

## Note

### **The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits**

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## INTRODUCTION

The evidence was clear: Bernard Abrams had mishandled the EZ Freight Lines account. A vice president of Lightolier, Inc., Abrams had renegotiated a contract with Freight Lines without putting the modifications into writing. He had misunderstood how certain tariffs would increase Lightolier's liability. He had even accepted gifts—not bribes, he maintained—from the trucking company. Once Freight Lines went bankrupt and its successor filed suit, none of Abrams's denials could prevent Lightolier from incurring considerable embarrassment and close to a million dollars in litigation and settlement expenses. Despite Abrams's satisfactory performance over a decade and a half of employment, Lightolier fired its longtime agent just a week after settling the lawsuit.

Taken alone, this narrative seems to represent an unremarkable chain of events, culminating in a routine, albeit unfortunate, termination of a poorly performing employee. Yet the addition of more facts begins to call this sympathetic interpretation into question. At the time of his termination, Abrams was fifty-nine years old, while his replacement was around forty. A judge of the situation might begin to wonder: Had age influenced the firing? Abrams insisted, moreover, that his employer's prior acts had betrayed a discriminatory character. His supervisor had, for example, made age-based remarks and mistreated other older employees. For Abrams, that evidence was sufficient to refute any suggestion that his termination was in fact due to the Freight Lines fiasco. The actual cause was age discrimination, he alleged, and he sued.<sup>1</sup>

This piecemeal introduction of evidence constitutes a cryptic way to tell a story. Yet it parallels how evidence must be introduced in a courtroom, where proof of an employer's prior discriminatory acts is likely to provide the fact-finders with the most useful insight into the existence of discriminatory animus. Before Abrams produces this same evidence in court, however, he would be well advised not to forget Federal Rule of Evidence 404, which precludes the admission of "[e]vidence of a person's character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion."<sup>2</sup> This Rule specifically disallows evidence of "other crimes, wrongs, or acts" to prove the same. It would seem, therefore, to require that Abrams prove his case without bringing his employer's prior acts of discrimination into evidence.

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1. The facts in these paragraphs are drawn from *Abrams v. Lightolier, Inc.*, 50 F.3d 1204 (3d Cir. 1995).

2. FED. R. EVID. 404.

It is not clear that this feat would be possible. The resolution of a lawsuit like *Abrams*'s, brought on the theory of intentional discrimination, turns on a single issue: the employer's mindset. If an employer fires her agent on the basis of an impermissible factor such as his age, then the termination is illegal. So long as those impermissible motives remain absent, however, an employer commits no wrong by terminating an at-will employee, be it for any other reason—or, indeed, for no reason at all.<sup>3</sup> A successful plaintiff must therefore convince the fact-finder that the employer harbored some discriminatory sentiment. Absent a confession by his boss, or some similarly fortuitous form of proof, the plaintiff must turn to the evidence normally most probative of this issue—the employer's prior acts of animus. Yet, again, the effect of Rule 404 seems clear: It prohibits the plaintiff from admitting such evidence for the purpose of proving a propensity to discriminate. The mandates are at odds. What result?

When *Abrams v. Lightolier, Inc.* went before a jury, the court allowed *Abrams* to introduce evidence of his employer's other acts to prove a discriminatory attitude. On the basis of this evidence, the jury agreed that age was a "determinative factor" in *Abrams*'s termination, and the court entered judgment accordingly. When the appellate court affirmed in all relevant respects,<sup>4</sup> it never even mentioned the rule of evidence—Rule 404—that seemingly would have gutted *Abrams*'s case, if applied.

Couched in these terms, *Abrams* may seem in error. Yet this case is no outlier in the field of employment discrimination. On the contrary, courts routinely fail to comply with Rule 404.<sup>5</sup> This incongruity in many cases reflects an unavoidable consequence—and therefore an exceptionally troubling aspect—of the interaction between this central rule of evidence and discrimination law. While at times a plaintiff will be able (at least theoretically) to meet his evidentiary burdens without violating Rule 404,

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3. See, e.g., *Foster v. BJC Health Sys.*, 121 F. Supp. 2d 1280, 1289-90 (E.D. Mo. 2000) ("Stated differently, while an employer may terminate an at-will employee for any reason or no reason, it will incur liability under [federal law] if it does so for a racially discriminatory reason."); see also *Sanchez v. Philip Morris*, 992 F.2d 244, 247 (10th Cir. 1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment.").

4. The court affirmed the district court's verdict and evidentiary rulings, remanding only on a narrow issue regarding the award for costs and out-of-pocket expenses. *Abrams*, 50 F.3d at 1226.

5. See, e.g., *Rathbun v. Autozone*, 361 F.3d 62, 76 (1st Cir. 2004) (declaring prior discriminatory acts to be "relevant background evidence" in a suit challenging the same type of act); *Lee v. Rapid City Area Sch. Dist. No. 51-4*, 981 F.2d 316, 334-35 (8th Cir. 1992) ("[I]t is important in these pretext cases that the plaintiff be permitted to show others' complaints of discriminatory conduct by the employer . . ."); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) ("Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices . . ."), *superseded on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Scaramuzzo v. Glenmore Distilleries Co.*, 501 F. Supp. 727, 733 n.7 (N.D. Ill. 1980) (noting that an employer's "treatment of its older employees is an evidentiary source that plaintiff may tap to prove his allegations of age discrimination").

such an occasion is a byproduct only of the multitude of causes of action and the diversity of fact patterns encompassed by discrimination suits.<sup>6</sup> In the prototypical discrimination suit, with the plaintiff relying on the most common forms of evidence, compliance with Rule 404 is difficult and often impossible.

Part I of this Note presents the “individual disparate treatment” model as illustrative of how discrimination suits interact more generally with Rule 404. It then lays out the dilemma: Whenever a plaintiff suffers some adverse employment action, and an employer is unwilling to concede that it committed this action “because of,” for example, the plaintiff’s “race, color, religion, sex, or national origin,”<sup>7</sup> the success of the lawsuit necessarily turns on the fact-finder’s interpretation of this ambiguous action. If the fact-finder determines that the employer made its decision for discriminatory reasons, statutes such as Title VII of the Civil Rights Act of 1964 deem the action illegal. Yet such a difficult evidentiary inquiry into the defendant’s state of mind virtually always requires reliance on one of the most problematic forms of evidence: a defendant’s prior acts.<sup>8</sup> Despite the willingness of courts to assume that this prior act evidence is relevant to a defendant’s “motive” or “intent,” Part II demonstrates that the logic underlying such reasoning nevertheless requires the fact-finder to rely, with few exceptions, on forbidden propensity inferences. Given the dearth of alternative evidence generally available to the discrimination plaintiff, this class of litigation therefore does more than merely allow plaintiffs to violate the propensity prohibition of Rule 404(b); in many cases it effectively compels them to do so.

While courts’ frequent infidelity to Rule 404 has received prior scholarly attention, Part III modifies these criticisms by recognizing that blame in discrimination suits cannot fall on the usual suspects: plaintiffs for successfully camouflaging propensity evidence or judges for tacitly relaxing the Rule. Both condemnations are unrealistic and unfair in light of the fundamental conflict between these discrimination suits and Rule 404. After analyzing the purposes behind Rule 404, this Part then acknowledges that, for discrimination suits, the propensity ban may be less imperative than it initially seems. Instead, the trouble may lie in the application of the Rule itself, as the incongruity between the cause of action and Rule 404 draws an often arbitrary line between propensity evidence that is admitted

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6. See, e.g., *infra* notes 20, 42.

7. 42 U.S.C. § 2000e-2(a)(1) (2000).

8. The term “prior act” rather than “extrinsic act” is used in this Note because the former term appears in Rule 404. However, courts applying Rule 404 do not distinguish between acts that occur “before or after the offense charged,” and instead apply the Rule to all acts extrinsic to the offense at issue. *United States v. Beechum*, 582 F.2d 898, 902 n.1 (5th Cir. 1978) (en banc).

and that which is excluded. This unattractive result leads to troublesome outcomes in the discrimination context, a weakening of the propensity ban in other areas of the law, and an unjustified bolstering of a deeply problematic Rule. This Note therefore concludes with a call for reform.

### I. PROOF OF A VIOLATION

Abrams brought his suit under the disparate treatment model, one of the oldest and most familiar in what has become discrimination's "onion-like body of law."<sup>9</sup> Such a case involves "the most easily understood type of discrimination" and "the most obvious evil Congress had in mind when it enacted Title VII."<sup>10</sup> It also, significantly, involves difficult evidentiary inquiries into the defendant's mindset, and to that end adopts a burden-shifting framework that systematically narrows the focus of a trial onto this precise issue.

The disparate treatment model under Title VII therefore provides an ideal window into these Rule 404 issues, and this Note relies on it as an exemplar. To the extent that suits brought under similar statutory and constitutional provisions and evidentiary frameworks raise analogous evidentiary issues,<sup>11</sup> the same Rule 404 tensions confront the litigants.

The illustrative model proceeds as follows. Title VII bars an employer from making adverse employment decisions "because of" an "individual's race, color, religion, sex, or national origin."<sup>12</sup> The triggering fact pattern is straightforward: An employee suffers some adverse employment action, such as being terminated, and then sues, alleging that the action was a consequence of his employer intentionally discriminating against him on the basis of some impermissible criterion. If he invokes the individual

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9. THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION, at v (2001).

10. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (discussing lawsuits in which an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin").

11. These would include certain suits brought under, for example, the Americans with Disabilities Act (ADA), the Pregnancy Discrimination Act, and the diverse array of state laws offering similar protections. These issues likewise emerge whenever litigants invoke constitutional provisions for employment protection. Although non-employment suits based on, for example, the Fair Housing Act and the Church Arson Prevention Act lie beyond the scope of this Note, the same dynamic would seem to affect these cases and, indeed, any litigation similarly focused on whether the defendant committed an act "because of" some protected trait. These same Rule 404 tensions do not, however, taint *all* evidentiary inquiries into state of mind (at least, not in the extreme manner identified in this Note), because, as Part II discusses, litigants outside the discrimination context are often able to offer proofs of motive and intent that do not depend on propensity inferences.

12. 42 U.S.C. § 2000e-2(a). The Age Discrimination in Employment Act (ADEA), following "a more or less uniform approach," 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE 61 (3d ed. 2002), prohibits adverse employment decisions when made "because of [an] individual's age," 29 U.S.C. § 623(a)(1)-(2) (2000).

disparate treatment model, as many plaintiffs do,<sup>13</sup> he bears the initial burden of establishing a prima facie case of discrimination, which generally requires showing some variant of the following:

- (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>14</sup>

The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>15</sup> If met, the burden finally returns to the employee and requires him to demonstrate that the employer's stated reason for the adverse action was a pretext for discrimination.<sup>16</sup> Ultimately, therefore, the case turns on whether the employee can prove that the motivating factor behind the action was in fact discriminatory, despite any explanations to the contrary.<sup>17</sup>

It is at this difficult last step that propensity proofs so frequently invade these lawsuits. The plaintiff in a discrimination suit has at his disposal a limited set of evidence, in large part because "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail" indicating that animus.<sup>18</sup> Having made his prima facie case and shown the employer's explanations to be pretextual, therefore, the typical plaintiff is left to rely on circumstantial evidence. Prior act evidence—the employer's comments, her treatment of past employees, statistical comparisons between employees, and the like—fills this gap, with the

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13. See Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 49 n.2 (1993) ("The typical discrimination case is one presenting a claim of individual disparate treatment."); cf. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1550 (2000) (describing this "classic model of discrimination" as "precisely what existing employment discrimination frameworks were designed to handle").

14. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see *id.* at 802 n.13 (acknowledging that the prima facie requirements vary according to the different forms of discrimination alleged); see also *Costa v. Desert Palace*, 299 F.3d 838, 855-56 (9th Cir. 2002) (noting that while "nothing compels the parties to invoke the *McDonnell Douglas* presumption," the ultimate burden will remain the same regardless of the choice, because "[o]nce at the trial stage, the plaintiff is required to put forward evidence of discrimination 'because of' a protected characteristic"), *aff'd*, 539 U.S. 90 (2003).

15. *McDonnell Douglas*, 411 U.S. at 802.

16. *Id.* at 807; see also *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

17. *Reeves*, 530 U.S. at 143; see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) ("It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.").

18. *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987).

plaintiff proffering such proof in the hope that it will make the existence of animus at the time of the employment decision more probable.

This dynamic will not, of course, affect every discrimination litigant, for occasionally parties are not forced to reach this final evidentiary stage. Concessions by the defendant may render the inquiry unnecessary;<sup>19</sup> the evidence going to the prior stages may, in the rarest of circumstances, itself be sufficient to persuade the fact-finder that the employer's state of mind was in fact discriminatory;<sup>20</sup> and the plaintiff alleging discrimination may, in certain cases, be able to avail himself of a cause of action that regards intent as irrelevant.<sup>21</sup> To the extent that in these select cases the plaintiff is

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19. Parties can avoid an inquiry into the employer's state of mind by, for example, accepting the defendant's explanations of her motives and disputing the legality of the conceded form of discrimination. *See, e.g., Johnson v. Transp. Agency*, 480 U.S. 616, 634-42 (1987) (describing conditions under which preferential policies for women and racial minorities may be permitted); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (per curiam) (addressing whether Title VII prohibits a policy of not hiring women with preschool-age children). Parties in ADA suits might agree on the motive behind the employer's action but dispute other factual elements of the case, such as whether the triggering condition was a protected disability. *See, e.g., Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 194-202 (2002). An employer may, similarly, seek to avoid or limit liability by denying the requisite knowledge or willfulness in regards to its agents' activities. *See, e.g., Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 384 (2d Cir. 2001) (declaring punitive damages to be available under Title VII, but only "where the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual" (internal quotation marks omitted)).

20. Theoretically, a fact-finder may be so persuaded by the employee's prima facie case and the falsity of the employer's stated explanation that it finds, based on this evidence alone, the existence of a discriminatory motive to be more likely than not. *See Reeves*, 530 U.S. at 147-48 (acknowledging the possibility). Yet it is not clear whether this formulation is realistic in practice. *See, e.g., id.* at 146 (acknowledging that the plaintiff had introduced evidence of prior "derogatory, age-based comments" to prove state of mind and finding such evidence to be probative); *Schnabel v. Abramson*, 232 F.3d 83, 88 (2d Cir. 2000) (explaining that, while jurors "could conclude that the defendants' stated reasons for firing plaintiff were pretextual," the district court did not err in concluding that no reasonable jury could find a violation of the ADEA, because the plaintiff had "offered no evidence that he was discriminated against because of his age"). Rather than articulate a realistic strategy for discrimination litigants, therefore, *Reeves* served mainly to remind courts ruling on summary judgment motions that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves*, 530 U.S. at 147.

21. For example, the disparate impact model governs a fundamentally different form of discrimination suit, insofar as it dispenses with the requirement to prove discriminatory intent in forbidding an employer from acting to "limit, segregate, or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of, e.g., his race. 42 U.S.C. § 2000e-2(a)(2) (2000). A suit alleging a hostile work environment likewise requires the plaintiff to show harassing behavior to be "sufficiently severe or pervasive to alter the conditions of . . . employment," without necessarily showing an employer's intention to make it so. *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004) (internal quotation marks omitted).

The systemic disparate treatment model also differs from the individual disparate treatment model, given its focus on a "pattern or practice" of intentional discrimination rather than on discrete events. However, because its plaintiffs must still prove intent, the same Rule 404 tensions emerge. They are not necessarily as disruptive in this context, given courts' willingness to presume, from the mere existence of a discriminatory pattern or practice, that the employer has intentionally discriminated against the individual class members. *See Rutstein v. Avis Rent-A-Car*

never required to expose the mind of the employer when she made the decision at issue (nor to connect it causally to the employment action), such litigation does not suffer from the same Rule 404 tensions that exist in a more typical discrimination suit. Yet this hardly helps the throngs of claimants unable to avoid the evidentiary quagmire: namely, those employees who have suffered discrimination that Congress clearly intended to be actionable under Title VII, the ADEA, or some analogous employment discrimination statute but who find themselves in circumstances that do not allow them to circumvent this last stage of proof. These are the litigants upon whom this Note focuses, because, for them, only two options remain: abandon Rule 404's propensity ban, or abandon the suit.

## II. DISCRIMINATION'S DANCE AROUND 404(B)

Whenever a plaintiff brings a discrimination suit into federal court, Rule 404 governs the presentation of evidence. The Rule reads, in relevant part:

(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 particular occasion . . . .

(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, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .<sup>22</sup>

While the Federal Rules do not themselves define "character," courts and scholars have made attempts to describe this elusive concept. They generally rely on some variation of the following: Character is "a generalized

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Sys., 211 F.3d 1228, 1238-39 (11th Cir. 2000). However, as soon as a plaintiff in a systemic suit attempts to prove this pattern or practice by, for example, relying on statistical disparities between groups or by connecting discrete acts of discrimination to one another (through assertions that the fact of one discriminatory act makes another more probable), the tensions in these systemic cases parallel those in the individual suits.

22. FED. R. EVID. 404 (emphasis omitted). The omitted text includes exceptions to the Rule that may be available to the prosecution and the accused in a criminal trial. *Id.* 404(a)(1)-(2); *see also* SEC v. Towers Fin. Corp., 966 F. Supp. 203, 204-06 (S.D.N.Y. 1997) (confirming the exceptions' inapplicability in civil trials); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554, at \*2-3 (N.D. Ill. Oct. 8, 1996) (same, in discrimination suits). Rule 404(a)(3), which addresses the characters of witnesses, is also not relevant to this discussion.



description of one's disposition, or one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."<sup>23</sup> This conception of character correlates squarely with an individual's "disposition towards discrimination,"<sup>24</sup> in the words of one court. While the definitional overlap (here, "disposition in respect to a general trait" as compared to "disposition towards discrimination") will not always be this blatant,<sup>25</sup> our intuitions confirm the underlying point: A person's "character" includes whether she has a propensity or willingness to act in a racist, sexist, or like manner.

Many courts characterize 404(b) as a "rule of inclusion," a term that emphasizes that the Rule will allow otherwise forbidden propensity evidence to enter whenever its relevance is based on something besides a person's character.<sup>26</sup> "In other words, properly viewed, the first sentence of Rule 404(b) bars not evidence as such, but a theory of admissibility."<sup>27</sup> It is important to recognize, however, that the bar on this theory applies even when parties offer evidence not directly on the basis of "character," but rather on some alternative basis, such as motive. Thus,

when a proponent of Rule 404(b) evidence contends that it is both relevant and admissible for a proper purpose, the proponent must clearly articulate how that evidence fits into a chain of logical

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23. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5233, at 354 (1978) (internal quotation marks omitted); *see also* United States v. Romero, 189 F.3d 576, 587 (7th Cir. 1999); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 49 (11th ed. 2003) (defining animus as "basic attitude or governing spirit" or "disposition").

24. Parker v. Burnley, 693 F. Supp. 1138, 1152 (N.D. Ga. 1988) (internal quotation marks omitted); *see also* Bundy v. Jackson, 641 F.2d 934, 952 n.18 (D.C. Cir. 1981) (indicating a "predisposition towards discrimination against members of the involved minority" (internal quotation marks omitted)).

25. The overlap certainly seems less obvious when a defendant appears to be engaged in what one might label rational discrimination—for example, when, despite Title VII, an employer refuses to hire male corrections officers due to, *inter alia*, the privacy interests of female inmates, *see* Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998), or when, despite the Pregnancy Discrimination Act, the YWCA fires an unwed counselor once she becomes pregnant, "due to plaintiff's expressed intent to represent" to her youth groups, in conjunction with the pregnancy, "a philosophy and social concept contrary to [that] of her employer," *see* Harvey v. YWCA, 533 F. Supp. 949, 954-55 (W.D.N.C. 1982). In both these cases, specific motivations rather than a propensity toward discrimination triggered the employment actions. Yet, as discussed *infra* note 40 and accompanying text, Title VII and similar laws actually allow many forms of discrimination when it is "reasonably necessary" to the job. *Robino*, 145 F.3d at 1111. Inevitably, there will be few Rule 404 tensions in such suits, because defendants generally can and will openly offer their motivation as a defense in a way they cannot when straightforward animus is the force motivating their decisions. Moreover, even where the line between propensity and specific motivation becomes most vague—for example, if an employer has a prejudice against hiring older employees due to the predictably higher medical bills he may incur—the prejudice still tends to be grounded in generalizations made about a person based primarily on his membership in a given group. Such an attitude is, arguably, precisely what fuels a disposition toward discrimination.

26. 29 AM. JUR. 2D *Evidence* § 404 (1994) (compiling illustrative cases).

27. United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998).

inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.<sup>28</sup>

The Rule's substantive purpose—to prohibit reliance on character propensity to prove the charged offense, especially when that propensity is inferred from prior bad acts—is “deeply imbedded in our jurisprudence.”<sup>29</sup> Nevertheless, the applicability and effects of Rule 404 remain notoriously inconsistent and confused,<sup>30</sup> plagued by a conceptual incoherence that, as the remainder of this Part reveals, proves particularly acute in the field of employment discrimination.

