) presumably includes knowledge, the element that the prosecution was trying to prove. For the sake of argument, the court assumed the prior urinalysis may have some probative value, and continued its discussion about MRE 404(b) in the alternative.[125]

Glaringly missing from the majority's discussion, however, is any mention of the *Reynolds* test, the supposed standard for measuring the admissibility of evidence under MRE 404(b).[126] Instead, citing a general statement about the probative value of MRE 404(b) from the *Military Rules of Evidence Manual*,[127] the court limited its evaluation of the prior urinalysis under MRE 404(b) to a brief comment on the trial court's failure to "develop a clear relationship between the prior test result and the issues at stake in the present case."[128] What *Graham* apparently stands for, therefore, is not what the *Matthews* majority asserted is a broad rule precluding admissibility of prior positive urinalyses to prove knowledge under MRE

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122. *Id*. at 57.

123. United States v. Graham, 46 M.J. 583 (A.F. Ct. Crim. App. 1997).

124. *Graham*, 50 M.J. at 60. The majority's use of the term *recognized exceptions* to describe the list of possible purposes found in MRE 404(b) represents a significant departure from precedent. Consistent with most federal courts, the CAAF had previously held that the list of purposes enumerated in MRE 404(b) was "illustrative, not exhaustive." United States v. Ferguson, 28 M.J. 104, 108 (1989).

125. *Graham*, 50 M.J. at 60.

126. *See* United States v. Reynolds, 29 M.J. 105, 109 (1989).

127. *Graham*, 50 M.J. at 60.

128. *Id*. In reality, the trial court had come close to strict application of the *Reynolds* factors, although the military judge neglected to mention them as such on the record. The trial court had before it a summarized record of the previous trial, which would be sufficient evidence for the members to conclude that the defendant committed the prior act. Second, the court had determined that the prior positive urinalysis pertained to two facts of consequence to the trial: (1) the likelihood of the accused testing positive twice and (2) his being "flabbergasted" at the positive result. Finally, the court had conducted MRE 403 balancing, and determined that while mention of the previous court-martial would be unfairly prejudicial, mere mention of the positive urinalysis was not. *Id.*

404(b). Instead, *Graham* allows for such evidence to be potentially relevant and admissible, but imposes a stringent requirement for the trial court to articulate clearly its reasoning on the record to establish a permissible basis for relating the prior misconduct to a fact at issue in the current case.

While the second case cited by the *Matthews* majority, *United States v. Cousins*,[129] is a MRE 404(b) urinalysis case, it too is factually distinguishable. In *Cousins*, the accused, an Air Force Senior Airman (SrA), was charged with wrongful use of cocaine in 1989 following a positive urinalysis. At trial, the government called another airman as a witness under a grant of immunity. That airman testified about the events of 29 July 1989, within the window of the charged cocaine offense. He described how he and SrA Cousins allegedly obtained marijuana, adding that their contact had obtained methamphetamine and cocaine the same day. The witness went on to testify that the contact had cut a line of methamphetamine for SrA Cousins. When asked how he knew that the line was methamphetamine, the witness replied that he thought it was methamphetamine because that is what he had seen SrA Cousins use on nine to eleven previous occasions.[130]

The mention of SrA Cousins's nine to eleven prior uncharged methamphetamine uses drew neither objection from the defense counsel nor unilateral action by the military judge. Exacerbating his error, the military judge permitted the trial counsel to call an expert witness who testified not only that methamphetamine worked in much the same way as cocaine, but also that the drug was called "poor man's cocaine."[131]

The accused did not testify, instead using the testimony of a female friend to raise an innocent ingestion defense. The friend testified that she had put cocaine into SrA Cousins's alcoholic drink to relieve pain he was suffering after a hand injury. She claimed not to have told him about the cocaine because "she knew that he was in the Air Force and was not allowed to use drugs."[132] The judge's sole limiting instruction to the panel members was that they could not consider the uncharged methamphetamine evidence to conclude that the accused was "a bad person or had criminal tendencies."[133] The panel convicted SrA Cousins, sentencing

129. 35 M.J. 70 (1992).
130. *Id.* at 71.
131. *Id.* at 72.
132. *Id.*
133. *Id.* at 73.

him to a bad-conduct discharge, confinement for eight months, and reduction to E-1.[134]

The CAAF reversed the conviction, finding plain error in the admission of the prior uncharged misconduct evidence.[135] Although MRE 404(b) was not raised at the trial level, the majority applied the *Reynolds* factors to determine the admissibility of the evidence in question. First, the majority found that the eyewitness testimony of the immunized drug source was sufficient to establish for the panel that the prior misconduct had occurred. Applying the second factor, the majority decided without analysis or explanation that the accused's use of methamphetamines nine to eleven times before the charged offense was irrelevant because those prior uses "did not make it more or less probable" that he had been provided cocaine on the evening in question.[136] The court ultimately concluded that even if the evidence were relevant, it would fail the MRE 403 balancing test due to the danger of unfair prejudice.[137]

Like *Graham*, *Cousins* cannot be made to stand for the essential proposition that the *Matthews* majority cited it for—namely, that the CAAF has "rejected the notion that evidence of an unlawful substance in an accused's urine at a time before the charged offense may be used to prove knowing use on the date charged."[138] In *Cousins*, the government's evidence consisted of an eyewitness account of multiple instances of the accused's prior drug use, not a urinalysis result. Unlike both *Matthews* and *Graham*, the accused in *Cousins* did not testify on his own behalf, relying instead on the testimony of another witness to raise his innocent ingestion claim, and did not raise the defense of good military character on the merits.

Nowhere in the *Cousins* opinion did the majority write that prior drug use is per se inadmissible to prove knowledge under MRE 404(b). Instead, the CAAF focused on both the significant volume of uncharged misconduct evidence presented, to include the government findings argument heavily relying on that evidence, and correctly concluded that the military judge's instructions were inadequate to ensure that the panel did not improperly use the uncharged misconduct evidence before it. The opinion does not, however, foreclose the admissibility of prior drug use to prove knowledge when (1) it is relevant under MRE 404(b) (i.e., the same sub-

134. *Id*. at 71.
135. *Id*. at 74.
136. *Id*.
137. *Id*.
138. United States v. Matthews, 53 M.J. 465, 469 (2000).

stance, whereas *Cousins* involves methamphetamine and cocaine); (2) the military judge scrupulously applies the *Reynolds* factors on the record to determine admissibility; and (3) the members receive proper limiting instructions.

b. Application of the Reynolds *Factors to* Matthews*: A Different Result?*

Adding to the difficulty of discerning a general rule from *Matthews* is the conspicuous absence of the application of the *Reynolds* factors to the subsequent urinalysis.[139] Although the majority cited *Reynolds* as controlling and set out the three-part test at the outset of the opinion, the CAAF utterly failed to apply the factors to the facts of the case. This failure is a striking departure from prior court practice and precedent.[140] Had the court applied the *Reynolds* factors, it could have reached the same decision while establishing clearer precedent for practitioners trying to apply *Matthews* to future issues of post-offense uncharged misconduct.

