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# CHARACTER FLAWS

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*Character evidence doctrine is infected by error. It is riddled with a set of pervasive mistakes and misconceptions—a group of gaffes and glitches involving Rule 404(b)’s “other purposes” (like intent, absence of accident, and plan) that might be called “character flaws.” This Essay identifies and investigates those flaws through the lens of a single, sensational case: United States v. Henthorn. By itself, Henthorn is a tale worth telling—an astonishing story of danger and deceit, malice and murder. But Henthorn is more than just a stunning story. It is also an example and an opportunity, a chance to consider character flaws in evidence law more broadly and an occasion to remedy them too. This Essay makes use of that occasion. It critically examines Henthorn: the arguments offered, the tactics deployed, the opinions written, the evidence used. And it frames Henthorn as a window into contemporary character flaws more broadly, hoping to prompt an overdue conversation, both in the courtroom and in the classroom, about the flaws that now infect character evidence.*

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## INTRODUCTION

They say that character endures.<sup>1</sup> So much else may come and go—status and beauty, luck and money, fitness and fame. But character, they say, holds constant, revealing our core nature and laying bare our true selves: the quarreler inclined to quarrel, the liar inclined to lie, the helper inclined to help.

And yet, in most settings, courts exclude evidence of character. Evidence that a person has a particular character trait or propensity—good or bad, noble or shameful, significant or trivial—is deemed inadmissible to show that she “acted in accordance therewith.”<sup>2</sup> That was the rule at common law.<sup>3</sup> It remains the rule today.<sup>4</sup>

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1. Many attribute this maxim to Horace Greeley, *see, e.g.*, Anthony Kronman, *The Erotic Politician*, 10 *YALE J.L. & HUMAN.* 363, 364 (1998) (“Horace Greeley said the only thing that endures is character.”), but the aphorism’s provenance is a tad dubious. The supposed passage—“Fame is a vapor, popularity an accident, riches take wing, only one thing endures and that is character”—proves quite difficult to locate in Greeley’s writings. In fact, the closest fit seems to say nothing about character at all. *See* HORACE GREELEY, *RECOLLECTIONS OF A BUSY LIFE* 143 (J.B. Ford & Co., 1868) (“Fame is a vapor; popularity an accident; riches take wings; the only earthly certainty is oblivion . . .”).

2. FED. R. EVID. 404.

3. *See, e.g.*, *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

4. *See* FED. R. EVID. 404.

There may be good reason why. We may exclude character evidence because we think it unduly persuasive. It may tempt a fact-finder into giving a person's character too much clout and too much credence<sup>5</sup>—and thus credit that person's peaceful (or violent or deceptive or honest) character more than it should. Or we may exclude character evidence because we think it distracting and disorienting. It may lure a fact-finder in the wrong direction and focus it on the wrong thing—a character trait instead of the crime charged, a propensity instead of the facts proven, a separate act instead of the conduct alleged.<sup>6</sup> And so, very often, we ban it.

But still character evidence comes in. It comes in, sometimes, because we affirmatively allow it—either in the context of particular traits (like a witness's character for untruthfulness) or in cases of particular offenses (like sexual assault).<sup>7</sup> And it comes in, other times, because it sneaks in where it shouldn't. There may be reason for this too. Character evidence may sneak in because “character” itself can be hard to define and detect.<sup>8</sup> Or it may sneak in because the allure of character inferences can prove difficult to resist.<sup>9</sup> Or it may sneak in because the doctrine devised around our character rules—a doctrine as well-intentioned as it is slippery and recondite—can dupe even the most diligent of courts.<sup>10</sup> But plausible reasons should not mask a disquieting result: with character evidence, what should stay out occasionally creeps in.

This Essay examines one stunning instance in which impermissible character evidence crept in. It recounts the timely and tragic tale of *United States v. Henthorn*, an outrageous but all-too-real story of flat tires, flying beams, and fatal falls.<sup>11</sup> Harold Henthorn now sits in prison for a murder it

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5. This is what Justice Cardozo famously called “excessive weight.” *Zackowitz*, 172 N.E. at 468.