Faced with a discrimination plaintiff offering proof, courts respond to the mandates of Rule 404 in one of two ways: They either ignore the Rule or misapply it. The *Abrams* court illustrated the former approach when it described the analysis it used in determining whether age might have caused *Abrams*'s discharge:

Both the comments and the evidence of how [Abrams's supervisor] treated older employees were probative of whether [he] harbored a discriminatory attitude against older workers, and if credited, that

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28. *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000) (internal quotation marks omitted); *see id.* (citing cases in agreement). Courts do vary in whether they emphasize the inclusionary or exclusionary aspects of the Rule. *Compare id. with United States v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000) (stating that the Rule excludes other crimes evidence “in but one circumstance—for the purpose of proving that a person's actions conformed to his character” (internal quotation marks omitted)). Nevertheless, those that squarely address the issue of underlying propensity inferences generally make it clear, as *Becker* did, that evidence must not be admitted if any inferential link is propensity based. *See, e.g., United States v. Tse*, 375 F.3d 148 (1st Cir. 2004). Arguably, a *Bowie*-type interpretation might endorse a different application of the Rule, where character inferences *are* allowed so long as they go to something that is not an “action,” such as a defendant's state of mind. Yet this sort of hairsplitting neither advances the clear purpose of 404(b), to render prior act evidence “not admissible to prove character,” FED. R. EVID. 404 advisory committee's note, nor reflects the more sweeping language the Supreme Court has adopted in describing the Rule's exclusionary effects, *see Old Chief v. United States*, 519 U.S. 172, 182 (1997) (“There is . . . no question that propensity would be an ‘improper basis’ for conviction . . . .”); *Estelle v. McGuire*, 502 U.S. 62, 75 (1991) (confirming that it is “misuse” to use evidence to prove that defendant was “a person of bad character or that he has a disposition to commit crimes” (internal quotation marks omitted)). It seems implausible, in sum, that decisions like *Bowie* intend through ambiguous language to endorse reliance on underlying propensity inferences.

29. FED. R. EVID. 404 advisory committee's note.

30. *See, e.g., Thomas J. Leach, “Propensity” Evidence and FRE 404: A Proposed Amended Rule with an Accompanying “Plain English” Jury Instruction*, 68 TENN. L. REV. 825, 826 (2001) (detailing the contortions and confusions encountered in the author's eighteen years as a trial attorney and ten years as a teacher of trial skills). *See generally* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (1998) (discussing the Rule's incoherent application and effects).

evidence made the existence of an improper motive for the discharge decision more probable.<sup>31</sup>

Notwithstanding the smoke screen produced by the court's mention of "motive" (one of the "other purposes" listed under Rule 404(b)), the similarity of the court's reasoning to that forbidden by Rule 404 is immediately apparent. The Rule declares that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."<sup>32</sup> Yet, according to *Abrams*, evidence of this defendant's other actions is useful to the fact-finder precisely for the purpose of proving a discriminatory character (in the court's language, that the employer "harbored a discriminatory attitude"), which is itself relevant only if it makes it more likely that the defendant would have acted in conformity with that character trait when he fired *Abrams* ("made the existence of an improper motive for the discharge decision more probable"). When the *Abrams* court nevertheless admitted this evidence, it justified its decision based on a single authority: Rule 401, the "definition of relevant evidence."<sup>33</sup> Were it not for the prohibitions of Rule 404, such a vague citation might suffice.<sup>34</sup> Yet given Rule 404's exclusion of character propensity evidence, the court's explanation certainly fails to address—much less resolve—this conspicuous discrepancy.

*Abrams* is hardly unusual: Courts frequently ignore Rule 404 when faced with discrimination suits. Labeling the inquiry as being into the "attitude,"<sup>35</sup> "animus,"<sup>36</sup> or "predisposition"<sup>37</sup> of employers toward members of a given class, courts rarely acknowledge the conceptual (and even definitional) overlap between those inquiries and classic character propensity inquiries.

Moreover, even when courts do explicitly address Rule 404, their analysis fails to satisfy. The standard rationalization invokes the two most

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31. *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214-15 (3d Cir. 1995).

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

33. *Id.* 401 (capitalization altered).

34. To clarify, so long as a judge is willing to give at least *some* credence to the theory that people tend to behave in accordance with character traits, character propensity evidence surpasses Rule 401's liberal threshold for relevance. It has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

35. *E.g.*, *Robinson v. Runyon*, 149 F.3d 507, 512 (6th Cir. 1998); *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 349 (1st Cir. 1989).

36. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 306 n.13 (2001); *Gu v. Boston Police Dep't*, 312 F.3d 6, 12 (1st Cir. 2002).

37. *E.g.*, *Bundy v. Jackson*, 641 F.2d 934, 952 n.18 (D.C. Cir. 1981) (internal quotation marks omitted).

plausible 404(b) purposes: motive and intent.<sup>38</sup> However attractive initially, neither purpose tends to comply with Rule 404 in the context of discrimination suits. On the contrary, in the vast majority of cases the logic underlying motive and intent proofs squarely violates the propensity ban. As the following discussion demonstrates, the proffered prior act evidence might indeed relate to these two stated purposes—but only to the extent that the evidence is probative of the defendants' supposed character traits.

A. *The First "Other Purpose": Motive*

Not all proofs of motive necessarily implicate a defendant's character. For example, if a juror learns that a victim had threatened to blackmail the defendant, she can infer a motive for murder that does not depend on the defendant's propensities; virtually everyone would want to avoid the undesirable consequences of being blackmailed. Yet it may be necessary for a prosecutor to bring in evidence of the event fueling the blackmail—for example, maybe the victim witnessed the defendant murder someone else—to establish the plausibility of such a motive actually having incited action in this particular case. Even though the relevance of the prior act is based on this hypothetical defendant having previously committed the crime for which he is now on trial (such that it might be possible for one to conclude that he has a "murderous character"), this prior act legitimately passes the 404(b) prohibition: It is probative of motive through reasoning that is independent of any propensity inferences.

The same does not hold, however, when a plaintiff suing for discrimination introduces the most common forms of prior act evidence to prove the motive behind his employer's actions. On the contrary, the "motive" proof in these cases relies on propensity inferences, because the only "motive" to be identified is the one we take to be inherent in a discriminatory character. Further comparison clarifies this distinction. Where motive usually relates to some desire or compulsion external to the contested act itself (such as a desire to avoid blackmail), prior act evidence

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38. See, e.g., *Brown*, 891 F.2d at 349 ("[P]rior discriminatory conduct is recognized as probative in an employment discrimination case on the issue of motive or intent." (emphasis omitted)); see also, e.g., *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1345-46 (4th Cir. 1991); *Allen v. Perry*, 279 F. Supp. 2d 36, 46 (D.D.C. 2003). Courts occasionally use broader terms like "attitude" or "state of mind" interchangeably with intent or motive. See, e.g., *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 84 (1st Cir. 2004) (referring generally to "defendant's discriminatory intent, motive or state of mind" (internal quotation marks omitted)); *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 194 n.8 (3d Cir. 2000) (listing cases in which courts admitted prior acts going to whether an act was "motivated by invidious discrimination," and noting that those "courts admitted the evidence because of the discriminatory nature of the prior conduct, which in turn tended to show the employer's state of mind or attitude towards members of the protected class").

of discrimination does not generally suggest that the defendant had some distinct *reason* to discriminate. Rather, whenever the motive is in dispute, this evidence tends to show nothing more than that the defendant had some tendency—some propensity—to act discriminatorily, and it is from this fact alone that the fact-finder can infer an enduring discriminatory motive.<sup>39</sup> The critical divide between this and other forms of motive proof is, therefore, that these plaintiffs are not attempting to identify *why* the defendants discriminated in the action at issue. They are not suggesting, for example, that the defendant's discrimination was motivated by financial gain or concerns for her business; such a showing would actually tend to refute charges of discrimination.<sup>40</sup> The same is true when there exists evidence of personal animosity between the employee and the employer.<sup>41</sup>

There are, of course, exceptional fact patterns in which prior acts might legitimately go to a disputed motive,<sup>42</sup> and, very occasionally, the analysis might shift from the discriminatory character of the employer to the discriminatory character of some other individual.<sup>43</sup> Yet none of these

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39. See, e.g., *Becker*, 207 F.3d at 194 n.8 (proposing that “the inference of the employer’s discriminatory attitude came from the nature of the prior acts themselves”); *Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995) (“There is no unfair prejudice, however, if the jury were to believe that an employer’s sexual harassment of other female employees made it more likely that an employer viewed his female workers as sexual objects, and that, in turn, convinced the jury that an employer was more likely to fire an employee in retaliation for her refusal of his sexual advances. There is a *direct link* between the issue before the jury—the employer’s motive behind firing the plaintiff—and the factor on which the jury’s decision is based—the employer’s harassment of other female employees.” (emphasis added)).

40. See, e.g., 42 U.S.C. § 2000e-2(e) (2000) (allowing employers to discriminate on the basis of religion, sex, or national origin when one of those attributes constitutes a bona fide occupational qualification (BFOQ) “reasonably necessary to the normal operation of that particular business or enterprise”); *id.* § 12111(8) (allowing employers to discriminate against a disabled individual who cannot demonstrate that he is qualified for the employment at issue).

41. Compare *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (repeating district court’s conclusion that while the plaintiff had “proven the existence of a crusade to terminate him, he [had] not proven that the crusade was racially rather than personally motivated”), and *Cooperman v. Solil Mgmt.*, No. 98 Civ. 8099(NRB), 2000 WL 16929, at \*5 (S.D.N.Y. Jan. 11, 2000) (mem.) (“Plaintiff has presented no evidence to suggest [a discriminatory] motive . . . . At most, we could find his supervisor’s directive to have been borne of personal animosity, which is not actionable under federal discrimination statutes.”), with *Mendez v. Artuz*, 303 F.3d 411, 413 (2d Cir. 2002) (acknowledging that an individual’s “vendetta” against a murder victim would constitute a valid ground for establishing motive).

42. For example, in a case alleging that the defendant had denied a woman employment because of her sex, the plaintiff might offer evidence of the employer’s prior discriminatory firings under the following theory: The defendant had developed a desire (or motive) to avoid hiring women after the termination of previous female employees had subjected him to litigation for sex discrimination. The prior acts are relevant without relying on the defendant’s character. This sort of case is exceptional, however, because the non-character-based motive does not immunize the defendant from liability. Normally, when there is some motivation beyond that which exists inherently when a defendant harbors a discriminatory attitude, the defendant is more than willing to concede that motive and, indeed, offer it as a defense.

43. Cf. *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (refusing to find a permissible basis for discrimination where the employer refuses “to hire an individual because of

exceptions helps the employee faced with simple, straightforward animus. For this plaintiff, it is essential that she avoid suggesting that any valid motive (that is, other than some ingrained compulsion to discriminate) might have caused the employer's adverse decision. She faces a defendant who can evade liability simply by showing that his motives were not discriminatory, even if those motives were not themselves legal.<sup>44</sup> It is, moreover, wholly unnecessary for her to attempt to present these genuine motive proofs, because it is not at all relevant to a plaintiff's case *why* a defendant has discriminated on the basis of some impermissible reason. A defendant will be held liable for engaging in prohibited forms of discrimination regardless of his motivation for doing so; he will even be held liable when he is unaware he is doing it.<sup>45</sup>

In short, then, when plaintiffs purport to offer evidence of an employer's "motive," they overwhelmingly do so based on the following logic: The employer's prior acts reveal that the employer has some discriminatory mindset; ipso facto, the employer was motivated to discriminate. Nothing more than semantics differentiates this "motive" from character propensity, while the underlying theory of admissibility in no manner complies with Rule 404(b)'s prohibition of prior act evidence "to prove the character of a person in order to show action in conformity therewith."