The first *Reynolds* factor requires that "the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts."[141] The majority discussed this factor indirectly in its response to Judge Crawford's dissenting opinion, commenting somewhat disparagingly that the only proof of the subsequent positive urinalysis was the laboratory report. The government offered expert testimony to admit the first positive result, and the same expert testified that the two positive urinalyses could not have come from the same use. The government did not offer any evidence about the alleged facts and circumstances surrounding the second use.[142]

Although the majority is correct that additional evidence about the facts and circumstances of the uses might be required for the subsequent urinalysis to be admissible under the doctrine of chances,[143] such evidence is not required under the *Reynolds* analysis. The standard for admissibility

139. *Id.* at 469.

140. *See, e.g.*, United States v. Tanksley, 54 M.J. 169 (2000) (applying the *Reynolds* factors in child sexual abuse case tried before the adoption of Rules 413-415, and finding thirty-year old uncharged sexual misconduct with other child admissible); United States v. Cousins, 35 M.J. 70 (1992) (discussed *supra* pp. 68-70).

141. United States v. Reynolds, 29 M.J. 105, 109 (1989).

142. *Matthews*, 53 M.J. at 470.

143. *See infra* pp. 83-88.

under MRE 404(b) is exceedingly low: enough evidence for the finder of fact to support a reasonable conclusion.[144] The standard is simple sufficiency, which is less than a preponderance of the evidence, and far below beyond a reasonable doubt.[145] The documentary evidence of the positive urinalysis result, coupled with expert testimony that the second positive result came from a separate use, is more than enough evidence under the sufficiency standard for the finder of fact to infer a second knowing use.

The second *Reynolds* factor requires the court to find the evidence logically relevant under MRE 401.[146] To be logically relevant, the existence of the evidence must have a tendency to make a fact of consequence more or less probable.[147] In the usual circumstance, this is a fairly low threshold to meet.[148] In *Matthews*, the trial court found that admission of the 21 May 1996 urinalysis under MRE 404(b) was relevant to establish both opportunity and knowing and conscious use of marijuana between 1 and 29 April 1996.[149] The CAAF rejected these bases for admissibility. In addition, both the CAAF and the AFCCA held that the 21 May 1996 positive urinalysis did not directly contradict the accused's testimony that she had not used marijuana between 1 and 29 April 1996.[150]

The more difficult issue, however, is whether the second urinalysis was relevant to prove knowledge in rebuttal to an innocent ingestion defense.[151] Based on the excerpts of the record reproduced in the CAAF opinion, the answer appears to be "no" because SSgt Matthews's testimony failed to raise the defense. In her carefully limited direct testimony, SSgt Matthews offered not an innocent ingestion defense, but a general denial of having "any idea" of how the results could have come back pos-

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144. *Reynolds*, 29 M.J. at 109.

145. *See* Huddleston v. United States, 485 U.S. 681, 690-91 (1988) (specifically rejecting a preponderance of the evidence standard for the admissibility of evidence under the Federal Rule of Evidence 404(b)).

146. United States v. Reynolds, 29 M.J. 105, 109 (1989).

147. MCM, *supra* note 3, Mil. R. Evid. 401; *Reynolds*, 29 M.J. at 109.

148. *See* Hansen, *supra* note 6, at 41 (discussing the low standard for logical relevance).

149. United States v. Matthews, 53 M.J. 465, 468 (2000). Both the military judge and the AFCCA also found the evidence relevant to the accused's credibility, a non-404(b) basis not discussed here. *Id*. In addition, the AFCCA found the evidence relevant to rebut the accused's defense of good military character under MRE 405(a). United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).

150. *Matthews*, 53 M.J. at 468.

151. The AFCCA concluded that SSgt Matthews's testimony had raised the defense of innocent ingestion. *Matthews*, 50 M.J. at 590.

itive, coupled with evidence of her good military character.[152] In the absence of the acceptance of a doctrine of chances or other probability based theory of admissibility, the fact that she subsequently tested positive for marijuana does not have any tendency to make her knowledge between 1 and 29 April 1996 more or less probable. Although the majority ultimately reached the same conclusion, the court's failure to delineate the analysis of relevance under MRE 404(b) from other potential bases of admissibility[153] reduces the decision's precedential value to trial practitioners.

The third and final prong of the *Reynolds* test is MRE 403 analysis, which requires the court to determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect.[154] In *Matthews*, the trial court conducted that balancing on the record before allowing the government to introduce evidence of the subsequent urinalysis, concluding that "its probative value was 'not substantially outweighed by the danger of unfair prejudice, confusion to court members, or anything else.'"[155] The military judge did not elaborate on his reasons for arriving at that conclusion.[156]

In contrast, the CAAF does not specifically discuss this factor in the opinion, even though it is a required test of the *Reynolds* analysis. The only mention the majority makes of the possible prejudicial effect of the subsequent urinalysis is a conclusory statement that the evidence was "highly inflammatory."[157] What about probative value? Had the evidence been logically relevant, which it might have been had it pre-dated the charged offense, would it have been probative of knowledge?[158] Courts and commentators universally acknowledge that MRE 404(b) evidence is usually prejudicial, but also usually highly probative.[159] As the court provides no reasoning for its conclusion in *Matthews*, determining what

152. *Matthews*, 53 M.J. at 467.

153. The evidence of the subsequent urinalysis is at least theoretically admissible under current case law to rebut a defense that SSgt Matthews clearly did put on—good military character. The AFCCA found the subsequent urinalysis relevant to rebut that defense under MRE 405(a). *Matthews*, 50 M.J. at 591. Even if the evidence was admissible to rebut the defense of good military character, the CAAF correctly noted that the extrinsic evidence offered at trial would not have been permitted. *See Matthews*, 53 M.J. at 470.

154. United States v. Reynolds, 29 M.J. 105, 109 (1989).

155. *Matthews*, 53 M.J. at 468 (citing MCM, *supra* note 3, MIL. R. EVID. 403).

156. *See id.*

157. *Id.* at 471.

would tip the balance in favor of admitting evidence of subsequent misconduct is difficult.

In light of the questionable precedent the CAAF relied on and the failure to specifically apply the *Reynolds* factors, is it safe to say that the *Matthews* rule against the admission of subsequent uncharged misconduct is limited to the urinalysis context? The best answer, unfortunately, is perhaps.[160] On one hand, the court's language lends itself to limited interpretation: "We . . . reject the notion that *evidence of an unlawful substance in the accused's urine* after the date of the charged offense and not connected to the charged offense may be used to prove knowing use on the date charged."[161] The court apparently based its holding on logical relevance, finding that subsequent misconduct cannot be relevant to show knowledge in the absence of an innocent ingestion defense. If that is true, then the court's statement in dicta that they have "no quarrel"[162] with a doctrine of chances theory of admissibility under different factual circumstances is puzzling, as it appears to allow for different outcomes in other than urinalysis cases.[163] On the other hand, certain members of the court seem to feel that *Matthews* is binding as to the entire issue of subsequent uncharged misconduct as proof of knowledge.[164] Such confusion, readily apparent

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158. *See* United States v. Graham, 50 M.J. 56, 59 (1999) (acknowledging the possibility that a prior positive urinalysis may be logically relevant under MRE 404(b) to rebut an innocent ingestion defense); *see also* United States v. Tyndale, 56 M.J. 209 (2001) (holding that a prior positive urinalysis coupled with evidence that the prior use occurred under similar circumstances as the charged offense satisfied logical relevance under MRE 404(b) to rebut an innocent ingestion defense).