6. GEORGE FISHER, EVIDENCE 153 (3d ed., 2013).

7. See FED. R. EVID. 404(a), 413, 414, 415.

8. See, e.g., Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1914 (2012) (“Unfortunately, the Federal Rules of Evidence do not define character, and worse still, there is no judicially manageable definition.”) (citations omitted).

9. See, e.g., *Zackowitz*, 172 N.E. at 466 (relying subtly on the power of character evidence in discussing the defendant).

10. See, e.g., *United States v. Jones*, 28 F.3d 1574 (11th Cir. 1994), *vacated*, 516 U.S. 1022 (1995).

11. 864 F.3d 1241 (10th Cir. 2017).

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seems clear he committed.<sup>12</sup> But it seems just as clear that some of the evidence mustered against him—truly damaging and sensational evidence—should have been excluded all the same. This Essay critically revisits that remarkable case.

But this Essay does more than scrutinize *Henthorn*. It also studies a set of pervasive errors—what I call here “character flaws”—that inform and infect modern character evidence doctrine more broadly. These flaws are subtle, inviting, hard to spot and even harder to resist—and all the more worrisome for being that way. But they are still flaws, no less so for being so common and so logical, as *Henthorn* keenly shows. They should be understood that way.

But if *Henthorn* teaches us about these character flaws, it can also teach us more. This Essay asks what else it might teach us from a specific perspective: the vantage of Evidence instructors using *Henthorn* as topic, as template, and as case file. For three years, I have used *Henthorn* as a case-file anchor in a writing-focused “applied evidence” course. This Essay offers a unique, early, and self-critical accounting of that course—a course built largely on *Henthorn*’s foundation and focused, inevitably, on its character flaws.

This Essay begins, in Part I, with the ugly and uncomfortable story of Harold Henthorn. The facts here take us far afield—to secluded mountain roads and ambitious off-trail hikes—and reach back long before his crime of conviction. Part I recounts these facts, quickly but carefully, setting the frame for the legal examination that follows.

Part II turns more deliberately to that legal examination—and, in particular, to the central legal question in *Henthorn*: whether specific “other act” evidence was or was not inadmissible character evidence. Here I start before trial and work forward, chronicling and critiquing the various arguments made, rejected, and accepted by parties and judges alike, both at the United States District Court for the District of Colorado and at the United States Court of Appeals for the Tenth Circuit. This retelling is intentionally targeted and unflinching. It picks no favorites and finds no heroes. What it finds instead is a real and repeated problem with the case’s approach to character evidence, and what it offers is opportunity to address that problem head on.

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12. *Id.*

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Part III considers how that problem might be addressed in a particular setting: a classroom that concentrates on *Henthorn* as both human tragedy and teaching tool. This Part briefly recounts the genesis of an “applied evidence” class centered on *Henthorn*, and it then considers questions as vital pedagogically as they are substantively: How might these “character flaws” be addressed in contemporary doctrine, even if only in future cases? Are they inevitable? And how should we engage a case, like *Henthorn*, that seems to reach the “right” human result for the wrong legal reason?

A short conclusion then reminds why *Henthorn* might be so revealing—and why it is so important that the case’s character flaws do not themselves endure.

## I. THE FACTS

Late in the afternoon of September 29, 2012—a mild and sunny early-autumn Saturday—Toni Henthorn fell from a secluded cliff near the Aspenglen portion of Rocky Mountain National Park.<sup>13</sup> The drop was long, precipitous, and severe—some 120 feet from scraggy cliff top to jagged ground below. Only one person saw her: her husband Harold.<sup>14</sup>

Harold would later claim that Toni toppled accidentally, having lost her balance while trying to take a photo.<sup>15</sup> Prosecutors would allege that Harold pushed her.<sup>16</sup>

By all accounts Toni was gravely injured by the fall.<sup>17</sup> Reports confirm that she suffered broken bones, lacerated organs, and substantial blood loss—injuries so intense that very few could survive them even with the best of aid. But trained medical assistance could not reach Toni until almost 8:00 p.m., nearly three hours later. By then Toni was dead.<sup>18</sup> Harold is now in prison for her murder.<sup>19</sup>

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13. *Id.*

14. Like the courts in *Henthorn*, I use many first names here, not out of a heavy-handed sense of familiarity, but rather for reasons of true compositional necessity. So many of the people involved in this case have the same surname that I must rely instead on first names—just as the courts did.