#### B. *The Second "Other Purpose": Intent*

If motive collapses into propensity, courts purporting to comply with Rule 404 can still admit evidence of prior discriminatory acts to show an employer's "intent" when he engaged in some later conduct.<sup>46</sup> Although plausible on its surface, this "intent" purpose actually implicates a chain of reasoning both less straightforward than the "motive" purpose and, in the discrimination context, equally dependent on propensity reasoning. An examination of the logic behind each illustrates the distinction. With motive proof, the prior act reveals the motive, which becomes relevant to the act at issue only if there is some cause-and-effect relationship connecting the two

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the preferences of co-workers, the employer, clients or customers" (internal quotation marks omitted)).

44. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (finding that discrimination against employees for the purpose of avoiding the vesting of pensions does not constitute illegal discrimination under the ADEA, even though such conduct is actionable under ERISA).

45. See Ann C. McGinley, [J]Viva la Evolución!: *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 447 (2000).

46. See, e.g., *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) ("As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent.").

events. Our intuitions about the incentives of rational actors, notwithstanding any individual's particular character, are therefore what establish the link between these prior and present acts.

Intent, by contrast, does not have the same cause-and-effect relationship with the act at issue—if it did, it would be a motive. As such, for evidence of some *prior* act to relate to a defendant's *present* intent (that is, his intent when he committed the act in question), some other logical chain must link these events and mental states across time. However, to comply with Rule 404, the basis for such an inference must relate the prior acts to the conduct without relying on a consistency of some particular character and conformity therewith.

Although scholars have argued that, as a practical matter, plaintiffs' proofs of intent routinely rely on propensity inferences,<sup>47</sup> there do exist consistencies through which parties can legitimately prove present intent from prior acts. To illustrate how, in the discrimination context, the consistency underlying this logic is propensity based, this Section begins by providing three examples of consistencies that allow evidence to go to intent without relying on propensity inferences. It then demonstrates that none of these three consistencies normally applies in the discrimination context. It concludes by more closely analyzing the most common forms of proof in discrimination suits, for the purpose of illustrating which consistency the parties invoke instead: the defendant's character.

To begin, say a defendant has had prior experience with the consequences of a given action. If he engages in a similar action in the future, but denies that he had intended to cause similar consequences through that action, the prior experience tends to make his denials of intent less plausible. For instance, if a defendant physically assaults and severely harms his stepson six weeks prior to beating that child to death, he will have a harder time convincing the jury in a trial for second-degree murder that he hadn't been aware that this particularly violent form of "punishment" could put the child in physical danger and, therefore, that he lacked the intent to harm necessary for conviction.<sup>48</sup> The invoked consistency—the defendant's experience—runs through time without necessarily implicating his character.

Another permissible consistency is a defendant's preconceived plan. If a prosecutor has evidence of a defendant's preparations and strategies in conjunction with some criminal activity, she can offer proof of those prior acts and evidence of the related crimes without violating the propensity ban, so long as she limits her argument to the following theory of admissibility:

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47. See, e.g., Morris, *supra* note 30, at 190-96.

48. United States v. Lewis, 837 F.2d 415, 416 (9th Cir. 1988); see also *id.* at 418-19.

A plan implies premeditation; therefore, it logically implies intent. For this narrow chain of reasoning, the defendant's character is again irrelevant.

Finally, a permissible basis for inference may arise from a defendant's relationship with a particular person. Faced with a defendant on trial for assault, for example, a court is more likely to admit evidence of the defendant's prior assaults if they were all directed at the same victim.<sup>49</sup> Where there is an "essential identity remaining between the victim, the assailant, the manner of the assault and the nature of the harm involved in the present and prior acts,"<sup>50</sup> one recognizes a relationship—that is, between the victim and the defendant—that does not depend on the particular character of the assailant. Granted, the relevance of this evidence may be based on the "character" of the relationship; however, because this reasoning does not necessarily implicate either party's individual character, Rule 404 poses no prohibition.<sup>51</sup>

These three consistencies—experience, plan, and relationship—are not exhaustive. Any consistency affecting someone's mindset through time could likewise be included in this discussion, so long as it is grounded in generalized assumptions about how people think rather than on particular character traits of the defendant. Nor do these consistencies ensure proper application of the Federal Rules, given the vast difference between a legitimate reliance on this "other purpose" being available in theory and being exercised in practice.<sup>52</sup> Nevertheless, these consistencies are illustrative of the depth of the problem in discrimination suits, where, for

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49. See, e.g., *United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994) ("[E]vidence of a prior incident involving the same victim has 'probative value in disproving claims that the defendant lacked intent.'" (quoting *Lewis*, 837 F.2d at 419)). The same court will find no contradiction in asserting that, had there been different victims, a "showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time." *Id.* (internal quotation marks omitted).

50. *Id.* at 822-23.

51. A party or court may be tempted to try to expand this "relationship" consistency to encompass the discrimination suits in question, by arguing, for example, that a given prior bad act goes to the defendant's relationship with women or minorities or older people, etc., generally. While creative, such an interpretation necessarily fails because it would have the effect of robbing the "character propensity" concept of all meaning. A prosecutor alleging disorderly conduct might provide evidence of a defendant's "relationship" with the police; a plaintiff bringing suit for breach of an employment contract might introduce evidence of a defendant's "relationship" with authority figures. Rule 404 therefore recognizes one's relationship with a given individual to be fundamentally different than one's "relationship" with a class of people. This Note does not, however, intend to justify this "relationship" exception, which may pose a particularly acute threat of prejudice to a defendant. Rather, the Note's intent is simply to acknowledge that this reasoning does not violate the plain text of Rule 404.

52. See *infra* notes 64-65 and accompanying text (acknowledging the Rule's frequent misapplication). Moreover, proper application of Rule 404 still allows misapplication of Rule 403, which excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," FED. R. EVID. 403, including the danger of a jury making impermissible propensity inferences despite instructions to the contrary.



the vast majority of cases, there is no consistency germane to the plaintiff's suit beyond what the defendant's propensities appear to be. The defendant's experience, for example, will almost never be relevant to the ultimate inquiry in a classic discrimination suit. Even when the parties bitterly dispute the cause of a particular employment action, both sides in the vast majority of cases concede that the defendant took the action itself knowingly and understood its effects. And while lack of knowledge is often important to defendants contesting intent, ignorance in discrimination suits can serve as a defense only in certain, atypical cases—for example, where the defendant argues that she had no knowledge of the plaintiff's inclusion in a given protected class. Otherwise, the defendant's knowledge remains irrelevant.

A defendant's "plan" likewise fails to concern most plaintiffs bringing employment discrimination suits. First, as a practical matter, a litigant in a disparate treatment suit need not prove some overarching or deliberate plan to discriminate. On the contrary, this cause of action, designed to accommodate a much subtler and more spontaneous manner of discrimination, renders any instance of discrimination actionable, even when it is isolated or unintentional. Second, even if a plaintiff does attempt to argue that intent can be inferred from the defendant's prior acts, all of which are relevant to one another not through propensity but as a preconceived plan, this argument, in practice, tends to put the cart before the horse. A plaintiff cannot demonstrate relevance merely by asserting the existence of a common plan. Rather, relevance legitimately based on this reasoning requires that the proffering party present some grounds (beyond the mere existence of the prior acts) for concluding that there exists, as a factual matter, such an arrangement. Simply put, the plan must precede the acts,<sup>53</sup> a logical necessity that poses an additional evidentiary burden<sup>54</sup> and one that is often impossible for a discrimination plaintiff to meet.<sup>55</sup>

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53. See, e.g., 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 300, at 238 (James H. Chadbourn ed., 1979) ("Design or plan . . . is not a part of the issue, . . . but is the *preceding* mental condition which evidentially points forward to the doing of the act designed or planned. . . . In proving design, the act is still undetermined . . . ." (emphasis added) (citations omitted)); see also EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:24, at 112-13 (1995) (arguing that when courts do not insist upon some evidence of plan beyond mere similarity between crimes, they in effect "convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory" and "are arguably permitting the proponent to introduce propensity evidence in violation of the prohibition in the first sentence of Rule 404(b)" (footnote omitted)).

54. See, e.g., *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 195, 195-96 (3d Cir. 2000) (describing the additional burdens imposed on the plaintiff, especially "where proof of a plan or design is not an element of the offense").

55. Cf. *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("Proof of [intentional discrimination in employment] is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it . . . .").

Finally, in discrimination suits, the employer's relationship with the employee cannot be what constitutes the underlying consistency, because this form of proof actually undermines the plaintiff's case. Title VII and its progeny prohibit discrimination only when an employer directs it toward an individual as a member of a protected class. Thus, if the animus is directed toward the plaintiff personally—for example, if prior acts go to the employer's intent only to the extent that they reveal the “existence of [some] crusade” against the plaintiff—then the plaintiff has failed to fulfill the Title VII requirement that his employer acted against him “because of” his membership in that protected class.<sup>56</sup> However counterintuitive the law may seem, personal animus actually presents a defense of sorts in a discrimination suit.

With these three consistencies inapposite in the discrimination setting, the plaintiff is left scrambling for a theory of relevance. Courts alleviate this burden by tacitly allowing plaintiffs to rely on the consistency left available to them: the consistency of the defendant's character. Evidence purportedly going to intent therefore enters under the theory that because the employer has previously intended to discriminate, he is more likely to intend to discriminate in the future.

A closer analysis of one of the common forms of proof—statistics—illustrates this particular reliance on propensity inferences to prove intent. Theoretically, statistics, like any form of evidence, could directly refute a defendant's stated explanation for his decision. Perhaps the defendant claimed that she terminated an employee based on his poor performance, but a statistical analysis of his work compared to others' reveals no underperformance. To the extent that a fact-finder could infer intent from the pretextual nature of an employer's explanation,<sup>57</sup> such evidence is relevant without reliance on propensity inferences.

Yet while statistical analyses comparing employees across time are common in discrimination suits,<sup>58</sup> they are rarely entered on this limited, legitimate ground. Rather, courts encourage plaintiffs alleging discrimination to introduce statistics demonstrating the “degree of disparity between the expected and actual . . . composition of the [workforce]

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56. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993).

57. *But see supra* note 20.

58. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (“Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer . . . .” (first omission in original) (internal quotation marks omitted)); *accord Schanzer v. United Techs. Corp.*, 120 F. Supp. 2d 200, 204, 209-10 (D. Conn. 2000).

necessary to support an inference of discrimination,”<sup>59</sup> where the “composition” indicates the workers’ race, sex, age, or other protected trait. Any “degree of disparity” is, however, probative of the ultimate issue in a disparate treatment case—the intention of the employer at the time she made the relevant employment decision—only insofar as it demonstrates that the employer has some enduring propensity to act in a given way. Without this baseline, the statistics shed no light on whether the employer might have discriminated at a given moment in time. No one would dispute that it is theoretically possible for a person to reject one thousand applicants in a row for discriminatory reasons but then act without discriminatory intent toward the next applicant. What renders this scenario entirely improbable is the consistency of character one infers from the first thousand acts. Absent this propensity inference, there is no reason to think, based merely on an actor’s discriminatory history, that she is more likely than anyone else to discriminate in some subsequent situation.

Nevertheless, it is precisely this sort of propensity-based logic that underlies statistics when courts admit them into evidence. The reasoning is, moreover, generally even more tenuous than that described, because few plaintiffs can offer direct proof that the incidents or decisions described in the data set were themselves discriminatory. Rather, the plaintiff enters the evidence based on a theory of relevance similar to (but even less persuasive than) that fueling the doctrine of chances. Premised “on the improbability of multiple coincidences,”<sup>60</sup> this doctrine allows fact-finders to infer an increased likelihood of intent if, for example, a defendant has been accused of the exact same offense on prior occasions. Although there is insufficient evidence to prove the offense in any single situation, the doctrine recognizes that it is improbable for an innocent individual to find himself in identical situations so many times. The more likely explanation, the theory goes, is that he is guilty. Similarly, statistics offered in a discrimination suit rely on the improbability that an employer’s innocent hiring decisions would result in disproportionately small representations of given groups. Absent a persuasive explanation from the defendant, the most likely reason for such disparities is discrimination.<sup>61</sup>

However reasonable these conclusions seem, they nevertheless rely on the same propensity inferences. The data, representing the effects of prior

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59. *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1412 (D.C. Cir. 1988); see also *Castaneda v. Partida*, 430 U.S. 482, 494-96 & n.17 (1977).

60. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1564.

61. Cf. *Berger*, 843 F.2d at 1412-13 (“The basic office of statistical proof is to seek to eliminate non-discriminatory explanations for racial disparities; thus a statistically valid showing of a substantial disparity between expected and actual results may give rise to an inference of discriminatory intent.”).

conduct, are relevant to the present employment decision only insofar as they shed light on some consistency in the defendant's character.

Generally, therefore, propensity-based inferences exist whenever employees attempt to prove intent through statistics. This dynamic is even more evident when plaintiffs rely on the most familiar forms of evidence in discrimination suits: bigoted comments and prior incidents of discriminatory conduct. Charged with determining whether an individual had discriminatory intentions when she made a certain decision, most laypeople would welcome such evidentiary insights into the person's past, because facts like these help establish whether someone tends to act with discriminatory intent—or in other words, whether she has the propensity to commit the act in question. Notwithstanding Rule 404, lawyers for discrimination plaintiffs welcome such evidence for the same reason. Prior conduct goes to propensity, which goes to present intent. Nothing complicates this straightforward logical progression—other than a judge's insistence upon a faithful adherence to Rule 404.

No doubt, if courts were to enforce the propensity ban faithfully, some plaintiffs could find ways of admitting prior act evidence. Bringing suit under the hostile environment sexual harassment model rather than under the disparate treatment model, for example, renders all evidence of prior discriminatory treatment directly relevant, because the environment created by those prior acts is what constitutes the allegedly actionable conduct. Yet alternative litigation models are not available to everyone, and they do not necessarily help the employees Title VII has always intended to protect: those whose employers made some discrete employment decision based on animus alone. For most of these individuals, no statistic or prior act, no invocation of motive or intent, will be probative of the ultimate issue without an underlying propensity inference.

### C. *The True Purpose in Discrimination Suits: Propensity*

Neither intent nor motive, therefore, ensures compliance with the propensity ban. Unsurprisingly, then, violations of this ban are routine. Citing "numerous cases," one court explained that, "as a general rule, evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible under the Federal Rules of Evidence to establish whether a defendant's employment action against an employee was motivated by invidious discrimination."<sup>62</sup> This evidentiary ruling is, in other words, common enough to constitute well-settled law.

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62. *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 194 n.8 (3d Cir. 2000).

It would be easy to blame these rampant violations on confused courts or wayward judges. However, as this Note has argued, culpability lies less with lax enforcement than with the requirements imposed by the cause of action itself. Courts could strictly enforce Rule 404, forcing discrimination plaintiffs to scramble for alternative forms of evidence. Consider, however, the consequences for the prototypical plaintiff in a disparate treatment discrimination suit—that is, for the employee who presents an unexceptional fact pattern and cannot win relief through alternative litigation models. This litigant has but one way to meet the ultimate burden of proving that the defendant intentionally discriminated against him: He must offer evidence of the defendant's prior acts, and he must do so in a context where the "other purposes" identified in Rule 404 simply do not apply. Strictly enforcing Rule 404 would undoubtedly strip this individual of relief.

Excluding propensity evidence in discrimination suits would therefore do more than drastically tip the scales in defendants' favor, a reality that courts have indirectly acknowledged.<sup>63</sup> It would literally preclude relief for many employees who have suffered discrimination under circumstances for which Congress clearly intended to provide redress.

### III. THE CONSEQUENCES OF THE INCOMPATIBILITY

Emerging from this evidentiary tangle, then, is a conspicuous but unacknowledged exception to Rule 404, as courts routinely allow plaintiffs to prevail in discrimination suits through propensity proofs. Certainly, this infidelity to the Rule provides fodder for those who criticize its application more generally. As one scholar has argued, the Rule in practice frequently appears to be more "rhetoric than substance," with "character evidence . . . admitted here, there and everywhere."<sup>64</sup> There is ample evidence that incoherence in the Rule's practical application runs deep.<sup>65</sup>

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63. *See, e.g.*, *Garvey v. Dickinson Coll.*, 763 F. Supp. 799, 801 (M.D. Pa. 1991) (explaining, in a discussion of Rule 404, that evidence that the employer had, for example, made "disparaging remarks about the class of persons to which plaintiff belongs" is "often the only proof of defendant's state of mind, and if it were excluded, plaintiff would have no means of proving that the defendant acted with discriminatory intent"); *see also* *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (acknowledging that, while evidence of the defendant's history and practices "in other kinds of cases may well unfairly prejudice the jury against the defendant," in discrimination suits such evidence is typical and "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive"); *Miller v. Poretsky*, 595 F.2d 780, 796 (D.C. Cir. 1978) ("[V]ictims may find it virtually impossible to prove [discriminatory purpose] unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others.").

64. Melilli, *supra* note 60, at 1548; *see also* Morris, *supra* note 30, at 182 ("[C]ourts routinely permit . . . [character inferences based on bad acts evidence], thus violating the propensity rule and the plain language of Rule 404(b)."); *id.* at 184 ("[T]he putatively categorical ban on character

Yet this Note has identified an even more fundamental problem, which implicates, at a minimum, one particular cause of action. In a classic discrimination suit, the case ultimately boils down to whether an employer acted for discriminatory reasons. For the prototypical plaintiff in such proceedings, proof of this vital fact comes in but one form: Rule 404-barred propensity evidence. The essential problem does not, therefore, derive from lawyers and judges bending the rules, as some scholars have implied,<sup>66</sup> but rather with the cause of action itself.

Taken alone, this result is not necessarily problematic. An implicit, judicially created exception to the propensity ban is, if nothing else, a workable response to the irreconcilable mandates set forth by Rule 404 and discrimination suits. Yet, as the remainder of this Part argues, this ad hoc response has undesirable side effects, which may be alleviated by a more straightforward and realistic approach to Rule 404's propensity ban. The following discussion begins by identifying the purposes of Rule 404 and then addresses whether this tension in the law defeats those same purposes. It finds that the unacknowledged incompatibility between the Rule and the discrimination laws produces adverse consequences, suggesting the need for reform.

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evidence has little effect on how courts decide cases.”); H. Richard Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (“[T]oday, character evidence most often appears either in burlesque of its function, or as a product of an arcane legalistic wordplay, or as a cruel and senseless shard of forgotten dogma.”); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 579 (1985) (“It is . . . generally understood that [unindicted antisocial acts of a criminal defendant] are admissible under certain elusively defined circumstances and that the frequency of admission may belie the proposition that exclusion is the general practice.”). See generally Leach, *supra* note 30, at 826-27, 853-62 (describing criticisms of the Rule and indicating his own disapproval).

65. See generally Morris, *supra* note 30, at 189-204 (using case law to bolster the claim that propensity reasoning is often what is employed when courts admit evidence under Rule 404(b)).

66. See, e.g., *id.* at 184 (“[W]hile discussions abound about whether we should liberalize our categorical ban on propensity, in practice, the courts already have liberalized the rule dramatically.” (emphasis omitted)); D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and “Offender Profiling”: Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 CARDOZO L. REV. 193, 206 (2002) (“The borderline between propensity uses and non-propensity uses is ill-defined and indeterminate, and therefore the decision is heavily subject to non-doctinal influences like the judge’s idiosyncratic personal views and the skills of the lawyers at marshalling facts and engaging in rhetorically persuasive forensic argument.”); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 62 (1995) (“[M]anipulation and expansion of the Rule 404(b) theories of logical relevance amply demonstrate this judicial ambivalence toward prohibition of character evidence.”).

A. *The Purposes of Rule 404 and the Effects of Propensity Evidence*

At least three justifications for Rule 404 emerge from the Rule's advisory committee's note and the scholarly literature. First, the Rule's proponents argue that it strengthens and clarifies Rule 403's concerns with prejudice and distraction. Suggesting that character evidence has only "slight probative value,"<sup>67</sup> these proponents worry that admitting such evidence will prejudice jurors by allowing them to exaggerate its significance.<sup>68</sup> Excluding such evidence also narrows the focus of the trial appropriately, given that its admission "tends to distract the trier of fact from the main question of what actually happened on the particular occasion."<sup>69</sup>

Second, Rule 404 imposes a blanket exclusion, thereby reducing the scope of evidence requiring Rule 403's case-by-case analysis. This leads, its proponents argue, to less arbitrary results.<sup>70</sup>

Finally, Rule 404 is important because character propensity evidence "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."<sup>71</sup> While this purpose is concerned to some extent with fairness and verdict accuracy, there is also a more subtle anxiety embedded here—one that recognizes the legitimizing principles of fault-based legal liability. As Gerald Lynch explains in the context of criminal law,

To infer that a defendant committed the particular offense for which he is being tried from the fact that he has previously committed other crimes of a generally similar nature—or, worse still, other crimes of an entirely different nature—is not only unfair, but inconsistent with a fundamental supposition that criminal behavior is punishable because it represents a free choice at a particular moment in time to commit an immoral act.<sup>72</sup>

While the substantive concerns underlying these justifications are valid, they nevertheless temper anxieties over the introduction of propensity evidence once they are examined in the context of discrimination suits.

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67. FED. R. EVID. 404 advisory committee's note (internal quotation marks omitted).