159. *See, e.g.*, Imwinkelried, *supra* note 5, at 43; Melilli, *supra* note 7, at 1549.

160. *See* Hansen, *supra* note 6, at 44.

161. *Matthews*, 53 M.J. at 470 (emphasis added).

162. *Id.*

163. *See also Tyndale*, 56 M.J. at 213 (accepting the doctrine of chances as a theory of logical relevance in a subsequent urinalysis case).

164. *Compare* United States v. Wright, 53 M.J. 476, 486 (2000) (Sullivan, J., dissenting) (arguing that *Matthews* stands for the proposition that evidence of misconduct that occurs after the charged offense but before trial is objectionable under MRE 403) *and* United States v. Young, 55 M.J. 193, 197 (2001) (Sullivan, J., dissenting) (arguing again that *Matthews* requires that the subsequent uncharged misconduct not be admitted), *with* United States v. Wright, 53 M.J. 476, 486 (Gierke, J., dissenting) (arguing against admissibility of post-offense sexual misconduct under MRE 413 without citing *Matthews* at all) *and Young*, 55 M.J. at 193 (applying *Reynolds* to an MRE 404(b) subsequent uncharged misconduct case involving conspiracy to distribute marijuana, not resolving the issue, and deciding the case on other grounds).

even within the CAAF itself, does little to assist the trial practitioner in an already complex area of the law.

2. Reconciling Matthews and Young: What Is Current Law?

The CAAF did little to clarify the issues *Matthews* presented in the subsequent case of *United States v. Young*.[165] Marine Corps Corporal (Cpl) Anthony Young was charged with conspiracy to distribute marijuana and distribution of marijuana following a controlled sale to a Naval Criminal Investigative Service (NCIS) informant on 26 December 1995. Another Marine, Private Frank Smith, had approached Cpl Young on 26 December 1995 and asked if he could store some marijuana at Young's home. The following day, the informant approached both Smith and Young at the barracks, asking Smith if Smith could get him some marijuana. Smith agreed to return to complete the sale that evening. At that point, Smith and Young went to Young's apartment, where the marijuana was stored. The two retrieved the marijuana, agreed to split the proceeds, and sold it to the informant back at the base.[166]

On 3 January 1996, the informant returned to Smith and complained of not receiving the entire amount of marijuana that he had asked for the week before. Smith blamed any error on Young, saying that Young was the one who had weighed and bagged the marijuana, and telling the informant that Young had probably smoked some of it while it was stored at Young's apartment. Two weeks later, on 17 January 1996, the informant, wearing an NCIS recording device, approached Young directly and asked to purchase more marijuana.[167]

During the conversation agreeing to another drug purchase, Young and the informant discussed Young's role in the 26 December 1995 drug transaction. At trial, over defense objection under MRE 404(b), the military judge allowed the government to play a tape and introduce a transcript of the entire 17 January 1996 conversation, to include the discussion of the second, uncharged drug transaction.[168] The court-martial panel convicted

165. 55 M.J. 193 (2001).
166. *Id.* at 194.
167. *Id.*
168. *Id.* at 195.

the accused and sentenced him to reduction to E-1, a bad conduct discharge, and thirty-six months' confinement.[169]

The government based the charged offenses on Young's agreement with Smith to sell the marijuana and split the proceeds, and Smith's overt act of selling the marijuana to the informant on 26 December 1995.[170] In response to the defense objection to the portion of the tape concerning the subsequent drug transaction, the government claimed that it was not offering the evidence to show Young's bad character.[171] Instead, the government argued that the panel needed to hear the entire tape to understand adequately that Young's admissions about the 26 December 1995 offenses concerned a drug transaction. Absent the context of a current transaction, the trial counsel argued, statements such as "[d]on't go to him [Smith] anymore" and "I didn't pinch out anything" lacked meaning.[172] The military judge admitted the evidence, and immediately issued a limiting instruction that the members were permitted to consider the tape and transcript "for the limited purpose of its tendency to show that the accused intended to join in a conspiracy," and were not permitted to "conclude from this evidence that [Young] is a bad person or his criminal tendency, and he, therefore committed the charged offenses (sic)."[173]

On appeal, Young argued that it was improper for the trial judge to admit the evidence of the subsequent uncharged misconduct under MRE 404(b).[174] While affirming Young's conviction, the opinion carefully disavows the existence of any per se rule in the area of subsequent uncharged misconduct under MRE 404(b). After setting out the *Reynolds* factors as the standard for admissibility under MRE 404(b), the majority discussed approvingly what it characterized as "prevailing federal practice" allowing the admissibility of subsequent uncharged misconduct under MRE 404(b) and its federal counterpart.[175] Ultimately, however, the CAAF skirted the issue entirely, finding that it "need not decide" the tricky issue of the logical relevance of the subsequent act because the taped conversation was "admissible for a separate limited purpose, to show the subject matter and context of a conversation in which [Young] admitted the charged conspir-

169. *Id*. at 193.
170. *Id*. at 194.
171. *Id*. at 195.
172. *Id*.
173. *Id*.
174. *Id*. at 193.
175. *Id*. at 196. *See also infra* pp. 77-79.

acy."[176] The court then cited *United States v. Matthews* in support of its reasoning.[177]

Unfortunately, as in *Matthews*, *Young* cites the *Reynolds* factors without specifically applying them. The opinion does not analyze the first factor at all, presumably because the taped conversation and testimony of the informant constituted more than sufficient evidence for the panel to determine that the misconduct occurred. The CAAF consciously avoided application of the second, most complicated factor—logical relevance—by deciding the case on other grounds. Finally, applying the third factor and balancing the evidence under MRE 403, the court found that the tape's purported admission is "the most probative and damaging evidence that can be admitted against an accused," outweighing any prejudicial effect.[178]

How, then, can *Matthews* and *Young* be read together to discern a coherent rule? One possible reading is that *Matthews* is intended to apply only in the urinalysis context.[179] Another, suggested by dicta in *Young*, is that subsequent uncharged misconduct cannot be relevant to prove knowledge or intent for prior charged offenses. Discussing possible errors in the military judge's limiting instruction, the CAAF wrote that the power of the admission "greatly overshadowed any suggestion . . . that [Young's] willingness to sell drugs on January 17 *might relate back to [Young's] intent to conspire with Smith on December 27. The prosecution did not rely on this tenuous theory.*"[180] This statement, combined with the court's reliance on two other intent-based decisions finding subsequent uncharged misconduct inadmissible under MRE 404(b),[181] suggests that under current military law, subsequent uncharged misconduct is not admissible to prove either intent or knowledge, regardless of the nature of the charged offenses.