15. Order at 1, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. May 29, 2015).

16. *Id.*

17. *See Henthorn*, 864 F.3d at 1247 n.4.

18. *Id.*

19. *Id.*

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This Part tells the story of how he got there. Very little of that story unfurls smoothly—not the prosecution, not the defense, not the fact narrative itself. Nor is the story of Toni’s passing confined to that dreadful autumn day. As the pages ahead will show, the story actually reaches back before September 29, back almost seventeen years, to another wife, another isolated location, and another unusual death—but the same Harold. Yet still, by twist and by turn, this story will bring us to a question not of fact but of law—a question of “other acts,” outrageous coincidence, and character evidence.

A. *The Cliff*

Toni Bertolet met Harold Henthorn online in 1999.<sup>20</sup> She was a successful ophthalmologist.<sup>21</sup> He claimed to be a fundraiser. She lived and worked in Mississippi, close to her family. He lived in Colorado.

After nine months of courtship, Toni and Harold wed. The couple lived for a time in Mississippi but eventually settled in Colorado, and Toni soon established an ophthalmology practice there. In 2005, they had their only child, a daughter named Haley.

By most accounts the Henthorns’ marriage was uneasy. Babysitters described Harold’s behavior as off-putting, even suspicious.<sup>22</sup> Friends claimed that Toni and Harold slept in separate bedrooms.<sup>23</sup> And though Harold was a dotting (if domineering) father,<sup>24</sup> he proved a fickle, controlling, and secretive spouse: He took mysterious trips, ostensibly for business, sometimes leaving the house without luggage and long after scheduled flight times had passed.<sup>25</sup> He complained about Toni’s work, threatening her with divorce and refusing to support her even after she had knee surgery.<sup>26</sup> And he accumulated life insurance policies on Toni—multiple policies

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20. See Answer Brief of the United States at 1, *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017) (No. 15-1490) [hereinafter Answer Brief].

21. *Id.* at 1–3 (noting that Toni also derived substantial income from a family-owned sulfur mine and generous gifts from her parents).

22. See Application for a Search Warrant at 25–26, *Henthorn*, 864 F.3d 1241 (No. 13-sw-05063-MEH).

23. *Id.* at 18–19.

24. *Id.* at 25–26.

25. *Id.* at 18.

26. *Id.* at 16.

of significant value—without her knowledge and payable entirely to him.<sup>27</sup>

And yet the marriage lasted. Through physical absences and covert purchases, through verbal confrontations and silent lies, Toni and Harold stayed together. The day of Toni's passing, September 29, 2012, would mark their twelfth anniversary.<sup>28</sup>

Harold alleges that what happened that day was a terrible mishap. The couple had traveled a couple hours north, he said, for a romantic getaway, a weekend celebration of more than a decade of wedlock.<sup>29</sup> Harold claimed to have been planning the details for weeks—a stay at the Stanley Hotel, a dinner at a fancy restaurant, a quiet excursion in Rocky Mountain National Park. What he hadn't planned—to hear him tell it—was just one thing: a sojourn off trail, away from crowds and Park services and cellphone coverage, and onto a secluded twelve-story precipice. That risky jaunt was impromptu, impulsive, meant only to search out some privacy.<sup>30</sup> And what happened there came out of the blue. Only after Toni tried to take a photo did she stumble, and only after it was too late did Harold realize the risk.<sup>31</sup> Harold meant no harm and connived no murder. Toni's death was, by Harold's account, the worst of accidents.