68. See Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027-32 (1977); see also *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

69. FED. R. EVID. 404 advisory committee's note (internal quotation marks omitted).

70. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.11, at 204 (2d ed. 1999).

71. FED. R. EVID. 404 advisory committee's note.

72. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 936 (1987).

Given that Rule 403 continues to provide its protections independently of Rule 404 (and in light of the empirical work verifying that propensity inferences, if nothing else, do meet the marginal threshold for relevance imposed by Rule 401),<sup>73</sup> circumventing Rule 404 does not seem to represent the miscarriage of justice that it initially might. Of course, this remains true only so long as judges enforce Rule 403 faithfully, thus advancing the overlapping purposes.<sup>74</sup> Likewise, it would hardly open the floodgates to inconsistent verdicts if Rule 404 were no longer to apply: Consistency of result will come about only if a “categorical” ban does, in fact, categorically ban a given form of evidence. This is clearly not the case in discrimination suits, where many courts regard the Rule as one of inclusion,<sup>75</sup> and every piece of evidence must still overcome the case-by-case analysis of Rule 403 before it can be admitted.

The most troubling offense, therefore, comes in the potential thwarting of the Rule’s third identified purpose. By acknowledging the existence of character propensities and by allowing liability to be assigned on the basis of individuals acting in accordance with those propensities, this circumvention threatens both to punish a defendant for his character rather than his acts,<sup>76</sup> and to undermine one of the principles legitimizing our fault-based legal system.

This is where the tradeoffs pose the most difficulty. On one hand, as this Note has argued, enforcing the ban on propensity evidence would preclude certain plaintiffs’ discrimination suits, despite Congress’s desire to provide redress for these individuals. In a sense, then, this cause of action implicitly recognizes that these propensities exist, and the conflict represents nothing more than the legislature’s weighing of public policy concerns—for while Rule 404 serves certain purposes, so do the

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73. See, e.g., Susan Marlene Davies, *Evidence of Character To Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 506 (1991) (“Current psychological literature strongly supports the commonsense intuition that people act predictably according to their characters.”). Many likewise dispute the presumed prejudicial effect of this evidence. See, e.g., *id.* at 533 (“[T]he notion that jurors overvalue the probativeness of character or make errors because of their inability to make accurate assessments of character gains little reinforcement from contemporary work in the social sciences.”); see also Melilli, *supra* note 60, at 1598.

74. It is true that Rule 403 adopts a presumption of inclusivity, while a propensity ban implies the opposite presumption. Evidentiary rules could, of course, address such concerns by flipping the presumption for evidence entered on propensity grounds. Cf. Melilli, *supra* note 60, at 1624, 1621-26 (proposing rules to replace Rule 404 and that adjust presumptions of inclusion and exclusion based on the “safeguards” and “virtues” of the different forms of evidence).

75. See *supra* notes 26-27 and accompanying text.

76. But cf. Melilli, *supra* note 60, at 1606-07 (“[T]here is simply no empirical basis for the speculative assertion that jurors will convict persons believed to be not guilty of the charged crimes in order to impose sanctions for uncharged crimes. . . . The notion that it is unfair to punish someone for something other than the matter at issue is so straightforward and so fundamental that it is difficult to fathom that an entire jury would agree to do just that, even in the absence of the nominal safeguard of the standard cautionary instruction to this effect.”).



discrimination statutes. When such purposes are in direct conflict, as this Note argues they are, it seems reasonable to assume that the purposes of a cause of action should supersede the purposes behind a rule of evidence meant to provide a framework for that cause of action, particularly when the drafters of the earliest discrimination statutes understood how elusive probative evidence would be and presumably formulated the cause of action in a manner that balanced this concern with the interests of the defendant.<sup>77</sup> To conclude otherwise would seem either to ignore Congress's reaffirmation of the value and desirability of these suits despite their de facto reliance on propensity proofs<sup>78</sup> or to recognize constitutional dimensions to this rule of evidence where there are none.<sup>79</sup>

Of course, on the other hand, this analysis assumes a conscious consideration of Rule 404 public policy concerns that is indicated nowhere in the legislative record.<sup>80</sup> One is particularly hesitant to accept such a convenient fiction given the potential unfairness to defendants faced with propensity proofs. Nevertheless, while it is not clear how Congress would respond if it were faced with the stark choice, multiple factors suggest that it should be the Rule, not discrimination law, that bends.

First, a faithful adherence to the propensity ban would, in practice, drastically limit the relief available to plaintiffs. No one disputes the difficulty of proving the ultimate issue in a discrimination suit.<sup>81</sup> To do so without reliance on propensity proofs would be, for the vast majority of plaintiffs, nearly impossible. Absent an indication that Congress desires

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77. See BNA, THE CIVIL RIGHTS ACT OF 1964, at 61 (1964) ("Absolute proof of discrimination is next to impossible, except in the clear-cut case where an employer runs a 'whites only' help-wanted advertisement or inquires as to race or religion in an employment application."); see also *Costa v. Desert Palace*, 299 F.3d 838, 854 (9th Cir. 2002) ("[I]t must be remembered that the current form of Title VII is the result of twenty-seven years of dynamic exchange between the Supreme Court and Congress, working toward a framework that provides a remedy for barriers of discrimination and inequality in the workplace."), *aff'd*, 539 U.S. 90 (2003).

78. Not only has Congress failed to overturn these antidiscrimination statutes, it has enacted subsequent legislation on the same model. See, e.g., H.R. REP. NO. 102-40(II), at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 696-97 ("A number of other laws banning discrimination . . . are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act." (footnote omitted)).

79. See, e.g., *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (considering the propensity evidence explicitly allowed by Rule 414, directed at evidence of similar crimes in child molestation cases, and concluding that the "introduction of such evidence can amount to a constitutional violation only if its prejudicial effect far outweighs its probative value").

80. See generally BNA, *supra* note 77 (making no mention of propensity evidence concerns).

81. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult.").

such a dramatic curtailing of relief,<sup>82</sup> eviscerating the cause of action seems inappropriate.

A second factor supporting a revision of the ban, rather than the cause of action, is the probative value of propensity proofs. The probative value of these proofs is particularly high in the discrimination context, because, in judging whether to admit potentially prejudicial evidence, courts must determine whether “other evidence” could prove the same facts.<sup>83</sup> As alternative proofs become more elusive across cases, the existing evidence becomes more probative. (This calculation is, importantly, different from basing probity on whether other evidence happens to be available in a particular case, given that the availability of evidence in individual cases is likely to vary in accordance with the culpability of the defendants.)<sup>84</sup> As this Note has argued, the dearth of nonpropensity evidence is both predictable and inevitable in the discrimination context. This reality renders propensity evidence exceptionally probative, which helps to outweigh its prejudicial effects.

Third, while reliance on character propensities potentially poses a danger of prejudice to any defendant, that danger is far less acute in the civil setting than in the criminal setting. Underscoring this uncontroversial point is the heightened burden of proof in criminal trials.

Finally, even the ban’s most ardent supporters agree that Rule 404 forces courts to deal with a complicated, difficult, and imperfect body of law.<sup>85</sup> Calls for reform are, unsurprisingly, widespread.<sup>86</sup>

In sum, then, congressional intent, the interests of the parties, and the burdens on the legal system all support bending Rule 404. Still, even if allowing propensity inferences into discrimination suits is, on balance, unproblematic, the manner in which courts currently achieve this—by substantively ignoring Rule 404 while purporting to adhere to it—undermines an already tenuous doctrine while unjustifiably buttressing the Rule itself. As discussed in the following Section, the unintended side effects of this construction advise against retaining the status quo.

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82. If anything, the opposite appears to be true. In identifying the “two primary purposes” of the Civil Rights Act of 1991, for example, the House Report pointed toward “restoring the civil rights protections” that certain Court decisions had eroded and “strengthen[ing] existing protections and remedies.” H.R. REP. NO. 102-40(II), at 2.

83. 29 AM. JUR. 2D *Evidence* § 327 (1994) (internal quotation marks omitted).

84. *Cf.* Gross v. Black & Decker, 695 F.2d 858, 863 (1983) (explaining that when measuring the “admissibility of potentially prejudicial evidence” one must take into account “whether the same facts *could have been* proved by other evidence” (emphasis added)).

85. *See, e.g.,* David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 835 (1998).

86. *See generally* Leach, *supra* note 30, at 829-71 (discussing proposed and attempted revisions to the Rule).

B. *The Problematic Effects of an Unacknowledged Exception to the Propensity Ban*

1. *Incoherent and Unfair Evidentiary Rulings*

The first problem comes in the line separating admissible and inadmissible evidence. Without the guidance of a clear and acknowledged exception to the propensity ban, this boundary frequently proves incoherent. A plaintiff can offer evidence of an employer's treatment of other employees, for example, but only in arbitrarily limited circumstances. One ADEA plaintiff encountered this dynamic when offering evidence of the deceptive manner in which his employer had terminated a prior employee.<sup>87</sup> Citing the "general rule" that evidence of a defendant's prior acts is admissible to show motive in discrimination suits,<sup>88</sup> the court nevertheless excluded the evidence on the grounds that "[t]his type of inference is precisely the kind prohibited by Rule 404(b)."<sup>89</sup> This ruling may seem surprising, but only until the identity of the prior employee becomes clear: He was too young to fall under the ADEA provisions protecting the plaintiff. Because the evidence therefore did not suggest that the defendant "possessed a discriminatory attitude towards its older workforce,"<sup>90</sup> the court decided that Rule 404 rendered it inadmissible. Yet nowhere in the decision did the appellate court question whether the trial court erred in admitting evidence of, among other things, the employer's earlier discriminatory comments and his pressuring of older employees through pointed offers of early retirement packages.<sup>91</sup>

While the evidentiary distinction between this employer's deceptive and discriminative practices may seem doctrinally valid, it is conceptually unpersuasive. The court's justification for excluding the termination evidence applies equally to the discrimination evidence, and the justification for admitting the latter (that is, that its probative value is "especially high because of the inherent difficulty of proving state of mind"<sup>92</sup>) applies equally to the former. Similarly problematic decisions have confirmed the hollowness of these distinctions. In agreeing that discrimination or retaliation is only probative if it is "of the same character and type" as that alleged, the court in *White v. U.S. Catholic Conference* argued that

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87. *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 182, 185 (3d Cir. 2000).

88. *Id.* at 194 n.8.

89. *Id.* at 203 (alteration in original) (internal quotation marks omitted).

90. *Id.* at 195 n.8.

91. *Id.* at 182-83.