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176. *Young*, 55 M.J. at 196.

177. *Id*. at 197.

178. *Id*. (quoting Arizona v. Fulminante, 499 U.S. 279, 292 (1991)).

179. *See supra* p. 73.

180. *Young*, 55 M.J. at 197 (emphasis added).

181. *Id*. at 197. In addition to *United States v. Matthews*, the majority cited *United States v. Hoggard*, 43 M.J. 1 (1995), parenthetically as follows, "[l]ustful intent in indecent assault 3-6 months after charged indecent act with another victim not admissible to show lustful intent during charged indecent assault." *Young*, 55 M.J. at 197.

Unfortunately for the military practitioner, this premise is far from clear, lacks defined reasoning, and is a possible departure from earlier precedent.[182] Aside from the argument that *United States v. Matthews*[183] is limited to urinalysis cases, the decision in *United States v. Hoggard*[184] is of questionable utility. First, its value as MRE 404(b) precedent has been partially undermined by the advent of MRE 413, which specifically allows the admission of propensity evidence in sexual misconduct cases.[185] Second, the reasoning in *Hoggard*, decided over six years ago, lacks precedential weight in light of *United States v. Wright*,[186] in which the CAAF found uncharged misconduct evidence of a sexual assault occurring six months after the charged offenses to be admissible under MRE 413 as evidence of propensity.[187] Finally, the court's reliance on the weight of other federal authority in *Young* can lead to inapposite conclusions, as the majority of those decisions fail to distinguish between admissibility of subsequent misconduct to prove actus reus versus mens rea.

B. The Weight of Authority Favors Admission of Post-Offense Uncharged Misconduct

Although MRE 404(b) and its federal and state counterparts are frequently referred to as the most litigated of the evidentiary rules,[188] legal scholars have devoted little scholarship to the specific issue of subsequent uncharged misconduct. The *Military Rules of Evidence Manual*[189] does

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182. In her dissent to *United States v. Hoggard*, Judge Crawford wrote, "Since the issue of intent is a question of logical relevance, the probative acts may be subsequent to the offense in issue." 43 M.J. 1, 16 (1995) (Crawford, J., dissenting). The case Judge Crawford relied on for this proposition, *United States v. Colon-Angueira*, 16 M.J. 20 (1983), was a case admitting evidence of subsequent conduct of a victim under MRE 412 to establish her motive to fabricate. *Id*. at 20.

183. 53 M.J. 465 (2000).

184. 43 M.J. 1 (1995).

185. MCM, *supra* note 3, MIL. R. EVID. 413. This article restricts its discussion of the admissibility of subsequent uncharged misconduct to MRE 404(b) and does not address the admissibility of similar acts under MRE 413.

186. 53 M.J. 476 (2000). *Wright* also struck down constitutional due process and equal protection challenges to MRE 413. *See id*. at 481-83.

187. *Id*. at 482.

188. *See, e.g*., SALTZBURG, *supra* note 5, at 529.

189. *Id*.

not address the issue of admissibility of subsequent acts at all. American Jurisprudence 2d states simply,

> Under Rule 404(b), evidence of other crimes, wrongs, or acts may include acts committed prior to, simultaneous to, or after the charged offense so long as the event occurred at a reasonably closely related time. However, it has been suggested that evidence of a subsequent extrinsic offense bears substantially less on predisposition than would a prior extrinsic offense.[190]

The *Federal Rules of Evidence Manual* discusses the issue for only a page and a half.[191] Professor Imwinkelried's extensive treatise on uncharged misconduct evidence, the largest single work in the field, addresses the timing of uncharged misconduct in less than three pages.[192] Ironically, though these works demonstrate an established consensus favoring the admission of subsequent uncharged misconduct evidence, they provide little analysis of the theories relied on to reach that conclusion.

Given this apparent academic agreement, it comes as no surprise that the majority of federal courts allow the admission of evidence of subsequent uncharged misconduct under FRE 404(b).[193] Some courts suggest that evidence of subsequent acts to prove mens rea, if not prohibited, is more rationally tenuous than admission of the same evidence to prove actus reus.[194] The more remote in time the subsequent act is from the prior offense, the more tenuous the connection becomes.[195] Other than this general principle, the federal courts lack uniform reasoning for their decisions. As the CAAF did in *United States v. Young*,[196] the federal circuit courts frequently invoke the Rule 404(b) jurisprudence of their respective jurisdictions without further analysis, making it difficult to derive coherent general principles to follow at the trial level.

Despite the lack of a uniting theory of admissibility, there has been surprisingly little support in the federal system for a per se rule in the area of subsequent uncharged misconduct.[197] In many cases, there are alternate evidentiary bases for admitting the evidence in controversy, allowing courts to decide cases on other issues without having to address the FRE 404(b) rationale for the relevance of subsequent uncharged misconduct. In the remaining cases, just as in the CAAF decisions to date, the case-by-

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190. 29 AM. JUR. 2d EVIDENCE § 415 (2d ed. 2000) (citations omitted).

191. *See* MARTIN, *supra* note 13, at 517.

192. *See* IMWINKELRIED, *supra* note 10, § 5:04.

case approach leads to arbitrary and inconsistent results interpreting what were intended to be uniform evidentiary rules.[198]