But by other accounts it was the foulest of crimes. Indeed, the United States Attorney<sup>32</sup> believed Toni's death to be no accident. They believed it to be the culmination of a long and devilish plot—a scheme devised before Toni and Harold even married and carried out, years later, in the coldest of blood.<sup>33</sup> In the prosecution's telling, Harold did not choose Toni for companionship or marry her for love. He chose Toni for opportunity and married her for money. The September 29

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27. Answer Brief, *supra* note 20, at 2.

28. *Id.* at 5–6.

29. *Id.*

30. *Id.* at 8.

31. *Id.* at 20–21.

32. Crimes of this type are not often prosecuted in federal court. But Toni's alleged murder happened on federal land—a national park—and so there was federal jurisdiction. See COLO. REV. STAT. § 3-1-103 (2017).

33. The prosecution's theory of Harold's guilt is alluringly simple: Harold married Toni, not for companionship, but for (indirect) access to wealth. He amassed significant life insurance policies in Toni's name and then killed her so he alone could collect. See, e.g., Answer Brief, *supra* note 20, at 2 (“Henthorn's real job was secretly accumulating life insurance on Toni . . .”).

outing—with its furtive, unsafe trek to the cliff—was his deliberate and diabolical move to cash in.

A good deal of circumstantial evidence pointed that way. For one, there was the insurance. On the day of her death, Toni was covered by four separate life insurance policies, each worth \$1 million or more. At most Toni knew of one of these policies.<sup>34</sup> Harold knew of and managed all four—and filed claims to collect on the Monday just after Toni’s Saturday death.<sup>35</sup>

But there was more than insurance. There was also Harold’s erratic behavior and shifting tales—both before and after Toni’s tragic fall. Before that fall, Harold was a disturbing acquaintance and a disagreeable spouse: volatile, vindictive, coarse. He boasted that, before marrying Toni, he drew up “financial profiles” of women he dated.<sup>36</sup> He lied about his professional pursuits, even to Toni. He controlled conversations, hectored his family, and demanded deference. And he apparently scouted the terrain in Rocky Mountain National Park surreptitiously, including the backcountry areas near the fateful rock face, though he later denied this fact.<sup>37</sup>

And Harold’s behavior after Toni’s fall was just as odd. Even on September 29, and even in conversation with emergency personnel, he appeared shifty, detached, and indifferent, seeming only to feign distress—and only then in fits and starts.<sup>38</sup> He first dialed 911 some forty-five minutes after Toni fell, claiming it took him that long to reach Toni, to move her, and to find cell coverage.<sup>39</sup> About fifteen minutes into that call, however, he told the 911 operator that he needed to hang up so he could save his cell-phone battery—but then immediately began texting Toni’s brother.<sup>40</sup> About an hour

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34. *Id.*

35. *Id.*

36. Alan Gathright et al., *Sinister Clues to Harold Henthorn’s Alleged Plot to Kill His Wife Revealed in New Documents*, DENVER CHANNEL (Nov. 19, 2014), <https://www.thedenverchannel.com/news/local-news/sinister-clues-to-harold-henthorns-alleged-plot-to-kill-his-wife-revealed-in-new-documents> [<https://perma.cc/2XG8-QYA6>].

37. *See* United States v. Henthorn, 864 F.3d 1241, 1246 (10th Cir. 2017) (“For instance, Henthorn reported a white sheet adorned a cliff near Toni’s fall, but that sheet had actually been removed by Park Service the week before her fall.”).

38. *See* Answer Brief *supra* note 20, at 12–16.

39. *See id.* at 12 (“Forty-five minutes later, Henthorn calls 911.”); *see also id.* at 14 (“Given her injuries, Toni died between 20 minutes and an hour after her fall . . .”).

40. More specifically, these texts were sent to Toni’s brother Barry, a



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later, Harold called 911 again—likely after Toni had passed<sup>41</sup>—and purported, awkwardly, to follow the operator’s CPR instructions.<sup>42</sup> Yet he quickly ended that call too, again (he claimed) because of battery concerns—but then phoned and texted a friend sixteen times in the subsequent hour.<sup>43</sup>

All the while, both in the park and after, Harold’s story changed. First he said the couple scurried to the cliff to see some wild turkeys; then he claimed they were in search of romantic escape.<sup>44</sup> First he said that Toni was dead for hours by the time Park Rangers arrived; then he said her heart stopped just as the Rangers appeared.<sup>45</sup> First he said that Toni lost her balance while he checked his phone for news of Haley’s soccer game; then he said that he was looking at Toni’s own phone for news of her patients, though investigators later found that phone sitting in Toni’s Denver office, a hundred-some miles away.<sup>46</sup> Each time Harold told his tale, it seemed, the chapters jumped and jumbled—but still never quite fit.