92. *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995) (internal quotation marks omitted).

there is nothing in human experience which suggests that a person who is bigoted as to race is equally likely to refuse to accommodate a disabled person unless one wants to say that certain folks are “like that” and always act a certain way as to people who are different from them. But to say that is to draw the very inference the law never permits a finder of fact to draw.<sup>93</sup>

However plausible, this argument proves too much. Courts will not exclude, for example, evidence of employers’ misconduct toward African-American workers—“or any other employee, for that matter”—in a separate trial of Hispanic plaintiffs’ claims.<sup>94</sup> Yet is a person who is bigoted toward African Americans “equally likely” to display animus toward Hispanics? If so, then toward those of a different national origin? Toward people who are disabled? The answer lies not in occasional resuscitations of Rule 404 but in the varying probative value of these different propensity proofs. Notwithstanding the language in *White*, a conclusion that someone is “bigoted” is precisely a determination that he is “like that” toward a certain group of people. Yet in a field unwilling to acknowledge its reliance on character propensities, the boundaries of what can be admitted into court remain unexamined and arbitrary.

This result is most troubling on a practical level because it threatens to introduce unacknowledged (and likely unconsidered) prejudice against the defendant. To be admitted, all evidence must overcome Rule 403, which rejects proffered evidence whenever its prejudicial effects substantially outweigh its probative value. When courts face the most familiar forms of propensity proofs, they quickly recognize the danger of prejudice.<sup>95</sup> When those proofs are only implicitly based on propensity inferences, by contrast, courts often seem blind to the prejudicial impact. In *Heyne v. Caruso*, for example, a waitress sued her employer for quid pro quo sexual harassment, a cause of action that requires the plaintiff to prove that an employer “explicitly or implicitly condition[ed]” some job-related condition “upon [the] employee’s acceptance of sexual conduct.”<sup>96</sup> In this case, the plaintiff alleged that her employer sexually propositioned her and, as a consequence of her rejection, fired her. The plaintiff therefore faced two elements requiring proof: first, that the employer made the adverse decision because of the rejection (a proof analogous to that normally required in

93. No. Civ.A.97-1253TAF/JMF, 1998 WL 429842, at \*5 (D.D.C. May 22, 1998) (mem.).

94. *Hawkins v. Groot Indus.*, 210 F.R.D. 226, 230 (N.D. Ill. 2002).

95. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (“The [evidence] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” (footnote omitted)).

96. 69 F.3d at 1478 (internal quotation marks omitted).

discrimination suits) and, second, that the alleged proposition in fact occurred.<sup>97</sup>

Predictably, the plaintiff resorted to evidence of prior acts, presenting proof that the employer had sexually harassed other employees. Under the current doctrine, such evidence would clearly be admissible as probative of the employer's state of mind when he terminated the plaintiff. Yet this court had to make an additional ruling in deciding whether the plaintiff could use that same evidence to prove that the employer had in fact propositioned her. It held she could not.<sup>98</sup> The circuit court therefore expected the jury to have accepted the following logic: "The sexual harassment of others, if shown to have occurred, is relevant and probative of Caruso's general attitude of disrespect toward his female employees, and his sexual objectification of them," which is in turn "relevant to the question of Caruso's motive for discharging Heyne,"<sup>99</sup> but *not* to the question of whether Caruso, in his conceded trip to Heyne's residence the night before, had propositioned her—even though the prior incidents of sexual harassment had included propositions but not retaliatory firings.<sup>100</sup>

Given this nonsensical distinction, there is little reason to think that the safeguards available to the district court (namely, the possibility of limiting instructions) could ever ensure that the jury would or even could separate these two inquiries in the contrived manner demanded by the court.<sup>101</sup> Yet despite the obvious prejudice to the defendant suggested by such a dynamic,<sup>102</sup> the *Heyne* court took the drastic step of finding that the trial court had abused its discretion in excluding this evidence of prior sexual harassment.<sup>103</sup>

The difficult balancing test of probity and prejudice may have, in the end, swung in favor of admitting this evidence. However, in its rare disapproval of a trial judge's use of discretion and its unacknowledged endorsement of this wholly inconsistent evidentiary framework, the Ninth Circuit appeared willing to apply the Rule 403 balancing test as though the

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97. HAGGARD, *supra* note 9, at 118-19.

98. "At the outset, we note that Caruso's alleged harassment of other female employees cannot be used to prove that Caruso propositioned Heyne on the night before she was fired." *Heyne*, 69 F.3d at 1480.

99. *Id.*

100. *Id.* at 1479-80 & n.2.

101. See, e.g., Melilli, *supra* note 60, at 1576 (arguing that "limiting instructions in this context are . . . manifestly inadequate"); see also *id.* at 1575 ("Privately, many judges acknowledge that their limiting instructions accompanying Rule 404(b) evidence are almost certainly futile.").

102. Cf. Morris, *supra* note 30, at 200 n.74 (noting that when a form of reasoning bears "such close similarity to propensity reasoning that we could not seriously have faith that limiting instructions could prevent a jury from crossing over the thin line," then "[a]s a result, evidence used on this theory would often fall to the Rule 403 balancing test").

103. *Heyne*, 69 F.3d at 1483.

inferences drawn from prior acts are somehow not propensity based (and thereby prejudicial) when they go to the likelihood of a discriminatory firing rather than of a sexual proposition. The court's misapplication of Rule 404, in other words, appeared to have colored its application of Rule 403. This unfortunate result is hardly unprecedented.<sup>104</sup>

As a final point, the unarticulated exception to the propensity ban leaves courts confused over its outer boundaries, even in the discrimination context. Some courts, for example, admit evidence of a defendant's reputation for prejudice.<sup>105</sup> Other courts adopt the general rule for admitting evidence of prior discriminatory conduct but still reject reputation evidence as violating Rule 404.<sup>106</sup> Still others base their decision on whether the reputation evidence constitutes inadmissible hearsay.<sup>107</sup> Amid this jumble, cases like *Johnson v. Pistilli* prove the most disconcerting, as the defendants in this case were the ones to offer propensity evidence, in the form of a witness attesting to their nondiscriminatory reputations.<sup>108</sup> The judge immediately recognized the conflict with Rule 404: "Essentially, the Pistillis want the trier of fact to conclude that, because they lack reputations for racial prejudice in certain communities, they lacked the requisite discriminatory intent with respect to the prospective tenants here. This is a classic example of an attempt to show action in conformity with character."<sup>109</sup> The broadness of the court's language suggested that courts should exclude *all* forms of prior act evidence favorable to the defendants: "Here, even if this evidence was, arguendo, admissible under Rule 404(b) to show lack of intent, the jury is much too likely to follow the impermissible, prejudicial inference that the Pistillis lacked discriminatory intent in the case at bar because on prior occasions they were not racists."<sup>110</sup>

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104. See, e.g., Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 588-89, 597 (1984) (discussing how certain evidentiary rulings would come out differently under an approach to Rule 403 that incorporated a sliding scale of proof, and arguing that such a reform is necessary to accommodate the varying levels of prejudice posed by prior act evidence); see also Melilli, *supra* note 60, at 1571 (recognizing signs of "a virtual abdication of any meaningful appellate authority on this issue").

105. See, e.g., *Afzal v. Atl. Coast Airlines*, No. 98-1011, 1999 WL 218727 (4th Cir. Apr. 15 1999) (unpublished table opinion).

106. See, e.g., *Schweitzer-Reschke v. Avnet, Inc.*, 881 F. Supp. 530, 532-33 (D. Kan. 1995).

107. See, e.g., *Hillstrom v. Best W. TLC Hotel*, 354 F.3d 27, 32 (1st Cir. 2003).

108. No. 95 C 6424, 1996 WL 587554, at \*1 (N.D. Ill. Oct. 8, 1996) (mem.). This was a case brought on the basis of the Civil Rights Statutes of 1866 and the Fair Housing Act. The plaintiffs offered evidence that the Pistillis, as landlords, had ignored calls from and refused to negotiate with African Americans seeking information about tenancies. The defendants responded with witnesses who could testify to their reputations for not acting in a racist manner. *Id.* Although this was not an employment discrimination suit, the evidentiary framework is sufficiently similar to warrant comparative analysis. See *id.* at \*4 (confirming this point).

109. *Id.* at \*2 (internal quotation marks omitted); see *id.* at \*4.

110. *Id.* at \*5 (emphasis and footnote omitted).

To forbid defendants but not plaintiffs from offering propensity-based evidence would be a miscarriage of justice. Some courts have recognized this problem and ruled accordingly.<sup>111</sup> Absent a principled articulation of the de facto propensity exception, however, these inconsistent rulings are to be expected. Courts, like those discussed above, will continue to draw ad hoc lines of admissibility, with results that feel unprincipled at best and unjust at worst.

## 2. *The Bolstering of a Beleaguered Rule*

Even more troubling, the effect of this selective adherence to Rule 404 extends beyond evidentiary rulings in employment discrimination suits. Assailing evidentiary doctrines on two fronts, the unacknowledged exception both undermines Rule 404's authority and unjustifiably encourages its continued use. The challenge to Rule 404's authority emerges from the courts' pretense of compliance. Whenever a court admits evidence in violation of Rule 404 without explicitly acknowledging that it is circumventing the Rule's mandates, this lack of candor destabilizes the Rule's meaning and invites analogous dismissal of its prohibitions in settings where such circumvention is unjustified.

One example of the de facto exception extending beyond the field of employment discrimination law comes in *Sabatini v. Reinstein*, where a § 1983 plaintiff sued after campus police stopped him from distributing leaflets at a graduation ceremony because they disapproved of the leaflets' content.<sup>112</sup> The court allowed the plaintiff to introduce evidence showing that the defendant had previously prevented him from exercising his First Amendment rights, explaining that "this situation is analogous to cases in which evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is admissible for purpose of proving . . . discriminatory animus" and that, as a consequence, there was no Rule 404 violation in admitting the evidence.<sup>113</sup>

*Wolsey, Ltd. v. Foodmaker, Inc.*<sup>114</sup> endorsed an even greater leap of logic. The court allowed the plaintiff, a franchisee, to introduce evidence of the defendant's prior conduct with other international franchisees for the

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111. See, e.g., *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 519 (3d Cir. 2003) (affirming that the defendant could admit testimony evidence of nondiscriminatory prior acts); see also *id.* (repeating the district court's unusually candid observation, in referring to the defendant's testimony evidence and the plaintiff's analogous offer of evidence, that "if that's 404(b) evidence [of intent], so is [the testimony of] this other witness" (first alteration in original) (internal quotation marks omitted)).

112. No. Civ.A. 99-2393, 2001 WL 872773 (E.D. Pa. July 10, 2001) (mem.).

113. *Id.* at \*3.

114. No. 96-CV-634-E(JFS), 1998 WL 2001059 (S.D. Cal. Dec. 3, 1998) (mem.).

purpose of showing that the defendant had intended to force the plaintiff to cease certain international operations.<sup>115</sup> The court based its decision on a single case, *Heyne*, relying on that court's assertion that "sexual harassment of others, if shown to have occurred, is relevant and probative of [defendant's] general attitude of disrespect [and] that attitude is relevant to . . . motive."<sup>116</sup>

In both of these cases, admitting the evidence may very well have been appropriate—but certainly not on the ground that a case like *Heyne* accurately illustrates the reach of Rule 404. By looking to discrimination suits, these courts relied on misleading precedent.