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193. The Supreme Court has not directly addressed the issue, even when it has arguably been presented. *See* Huddleston v. United States, 485 U.S. 681 (1988) (holding that FRE 404(b) does not require a preliminary finding by the trial court under FRE 104(a) that the uncharged misconduct occurred, and finding that evidence of the defendant's receipt of stolen appliances one month after the charged offenses was relevant to prove knowledge under FRE 404(b) that the blank VCR tapes that were the subject of the charged offenses were also stolen); *see also* Dowling v. United States, 493 U.S. 342 (1990) (holding that admission of evidence of alleged circumstances of robbery occurring two weeks after the charged robbery offense relevant to prove identity under FRE 404(b)); McKoy v. United States, 516 U.S. 1065 (1996) (holding evidence of subsequent uncharged drug misconduct admissible to prove both identity and intent). The federal circuit decisions clearly favor admissibility of subsequent uncharged misconduct. *See, e.g.*, United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998) (holding defendant's sale of crack cocaine to undercover officer seven months after charged cocaine offense admissible to prove intent); United States v. Latney, 108 F.3d 1446 (D.C. Cir. 1997) (holding discovery of crack cocaine and cash in car relevant to prove knowledge and intent for charged aiding and abetting crack distribution offense eight months earlier); United States v. Procopio, 88 F.3d 21 (1st Cir. 1996) (holding evidence of criminal association in 1993 relevant to prove charged conspiracy in 1991); United States v. Buckner, 91 F.3d 34 (7th Cir. 1996) (holding subsequent taped discussions admissible to prove knowledge of conspiracy); United States v. Olivo, 80 F.3d 1466, 1469 (10th Cir. 1996) (holding evidence of defendant's arrest for transporting large quantity of marijuana more than one year after charged drug distribution offense admissible to prove intent, knowledge, and lack of accident or mistake); United States v. Buckner, 91 F.3d 34 (7th Cir. 1996) (holding subsequent discussions involving uncharged misconduct admissible to prove intent for prior conspiracy); United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995) (holding subsequent conspiracy and attempt to possess with intent to distribute cocaine relevant to charged cocaine importation, possession, and distribution); United States v. Morsley, 64 F.3d 907, 911 (4th Cir. 1995) (holding subsequent uncharged drug activity admissible to prove both knowledge and identity for prior charged conspiracy offense); United States v. Corona, 34 F.3d 876 (9th Cir. 1994) (holding defendant's subsequent possession of list of drug customers relevant under FRE 404(b) to show knowledge and intent in prosecution for cocaine possession with intent to distribute); United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993) (holding evidence of subsequent uncharged successful homicide inadmissible to prove earlier conspiracy for attempted murder of another); United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990) (holding evidence of subsequent drug sale admissible to prove knowledge and intent for prior drug distribution); United States v. Childs, 598 F.2d 169 (D.C. Cir. 1979) (holding the post-offense sale of credit cards relevant to prior mail theft).

194. *See* MARTIN, *supra* note 13, at 517; IMWINKELRIED, *supra* note 10, § 5:04; *see also*, *e.g.*, *Procopio*, 88 F.3d at 29 (holding that evidence seized in shared apartment in 1993 admissible to show 1991 criminal association, but acknowledging that the "need to reason backward from 1993 to 1991 weakens the inference").

C. An Examination of the Theories of Admissibility of Post-Offense Uncharged Misconduct

1. The Federal Court Standard

Although MRE 404(b) and its federal counterpart are most often used to admit prior uncharged misconduct, the text of the Rule refers to "other,"[199] not necessarily prior, acts.[200] The notion that the uncharged act must predate the charged offense was, at one time, a commonly held view.[201] Courts were particularly inclined to find subsequent acts inadmissible to prove mens rea.[202] Over time, federal courts have moved away from this position, allowing subsequent acts evidence to prove mens rea in certain factual circumstances. Courts generally find subsequent acts to prove mens rea relevant when the subsequent act is similar or somehow related to the charged offense, and occurs relatively close in time.[203] The CAAF apparently endorses this view,[204] even though doing so is inconsistent with the court's holding in *United States v. Matthews*.[205] Although in *Matthews* the government could not establish that the two alleged marijuana uses took place under similar circumstances, the positive results did

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195. *See, e.g.*, United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995) (holding evidence of methamphetamine sale occurring two years after charged conspiracy to distribute cocaine too remote to be considered relevant); United States v. Echeverri, 854 F.3d 638 (3d Cir. 1988) (holding discovery of cocaine in the defendant's apartment eighteen months after the termination of the alleged conspiracy and four years after the latest overt act not relevant to prove knowledge and intent); United States v. Boyd, 595 F.2d 120 (3d Cir. 1978) (holding subsequent chemical purchases not admissible for charged methamphetamine production and distribution offense to prove intent, knowledge, or common plan or scheme).

196. 55 M.J 193 (2001).

197. IMWINKELRIED, *supra* note 10, § 5:04 (citing cases).

198. *See* Rothstein, *supra* note 8, at 1264.

199. MCM, *supra* note 3, MIL. R. EVID. 404(b).

200. *See* MARTIN, *supra* note 13, at 517; IMWINKELRIED, *supra* note 10, § 5.04 (both discussing FRE 404(b)). The *Military Rules of Evidence Manual* does not address the issue of subsequent uncharged misconduct. Although CAAF cited the Drafter's Analysis of MRE 404(b) in *United States v. Young*, 55 M.J. 193, 196 (2001), the analysis also does not address the admissibility of subsequent acts.

201. IMWINKELRIED, *supra* note 10, § 5:04.

202. *Id.*; *see, e.g.*, United States v. Gallo, 543 F.2d 361 (D.C. Cir. 1976).

203. MARTIN, *supra* note 13, at 517. *See, e.g.*, United States v. Watson, 894 F.2d 1345, 1349 (D.C. Cir. 1990) ("Later acts are most likely to show the accused's intent when 'they are fairly recent and in some significant way connected with prior material events.'") (citations omitted).

204. *See* United States v. Young, 55 M.J. 193, 196 (2001).

205. 53 M.J. 465, 470 (2000).

involve exactly the same drug, and the second urinalysis occurred less than one month after the charged offense.[206]

2. A Comparison of MRE 404(b) and MRE 413: The Same Standard for Admissibility of Subsequent Misconduct?

The CAAF's current interpretation of MRE 413,[207] allowing the use of subsequent uncharged acts in sexual assault cases, is likewise inconsistent with *Matthews*.[208] In enacting Rule 413, Congress explicitly intended to remove the Rule 404(b) bar to propensity evidence in sexual assault cases, so that "finders of fact [could] accurately assess a defendant's criminal propensities and probabilities in light of his past conduct."[209] Congress clearly envisioned the use of similar act evidence to establish a defendant's predisposition to commit the charged offense, although they placed no temporal limits within the text of the rule.

In *United States v. Wright*,[210] the government admitted evidence of an uncharged October 1996 sexual assault to establish the accused's propensity to commit the charged sexual assault, which had occurred six months earlier.[211] The CAAF affirmed the conviction, finding the later assault admissible under MRE 413.[212] Finding MRE 403 analysis critical to the constitutionality of the rule, the court enumerated specific factors to consider as part of that balancing, including:

> (1) strength of proof of prior act—conviction versus gossip; (2) probative weight of evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; and time needed for proof of prior conduct; (5) temporal proximity; (6) frequency of

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206. *Id*.

207. Military Rule of Evidence 413 provides, in pertinent part: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." MCM, *supra* note 3, MIL. R. EVID. 413(a). Military Rule of Evidence 413 is almost identical to its federal counterpart. SALTZBURG, *supra* note 5, at 615.

208. United States v. Wright, 53 M.J. 476, 483 (2000).

209. SALTZBURG, *supra* note 5, at 615 (quoting from the floor statement of Representative Susan Molinari, proponent of the legislation).

210. 53 M.J. 476 (2000).

211. *Id*. at 478.