And then there was the map. On the night of Toni’s death, the Park Service conducted a search of Harold’s Jeep. There they found something remarkable: a park map, dotted with notes and arrows and circles, all made in Harold’s blocky hand.<sup>47</sup> Most of those notes were insignificant or inscrutable, entirely unrelated to Toni’s death. But one note stood out: a solitary X, drawn in red marker, at precisely the spot where Toni perished. Harold later contended that he marked the map for someone else, a man named Daniel Jarvis, and that the red X was sheer coincidence.<sup>48</sup> But Harold’s explanation never settled, and through each of his shifting retellings there was still the red X, a glaring strike against Harold’s story of uncharted territory, unplanned diversions, and spontaneous hikes.

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cardiologist. See Application for Search Warrant at 10, *Henthorn*, 864 F.3d (No. 13-sw-05063-MEH).

41. Answer Brief, *supra* note 20, at 14.

42. *Id.* at 15 (“... the dispatcher doubted that Henthorn was actually performing CPR.”); see also *Henthorn*, 864 F.3d at 1247 (“Toni’s lipstick was not even smeared from the alleged mouth-to-mouth resuscitation.”).

43. Answer Brief, *supra* note 20, at 15.

44. *Id.* at 8.

45. *Id.* at 15.

46. *Id.* at 21–22.

47. *Id.* at 17.

48. *Id.*

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*B. Other Acts*

All of this evidence the prosecution had. Even more, all of this evidence the prosecution seemed ready, willing, and able to use. A stream of witnesses, unconvinced by Harold and eager to recount his fitful behavior in the weeks surrounding Toni's death, stood ready too.

But the prosecution hoped for more. In particular, the prosecution hoped to introduce two episodes from Harold's past.<sup>49</sup> For September 29 was not the first "accident" that befell Toni, apparently at Harold's doing. And Toni was not the first wife that Harold Henthorn had lost.<sup>50</sup>

1. The Beam

It is not clear if Harold earned much money during his marriage to Toni. Though he convinced some acquaintances that he was a successful businessman, "flying around" the country for work,<sup>51</sup> he seemed to contribute little, if anything, to the family's accounts. His job as a fundraiser was, by most reports, a lie.

Toni's job was not. She was a thriving ophthalmologist, both in Colorado and before. She also derived a healthy bump in income from her share in a lucrative family sulfur mine and from gifts from her generous parents. All told, Toni made a good deal of money—enough to be the real breadwinner<sup>52</sup> in the Henthorn family (despite Harold's posturing) and enough to afford a primary home near Denver and a mountain cabin near the small Colorado town of Granby.

Photographs of that cabin show it to be tidy, charming, and rustic. Surrounded by trees on three sides, the cabin sits on a quiet hill, a gentle slope rolling off one corner. Attached to that corner is an expansive timber deck.<sup>53</sup>

In May of 2011, while under that deck, Toni was struck in the back of the neck with a twenty-foot wooden beam. Harold

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49. Harold's prosecutors also wished to introduce evidence of a third "other act": "[A] life insurance policy taken out in the name of Grace Rishell, Mr. Henthorn's sister-in-law." The district court excluded this evidence. Order, *supra* note 15, at 17–18.