The impact of this de facto exception, moreover, will generally be subtler. As scholars have recognized, when courts "routinely admit bad acts evidence precisely for its relevance to defendant propensity," this practice supports a fallacy that "robs Rule 404(b) of any coherent purpose," with "grave consequences" for all defendants.<sup>117</sup> The list of criminal and civil defendants convicted on the basis of veiled propensity inferences is notoriously long.<sup>118</sup> A particularly egregious violation of the propensity ban emerges in prosecutions for drug crimes, where intent to distribute often becomes a critical element. Adhering to the widespread rule that use of evidence "of prior drug involvement to show plan, motive or intent in a drug trafficking offense is appropriate,"<sup>119</sup> courts regularly admit evidence that, for example, defendants on trial for intent to distribute cocaine have previously sold marijuana,<sup>120</sup> even though the only way to link this prior drug history to the charged crime is to infer that the defendants have some drug-related propensity that makes it more likely that they would once again have the intent to distribute. Labeling this particular scenario "typical" and "commonplace" in litigation for drug crimes, Andrew Morris described the standard reaction to this Rule 404(b) violation:

As is common, the court failed to explain how the evidence of marijuana sales could, without employing a propensity inference,

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115. *Id.* at \*6.

116. *Id.* (alterations and omission in original) (quoting *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995)).

117. Morris, *supra* note 30, at 184; cf. Melilli, *supra* note 60, at 1574 (criticizing courts' reliance on limiting instructions to manage prejudicial propensity inferences and arguing that "[a]ny meaningful consideration of prejudice" stemming from prior act evidence "must focus, not on the theory constructed by the law and contained in the jury instructions, but rather on the actual use to be made of such evidence by the jury").

118. See generally Morris, *supra* note 30, at 190-99 (citing a series of cases that demonstrate the underlying use of propensity inferences in so-called "intent" and "identity" cases).

119. *United States v. Ramirez*, 63 F.3d 937, 943 (10th Cir. 1995) (internal quotation marks omitted); see *id.* (listing cases). Andrew Morris cites these cases in support of his proposition that this is a general principle throughout the courts. Morris, *supra* note 30, at 191.

120. See, e.g., *United States v. Kills Enemy*, 3 F.3d 1201 (8th Cir. 1993).



increase the probability that the defendant had possessed the cocaine with criminal intent. In fact, as is common in Rule 404(b) cases, the court failed to explain its reasoning at all.<sup>121</sup>

Such a cursory treatment of the Rule seems eerily familiar. Given this willingness of the courts to decide Rule 404 issues without scrutinizing the underlying reasoning, the precedent in the employment discrimination context becomes even more unsettling.

What is more, at the same time that this unacknowledged exception to Rule 404(b) threatens its meaning and authority, it also obstructs movements toward reform. Many have indicted the Rule for its incoherence and have accused it of proceeding on the unexamined, ad hoc basis described above, where courts arbitrarily allow propensity proofs in some circumstances and not in others.<sup>122</sup> But despite these widespread criticisms, reform remains slow.<sup>123</sup> In part, this is surely due to the “pious fiction that we follow the character evidence rule.”<sup>124</sup> Were the courts to openly acknowledge the fractures in the propensity ban, a more direct analysis of its effect and purposes—and what reforms might best serve the latter—could follow.

### C. *A Call for Change*

Given such harmful effects, some response seems necessary to the “embarrassing state of the American law of other crimes evidence.”<sup>125</sup> In the context of discrimination suits, there appear to be three possible responses: (1) The system must tolerate the inconsistency, (2) plaintiffs must adhere to the Rule despite any effect it might have on the cause of action, or (3) the Rule must change. While fully evaluating the relative value of these three options is beyond the scope of this Note, its analysis does suggest that the third option may be the most attractive. As discussed in this Part, perpetuating the Rule 404 inconsistency under the premise that no

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121. Morris, *supra* note 30, at 191 (footnotes omitted).

122. See *supra* note 64.

123. See Leach, *supra* note 30, at 825-26 (“Endlessly, the Rule’s origins are explored; the Rule is criticized or defended; whether the theory of the doctrine of chances should or should not support departure from the Rule is debated; competing psychological theories . . . that may support or erode the Rule are consulted; yet the Rule continues unchanged.” (footnotes omitted)). The 1996 introduction of Rules 413 and 414, allowing limited use of propensity proofs in sexual assault and child molestation cases, respectively, did change the scope of Rule 404. Otherwise, a 1991 amendment imposing a pretrial notice requirement in criminal cases and a 2000 amendment altering Rule 404(a)(1), a provision not relevant to this discussion, represent the only substantive changes to the Rule since 1974. See FED. R. EVID. 404 advisory committee’s note.

124. Melilli, *supra* note 60, at 1569.

125. Morris, *supra* note 30, at 208.

incompatibility exists undermines the legitimacy of the system; makes fuzzy the lines that should be drawn to exclude propensity evidence; and refuses to address what, by many accounts, is a symptom of a more widespread disorder in the Rule's application. To adhere to the Rule at the expense of the cause of action is similarly unattractive, because it would subvert longstanding congressional intent while ignoring the conclusions to be drawn from balancing the interests of the parties and the courts.

This leaves a reform of Rule 404. The simplest response—codifying the exception in discrimination suits—would help define its contours and thereby limit its effect as precedent. However, this response assumes that these same difficulties do not reemerge elsewhere (despite, for example, the analogous requirement of proof imposed by the Fair Housing Act<sup>126</sup> or, indeed, by any cause of action centered around a similarly difficult inquiry into *why* an individual acted as she did).<sup>127</sup> Nor would a codification of this isolated exception acknowledge the more fundamental problems of the Rule's applicability.<sup>128</sup> Such a response would, finally, erode the appeal of the Federal Rules as a nearly universally applicable system of evidence.<sup>129</sup>

A more careful and responsive reform would be to replace Rule 404 with a rule that balances the purposes of the propensity ban while recognizing its shortcomings. Such a rule could, for example, adopt a balancing test similar to that in Rule 403 while providing defendants with greater protections, such as a presumption of inadmissibility when evidence of prior acts is offered; a more rigorous standard of review in criminal cases; and a definition of "probity" that explicitly takes into account which alternative forms of evidence are theoretically available to a plaintiff or prosecutor bringing a particular type of suit.<sup>130</sup> Some commentators have already proposed—and at least one jurisdiction has adopted—analogue

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126. 42 U.S.C. §§ 3601-3631 (2000).

127. See *supra* note 11. Although it is tempting to extend these criticisms to all suits requiring proof of mental state or *mens rea*, this slippery slope reasoning ignores the particularly high probative value of propensity evidence in causes of action, like those implicated in discrimination suits, that tend to lack alternative forms of proof.

128. "Like the top floor of a structurally unsound building," such reforms threaten "not only [to] do nothing to remedy the preexisting disorder," but also to "compound the problem by adding yet another unprincipled and indefensible distinction to the character evidence rules." Melilli, *supra* note 60, at 1590 (discussing Rules 413 and 414).

129. Scholars defend the Rules on these grounds:

[T]he virtue and success of the Federal Rules of Evidence can be attributed precisely to their universal application, generally making no distinctions among litigants and subject matter, and impervious to variable political agendas and shifting statistics. . . . Consistency and integrity dictate that our rule on character evidence not vary from crime to crime with the winds of today's particular *cause celebre*.

*Id.*

130. See *supra* text accompanying notes 83-84.

reforms.<sup>131</sup> These efforts are commendable; our judges, juries, and litigants deserve a workable system of evidence.

#### CONCLUSION

Faced with conflicting mandates, courts routinely allow discrimination plaintiffs to introduce character propensity evidence in violation of Rule 404. Yet this failure to apply the Rule is hardly a consequence of lawyers forgetting to object or judges asleep at the bench; the cause of action itself requires a showing of mental state that effectively compels most plaintiffs in discrimination suits to introduce propensity proofs in order to prevail. Analyzing the logic behind the law illustrates this point. By basing the legality of an employer's action solely on why she acted a certain way, discrimination law expects a plaintiff to prove that his employer harbored certain motives, intentions, or attitudes, and then show that the employer acted as a consequence of those same traits. Yet as far as the law (as opposed to, for example, a psychiatrist) is concerned, the discriminatory employer will generally have no motive to discriminate beyond whatever irrational motives derive directly from discriminatory animus. No more than semantics, therefore, differentiates this sort of "motive" from that directly inferable from an individual's character propensities.

The "intent" of the employer, moreover, promises to remain hidden beneath denials, accessible only through whichever character propensities are revealed by the employer's prior discriminatory conduct. For this cause of action, there are few, if any, logical inferences about intent to be made based on the employer's knowledge, plans, or relationship with the plaintiff. Instead, fact-finders use propensity proofs to delve into this issue. In sum, the requirements of proof compel all but the most exceptional of plaintiffs to rely on character propensity inferences if they are to prevail. Rule 404 crumbles as a consequence.

The conclusion we must draw is troubling: Rule 404 is, on a fundamental level, incompatible with classic discrimination suits. We incur significant costs by maintaining this contradictory model. Currently, the doctrine thwarts courts' attempts to make principled and fair rulings in

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131. See, e.g., Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 807-08 (1981) (proposing a balancing test that reverses Rule 403's presumption of admissibility); Melilli, *supra* note 60, at 1621-25 (proposing replacements for several rules, including Rule 404, that would assume admissibility of evidence of criminal convictions and inadmissibility of all other extrinsic acts, along with a notice provision protecting criminal defendants and a bar on most opinion or reputation testimony going to character); Morris, *supra* note 30, at 207, 205-08 (discussing, positively, the English courts' rejection of their "discredited ban" on propensity reasoning and their adoption in its place of "a direct inquiry into the probativeness and prejudicial effect of the evidence").

discrimination suits, undermines the propensity ban in other contexts, and unjustifiably props up a deeply problematic Rule.

Reform is therefore warranted. While this Note does not take on the Herculean task of judging the scope and value of Rule 404 as a cross-cutting rule, it does make a series of relevant claims. First, as between a rule of evidence and a cause of action, the former should bend. Second, the protections lost through liberalizing Rule 404 in the discrimination context will not necessarily be as drastic as they might seem in isolation, given the perseverance of Rule 403. And third, despite the fact that the legitimizing purposes of Rule 404 do extend beyond those implicated by Rule 403, it may nevertheless be appropriate to revise or replace the Rule. A strict adherence to the Rule in its present form would drastically undermine this cause of action in contravention of congressional intent. What is more, a balancing of the interests of the parties and the courts supports reform of the Rule.

In short, the character of discrimination law does not allow for a blanket rule prohibiting character propensity inferences. For many plaintiffs, denying propensity evidence would effectively preclude a discrimination suit. One of the most complicated bodies of law thus reveals itself to be incompatible with one of the most complicated rules of evidence, suggesting, at a minimum, that our legislators should embark on a critical examination of this most complicated relationship.