212. *Id*. at 483.

the acts; (7) presence or lack of intervening circumstances; and relationship between the parties.[213]

Applying these factors, the majority found that the prejudicial effect of the subsequent assault did not substantially outweigh its probative value.[214]

With the exception of the "temporal proximity" factor,[215] the majority opinion does not discuss the post-offense timing of the similar act. The admission of a subsequent act, however, runs counter to the intended purpose of MRE 413: namely, to establish an accused's propensity or predisposition to commit the offense charged.[216] Addressing the constitutionality of the rule, the CAAF expressed support for more liberal admission of uncharged misconduct generally. First, the majority cited Uniform Code of Military Justice panel selection criteria as a countermeasure to the traditional concern that jurors may accord too much weight to character evidence.[217] Next, discussing the application of MRE 403, the court cited favorably from law review articles advocating "the trend in evidence law towards free proof" and away from "technical rules of evidence designed to prevent fact finders from making mistakes."[218]

The CAAF's statements in *Wright* run directly counter to its reasoning in *United States v. Matthews*,[219] which described the subsequent urinalysis as "highly inflammatory" evidence increasing the "danger of a conviction improperly based on propensity evidence."[220] Admittedly, MRE 413 carved an exception into MRE 404(b), permitting the finder of fact to consider propensity expressly for that purpose or any other deemed relevant, eliminating any concern of impermissible use. At the same time, the

213. *Id*. at 482.

214. *Id.* at 483.

215. *Id*. at 482.

216. SALTZBURG, *supra* note 5, at 615. Judges Gierke and Sullivan support this view. In Judge Gierke's dissent, he cited both Professor Salzburg's commentary and the floor comments of Senator Dole, the Rule's co-sponsor. Acknowledging that the Rule does not contain an explicit temporal requirement, Judge Gierke concluded nonetheless that Rule 413 "does not authorize admission of evidence of sexual offenses committed after the charged offense." *Id*. at 486 (Gierke, J., dissenting). Citing *United States v. Matthews*, 53 M.J. 465 (2000), Judge Sullivan believed that "evidence of conduct that occurs after the charged offense but before the trial is objectionable under Mil. R. Evid. 403." *Id*. (Sullivan, J., dissenting).

217. *Wright*, 53 M.J. at 480.

218. *Id*. at 483 (citations omitted).

219. 53 M.J. at 465.

220. *Id*. at 471.

Wright majority's embrace of free proof doctrine and approval of the use of subsequent acts to prove similar conduct adds even more confusion to the status of the admissibility of subsequent acts under MRE 404(b).

3. The Doctrine of Chances: A Viable Theory of Admissibility or the "Real Hinterland of Evidentiary Metaphysics?"[221]

Another frequently cited basis for admitting subsequent acts under MRE 404(b) is the doctrine of chances. Professor Imwinkelried is undoubtedly the doctrine's most ardent supporter, having argued repeatedly[222] that the doctrine permits a rational intermediate inference from which the factfinder may draw a proper ultimate inference to establish either the actus reus[223] or mens rea[224] under Rule 404(b).[225]

a. The Operation of the Doctrine of Chances

In the actus reus context, the doctrine of chances usually comes into play when the accused invokes the defense of accident to an event.[226] Professor Imwinkelried often cites an English case, *Rex. v. Smith*,[227] to illustrate the operation of the inference. In the case, a man is accused of murdering his wife, who was found dead in her bathtub. The husband claimed the death was accidental.[228] The English court permitted evidence of the death of the husband's two previous wives, who had also been found drowned in their bathtubs.[229] As Professor Imwinkelried defines it, the

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221. Melilli, *supra* note 7, at 1564.

222. *See* IMWINKELRIED, *supra* note 10, § 4-5; Edward J. Imwinkelried, *The Use of Evidence of an Accused's Misconduct to Prove Mens Rea: The Doctrine That Threatens to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41 (1990); 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 Offered Under FRE 404?*, 42 ST. LOUIS L. J. 813 (1998); *Imwinkelried*, supra note 60; Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as a Theory of Admissibility for Similar Act Evidence*, 22 ANGLO-AM. L. REV. 73 (1993) [hereinafter Imwinkelried, *Doctrine of Chances Evolution*]; Imwinkelried, *supra* note 68.

223. IMWINKELRIED, *supra* note 10, § 4.

224. *Id.* § 5.

225. *See supra* pp. 58-60.

226. IMWINKELRIED, *supra* note 10, § 4:01.

227. *See, e.g.*, Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 73 (citation omitted).

228. IMWINKELRIED, *supra* note 10, § 4.01.

229. Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 77.

doctrine of objective chances provides the intermediate inference that the likelihood of accident decreases with the increase of the number of similar incidents. From that permissible intermediate inference, the finder of fact may then make a permissible ultimate inference about the accused's commission of the actus reus itself. Under this model, the question for the fact-finder becomes not about the accused's personal character, but about the objective chance of the accident at issue.[230]

The doctrine operates in a similar fashion to prove mens rea. In the mens rea setting, the intermediate inference is also one of objective improbability under the doctrine of chances. Citing examples from Professor Wigmore, Professor Imwinkelried argues that it is the recurrence or repetition of the act that increases the likelihood of intent or knowledge and thus the ultimate inference of mens rea.[231] Again, the inference is based on an objective assessment of probability instead of an improper character judgment, making it permissible under Rule 404(b).[232] The more similar the uncharged act, the greater likelihood that it was intentional rather than simple coincidence, although Professor Imwinkelried does cite several examples where he believes such similarity is not required.[233]

b. The Current Status of the Doctrine of Chances in Military Courts

Judge Crawford endorsed the use of Professor Imwinkelried's formulation of the doctrine of chances to prove mens rea in her dissent to *United States v. Matthews*.[234] Specifically, Judge Crawford found it "implausible" that SSgt Matthews could test positive for marijuana in two consecutive months and still "have an innocent state of mind."[235] Relying on the premise that even a single similar instance may be sufficient to establish improbability,[236] Judge Crawford argued that the similarity of the drug, the proximity in time, and the complex steps required to ingest marijuana make the subsequent positive urinalysis admissible under the doctrine of

230. IMWINKELRIED, *supra* note 10, § 4.01.

231. *Id.* § 5:06.

232. *Id.*; *see also id.* § 5:08.

233. *Id.*; *see also id.* § 5:04.

234. 53 M.J. 465 (2000).

235. *Id.* at 473 (Crawford, J., dissenting).