50. See *infra*, Section I.B.2.

51. See Application for a Search Warrant, *supra* note 22, at 20.

52. See Answer Brief, *supra* note 20, at 2.

53. *Id.* at 34.

admitted he threw it. Or at least he admitted as much to the paramedics who arrived first, claiming that he did not see Toni below him in the dark mountain night.<sup>54</sup>

But soon Harold's account changed. He told the emergency room doctor that the beam was not thrown off the deck but fell on its own. He told a friend that he inadvertently dropped the beam while standing on a ladder that Toni was trying to hold steady. And he told still others that the beam fell on Toni, without his knowledge, as she cleaned under the deck by herself.<sup>55</sup>

Whatever the story, the prosecution in *Henthorn* wanted the jury to hear it. It was, to them, rich and revealing information—evidence of a victim repeatedly targeted and a defendant “murderously inclined.”<sup>56</sup> And perhaps it was.

But still there was more.

## 2. Lynn

Harold had been married before. Long before he met Toni, he was wed to Sandra Lynn Henthorn—a social worker everyone called Lynn.<sup>57</sup>

Lynn died in 1995, crushed beneath a Jeep on a snaky and secluded mountain road near Sedalia.<sup>58</sup> Only Harold was there to see it, again the lone witness to his spouse's fatal turn—but here too he denied all blame. He claimed that Lynn was smothered when the two jacks holding the car broke unexpectedly, dropping the car's full weight on his wife, who had been scrambling underneath to retrieve some stray parts.<sup>59</sup> In Harold's telling, he was not a killer in search of victims but a husband left twice bereft. Lynn's death was just like Toni's: tragic, surreal, improbable—but accidental still.

For years, as we will see, the authorities agreed about Lynn. But pieces of Harold's story there still seemed odd from the start. Harold claimed, for example, that the Jeep had a flat

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54. *Id.* at 35 (“[A]fter ten at night . . .”).

55. *Id.* at 36.

56. *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

57. *See* Defendant Henthorn's Motion in Limine Regarding Proposed Douglas County 404(b) Evidence at 3, *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017) (No. 14-cr-00448-RBJ).

58. *See* Answer Brief, *supra* note 20, at 24.

59. *Id.* at 31. What these parts were was never entirely clear. At some times Harold said they were lug nuts; at others he said it was a flashlight. *Id.*

tire, punctured miles before by some loose nails. But by Harold's own later account, the tire was not flat but merely "spongy,"<sup>60</sup> and he planned to swap it for a tire with even less air pressure still. Harold claimed, too, that he used boat jacks to raise the vehicle instead of the Jeep's own equipment because the car's jack was stuck tight, immobile even after being lubricated.<sup>61</sup> But by official accounts the car's simple jack seemed untested, and no lubricant was ever found.<sup>62</sup>

Stranger still, on that perilous night, Harold resisted assistance. A mechanic stopped to offer help only minutes before the Jeep collapsed, worried that the Henthorns were marooned on a dark and treacherous byway, but Harold sent him away curtly, saying they were only "wrapping up."<sup>63</sup> Then, after the jacks broke and Lynn was injured, Harold flagged down a family—the Montoyas—only to seem vexed by, not thankful for, their attempts to help.<sup>64</sup> Still the Montoyas did help, and valiantly, searching for phone service, using their own jack, waiting for and then cheering on emergency aid. But Harold seemed ungrateful, even defiant, all the while, meeting the Montoyas' expressions of hope with a toxic combination of derision and fear. And despite the Montoyas' best efforts, Lynn soon passed.<sup>65</sup>

In the brief investigation that followed, local sheriffs documented a curious scene: two broken boat jacks, no lubricant, underinflated tires, a suspicious footprint on the rear bumper, and a bereaved spouse eager and quick to cash a surprisingly large life insurance policy.<sup>66</sup> As time passed, Harold's story of Lynn's demise continued to tweak and twist too—from lug nuts under the car to a flashlight, from two jacks used at once to one at a time, from Lynn changing the tire to Harold doing it himself, from a leisurely drive after dinner to a directed drive before it.<sup>67</sup> But still no charges were filed, at least back then.<sup>68</sup> The file on Lynn's death was closed only six days after it was opened. Lynn was soon cremated, her death

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60. *Id.* at 29.

61. *Id.* at 28.

62. *Id.*

63. *Id.* at 26. The good-Samaritan mechanic thought this reaction strange. *Id.*

64. *Id.* at 27.