236. Professor Imwinkelried specifically acknowledges the evidentiary weakness of the doctrine of chances to prove knowledge when there is only one additional uncharged act. IMWINKELRIED, *supra* note 10, § 5:27.

chances.[237] Despite disagreeing with Judge Crawford regarding the application of the doctrine in *Matthews*, the CAAF remained open to the possibility that it could provide a basis for admissibility under MRE 404(b) in a case with more similar acts and a greater quantum of proof.[238]

The CAAF found just such a case the following year. In *United States v. Tyndale*,[239] the accused, a Marine staff sergeant, was charged with wrongful use of methamphetamine in 1996. The accused had been acquitted of methamphetamine use in a 1994 court-martial after raising an innocent ingestion defense. At the 1996 court-martial, the accused again raised the defense of innocent ingestion. The military judge allowed the government to introduce evidence of the 1994 positive urinalysis and the accused's 1994 innocent ingestion claim to rebut this defense.[240]

The CAAF hesitantly adopted the doctrine of chances in its decision affirming the conviction. Although, as in *Matthews*, there was evidence of only one additional use, the court found the facts surrounding the accused's claims of innocent ingestion sufficiently similar to make it unlikely that the accused had unknowingly done so twice.[241] The court went on in dicta to strictly limit the doctrine's use in future cases. First, citing *Matthews*, the court wrote that the prior urinalysis result would not have been admissible absent the additional evidence describing the circumstances of the earlier use.[242] Next, the court took a full paragraph of the opinion to explain its reasoning, stating that the "doctrine of chances . . . is not a roll of the appellate dice," and cautioning that "[i]ts use should not be frequent, except in rare factual settings as the one presented in this case."[243]

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237. *Id.* The AFCCA also relied, in part, on the doctrine of chances in its opinion. *See* United States v. Matthews, 50 M.J. 584, 590 (A.F. Ct. Crim. App. 1999).

238. *Matthews*, 53 M.J. at 470.

239. 56 M.J. 209 (2001).

240. *Id.* at 210.

241. *Id.* at 214. The court wrote, "While the circumstances in 1994 did not mirror those related to the 1996 use, they were substantially similar and were clearly probative on the issue of whether [the accused] plausibly found himself in a similar circumstance in 1996 where he might unknowingly be given a controlled substance." *Id.*

242. *Id.* at 213.

243. *Id.* at 214. Judges Gierke and Effron disagreed that the doctrine of chances was properly applied even in this limited circumstance. First, they believed that there was insufficient proof of the accused's prior use of methamphetamine before the members, who heard only the testimony of the prosecutor at the previous court-martial and not a laboratory expert. Second, even if sufficient evidence were presented, they believed the military judge's instructions were "blatantly inadequate" to allow members to properly apply the doctrine. *Id.* at 220 (Gierke, J., dissenting).

c. The Doctrine of Chances Outside of Military Courts

Outside of military courts, the doctrine of chances enjoys widespread acceptance as a theory of logical relevance to prove both actus reus and mens rea under Rule 404(b).[244] The doctrine gained an even stronger foothold with the enactment of FRE 413 in 1994. In proposing the amendment that ultimately became Rule 413, the Justice Department relied in part on "a variation of the so-called doctrine of chances."[245] The Justice Department argued for the admission of similar acts to prove sex crimes on the basis that

> [i]t is inherently improbable that a person whose prior bad acts show that he is in fact a rapist . . . would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims.[246]

Even when not explicitly stated as the doctrine of chances, the common-sense application of probability permeates the federal decisions permitting subsequent acts to establish mens rea.[247]

d. The CAAF Should Not Accept the Doctrine of Chances as a Theory of Logical Relevance to Prove Mens Rea in Subsequent Acts Cases

As appealing as the doctrine of chances may be to common sense, the CAAF should heed its own caution and reject the doctrine as a theory of logical relevance to prove mens rea in subsequent act cases. First, the human experience-based version of the doctrine of chances that Professor Imwinkelried so ardently espouses bears little resemblance to its mathematically modeled ancestor.[248] If defined in mathematical terms, the doctrine becomes the basis of an impermissible character inference, as the underlying probability rule requires an assumption that the accused's character remains constant over time.[249] Even absent this inferential probabil-

244. IMWINKELRIED, *supra* note 10, § 4-5 (citing cases).

245. Imwinkelried, *Doctrine of Chances Evolution*, *supra* note 222, at 1131.

246. *Id.* (quoting the Justice Department analysis to the 1991 Comprehensive Violent Crime Control Act) (citation omitted). Ironically, Professor Imwinkelried did not endorse this variation of the doctrine, finding it unnecessary since the base doctrine already provided a non-character based theory of logical relevance under Rule 404(b). *Id.* at 1130.

247. *See supra* pp. 77-79.

ity problem, using subsequent acts to establish prior knowledge or intent is logically flawed, as an accused's later knowledge or intent should not be used to infer an earlier state of mind.

Second, the evidentiary doctrine of chances to prove mens rea rests on the preliminary assumption that multiple accusations of criminal wrongdoing do not happen to innocent people. That assumption, particularly in a military context, is weak at best. At least one critic has observed that "in real life, a person who has been charged before commonly is charged any time a vaguely similar crime is reported," reducing the improbability of an innocent person being "repeatedly charged falsely" that the doctrine relies on as its starting point.[250] Anecdotally, the same would appear to be true in a military unit. The converse of the soldier of good military character[251] is the prototypical bad soldier. Once guilty of a particular act of misconduct,[252] the bad soldier is more likely to be suspected first, and thus more likely to be accused when a new offense occurs. This phenomenon makes the assumption underlying the doctrine of chances even more suspect when applied to subsequent acts in courts-martial.

Finally, there is merit in the criticism of the evidentiary doctrine of chances as nothing more than "a convoluted explanation of the general propensity inference."[253] Following the complex inferential steps and establishing the required predicate facts for proper application of the doctrine are daunting tasks, particularly in the dynamic nature of a contested court-martial.[254] In the end, the application of common-sense probability provides no greater rationale for practitioners to follow in MRE 404(b) cases than the current conclusory application of MRE 403 analysis by military courts. As a result, accepting the doctrine of chances for acts of sub-

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248. The original doctrine of chances evolved from Pascal's theory of probability. Pascal, with Galileo, derived the theory of probability in response to a commission from seventeenth century gamblers trying to calculate the odds of the then-popular dice game, Hazard. The mathematical doctrine of chances is the basis of modern day moral hazard theory, and played a critical part in the development of the insurance industry. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 246 (1996).

249. Morris, *supra* note 5, at 194.

250. Rothstein, *supra* note 8, at 1263.

251. *See infra* pp. 6-9; *see also* Katz & Sloan, *supra* note 34.

252. The Army tacitly recognizes this very phenomenon, providing for administrative separation from the service for enlisted soldiers who exhibit patterns of misconduct. *See* U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 14-12b (1 Nov. 2000).

253. Melilli, *supra* note 7, at 1568.

254. *See* IMWINKELRIED, *supra* note 10, §§ 4-5.

sequent misconduct would do little to ensure uniform application of evidentiary rules.

IV. Finding Method in the Madness: The Need for a Coherent Rule

A. The Composition of Military Court-Martial Panels Requires Judicious Use of MRE 404(b) Evidence

The unique nature of the court-martial process demands careful, uniform, and judicious application of MRE 404(b) to subsequent acts of uncharged misconduct. Although panel members are selected for their education, experience, maturity, and judicial temperament, that process usually results in panels with significant amounts of leadership experience.[255] Undoubtedly, education, maturity, and judicial temperament make military panel members more likely to follow the counterintuitive complex evidentiary instructions for using MRE 404(b) evidence.

The members' leadership experience is an important variable to consider. It is difficult to envision a panel member of any rank who has not had a prototypical bad soldier in his unit at some point during his military career. Assuming that is true, panel members may understandably classify an accused involved in even one additional alleged incident as a bad soldier, and as a result, give subsequent uncharged misconduct evidence more weight than it truly deserves. Excluding subsequent uncharged misconduct to prove intent or knowledge places a definable limit on MRE 404(b) evidence, reducing the likelihood that panel members will either accord too much weight to the evidence or draw impermissible inferences about the character of the accused.

Given the current criticism of the military justice system, limits that ensure the fair administration of justice are both prudent and warranted.[256] The government retains the opportunity to present evidence of the soldier's entire duty performance and rehabilitative potential during the sentencing phase, which may include evidence of post-offense misconduct.[257] At sen-

255. *See, e.g.*, United States v. Beetie, 50 M.J. 489 (1999).

256. The military justice system is currently under increased public scrutiny for its perceived procedural unfairness. *See* REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), *available at* http://www.nimj.com/Home.asp.

257. MCM, *supra* note 3, R.C.M. 1001(b)(2).

tencing, the panel may properly consider the accused's other misdeeds and whether he is a good or bad soldier to determine an appropriate sentence.

B. Making Subsequent Acts Inadmissible to Prove Knowledge or Intent Reduces the Complexity of MRE 404(b) for Trial Practitioners

Many scholars have criticized both the complex rationale and application of Rule 404(b) in American criminal courts. In England, where the rule originated, the bar to propensity evidence has been replaced with a Rule 403-like balancing test.[258] Here in the United States, scholars have proposed a variety of new approaches. Some of these proposals include outright abandonment of the present ban,[259] barring all Rule 404(b) evidence that did not result in a criminal conviction,[260] and the use of expert witnesses and personality trait theory as a scientific method of proving relevant character evidence.[261]

Outside of abandoning the rule entirely, many of the proposed civilian solutions to the use of Rule 404(b) evidence are impractical for courts-martial. A bar to all evidence except prior criminal convictions would be tantamount to an outright ban, as individuals with prior criminal convictions are generally not qualified for military service. The dubious scientific basis of personality trait theory makes its admissibility questionable under current law,[262] and the prospect of expert testimony in every court-martial involving character evidence is clearly a waste of court-martial time and resources. Finally, given the long lineage of MRE 404(b), utter abrogation of the rule is unlikely to receive much support.

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258. Morris, *supra* note 5, at 205.

259. Uviller, *supra* note 65, at 883. Professor Uviller's proposed rule would still limit character evidence to repetitive prior uncharged acts. *Id.* at 885.

260. Melelli, *supra* note 7, at 1624.

261. Reed, *supra* note 8, at 400.

262. *See* MCM, *supra* note 3, MIL. R. EVID. 702. Federal Rule of Evidence 702 was amended on 1 December 2000 to incorporate the more stringent standards for the reliability of expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 562 U.S. 137 (1999). By operation of MRE 1102, the amendment to FRE 702 amended MRE 702 effective 1 July 2002. Given the change to MRE 702 and the other types of evidence now being excluded, it is unlikely that personality trait testimony would be found reliable enough to be admissible in courts-martial. *See*, *e.g.*, United States v. Griffin, 50 M.J. 278 (1999) (excluding expert testimony about false confession); United States v. Blaney, 50 M.J. 533 (A.F. Ct. Crim. App. 1999) (excluding expert testimony about sleep disorders), *cert. granted*, 52 M.J. 412 (1999).

C. The CAAF Should Define Standards and Limits for Admitting Subsequent Acts to Prove Mens Rea Under MRE 404(b)

Given the impracticality of these proposed solutions for courts-martial, the CAAF should specifically define standards and limits within the existing framework of MRE 404(b). As this article illustrates, proper use of MRE 404(b) evidence presents a myriad of issues of ever-increasing complexity. While the law will always require case-by-case determinations, setting defined standards would eliminate appellate issues and ensure more uniform application of the law. The narrow field of the admissibility of post-offense uncharged misconduct to prove mens rea is an area where a per se rule is both warranted and possible.

While the standard was once to exclude evidence of subsequent uncharged misconduct, courts have steadily progressed towards admission without any rational basis for doing so. This trend has resulted in confusing and sometimes contradictory precedent, as a review of CAAF cases on the issue illustrates. At a minimum, the CAAF should mandate specific standards for courts conducting MRE 403 balancing, require factors to be considered on the record at the trial level, and explicitly discuss its analysis of the factors in future decisions on the issue.[263]

D. The President Should Amend MRE 404(b) to Exclude Evidence of Subsequent Uncharged Misconduct to Prove Knowledge or Intent

In the alternative, a simple amendment to MRE 404(b) excluding subsequent uncharged misconduct to prove knowledge or intent would provide clear guidance to trial practitioners and preclude future misapplication of the doctrine of chances to subsequent acts. The proposed amendment would change MRE 404(b) to read as follows:

> (b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

263. The CAAF could simply extend application of the factors required for MRE 413 analysis to all MRE 404(b) cases and require military judges to explain their reasoning on the record. *See* United States v. Wright, 53 M.J. 476, 482 (2000) (listing factors for MRE 413 analysis); United States v. Humpherys, 57 M.J. 83, 91 (2002) (giving more appellate deference to the military judge in an MRE 403 decision in which "his reasoning is articulated on the record"); *see also* McCormick, *supra* note 11, at 672 (suggesting additional factors for courts to consider in Rule 403 analysis).

> however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, *except that evidence of subsequent crimes, wrongs, or acts is not admissible as proof of intent or knowledge*. [U]pon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The proposed amendment does not bar the use of subsequent uncharged misconduct in all circumstances. Instead, the proposal would limit application of the doctrine of chances to prove intent or knowledge to prior conduct, eliminating the tenuous and illogical backward reasoning required to admit subsequent acts under the current rule. Directly amending the rule would ensure the uniform administration of justice in courts-martial with the added benefit of reducing complexity for the trial practitioner.

V. Conclusion

Despite the confusion surrounding MRE 404(b), its guiding principle remains unchanged: an accused should be convicted based on his guilt of a particular offense, not for being a person of bad character or the unit's prototypical bad soldier. Doing otherwise not only violates the accused's constitutionally guaranteed presumption of innocence, it directly affects the fair administration of the military justice system. Under any theory of admissibility, using subsequent acts to establish the accused's knowledge or intent to commit a prior offense is not only illogical, but inconsistent with the spirit of the rule itself.

The CAAF should retain what remains of the bar to propensity evidence and decline to consider subsequent acts as proof of mens rea under MRE 404(b). In addition, the President should amend MRE 404(b) to exclude specifically evidence of subsequent crimes, wrongs, or acts as proof of knowledge or intent. To do so is consistent with the common-law tradition of MRE 404(b), will result in more equitable application of military justice, and will lend method to the madness that has unfortunately come to dominate this area of law.