65. *Id.*

66. *Id.*

67. *Id.* at 30–31.

68. He may still be charged eventually. *See infra* Section III.B.

deemed an accident.<sup>69</sup>

Yet prosecutors in Toni's case still wanted the jury to hear this tale. Like the beam in Granby, Lynn's death near Sedalia appeared probing, persuasive, and narratively helpful—no less so for having happened so many years before. It was not, to them, an isolated moment of heartbreaking misfortune but a connected chapter of deliberate offense. It was, in their eyes, more and powerful evidence of who Harold Henthorn was at his core: a scheming husband, an insurance fraudster, an inveterate liar, and a murderer on the loose.

### C. *The Verdict*

That is the image prosecutors sketched for the jury. They drew a portrait of a man who had killed before, killed here, and would readily kill again. Toni did not stumble off the cliff, prosecutors argued—just as the beam did not fall from the deck and the jacks did not break by accident. Toni was pushed, just like the beam was thrown and Lynn was smothered on purpose. Harold was the hand behind it all. He was the murderer.

A federal jury heard all of this. It heard about the beam in Granby and the Jeep near Sedalia; it heard about Harold's dastardly schemes, ill-gotten profits, and lethal "design[s]."<sup>70</sup> And then, after very little deliberation,<sup>71</sup> it found Harold guilty.<sup>72</sup> He has been in federal prison since.

That verdict was no surprise. Having heard what it heard and learned what it learned, the jury was almost certain to find against Harold. It would have been astounding had it voted the other way.

But still the verdict was tainted. It was stained, not by juror misconduct or procedural blunder, but by an evidentiary error—a mistake neither easily excused nor quickly explained away. That mistake blights the Tenth Circuit's recent

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69. Answer Brief, *supra* note 20, at 32.

70. *See, e.g., id.* at 41.

71. News reports suggest that the jury deliberated for "less than a day." *See* Anica Padilla & Phil Tenser, *Harold Henthorn Found Guilty of Murder*, DENVER CHANNEL (Sept. 21, 2015, 8:27 AM), <http://www.thedenverchannel.com/news/local-news/jury-deliberating-whether-harold-henthorn-murdered-his-wife-by-pushing-her-off-a-cliff> [<https://perma.cc/L2Y4-7J8K>].

72. The verdict was announced on September 21, 2015, almost exactly three years after Toni's fatal fall. *Id.*

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*Henthorn* opinion too, appearing there in stark and crystallized form—as I explain at length below. But this mistake took root long before appeal, before Harold’s jury was even empaneled and his trial had even begun. It took root in the prosecution’s trial strategy, a convincing and compelling tactic built on a crucial misapprehension of character evidence law. It took root in a character flaw.

## II. THE LAW & CHARACTER FLAWS

I should be clear: I do not mean to question Harold’s guilt as a moral or factual matter. I do not mean to claim that Harold is innocent of harming Toni or Lynn. Nor do I mean to condemn the simple intuition behind the prosecution’s approach. Harold’s tale is truly striking in its strangeness, his luck (if that is indeed what it is) astonishing in its cruelty. The stories of the Granby beam and the Sedalia Jeep are sensational, even scandalous, all by themselves—no matter how one reads them. And when set beside Toni’s tragedy, the pieces seem uncanny in their coincidence: the improbable events, the isolated locations, the insurance policies, the unstable explanations, the lost wives. It is no wonder the prosecution would want the jury to hear the tale fully told.

It is no wonder, either, that the prosecution would invite a critical inference: Harold Henthorn is a dangerous and despicable person, a man who is bad at his core and does bad things. And since he harmed his spouses before, on purpose and for a reason, he surely must have done so—and meant to do so—here too. The argument seems airtight.

But there is a problem. There is a snag in that argument, a glitch not of fact or of logic but of law:<sup>73</sup> it is impermissible under our rules.<sup>74</sup> Our rules of evidence prohibit precisely the argument offered by the prosecution and accepted by the courts. Our rules forbid the very character attack that seemed so intuitive in *Henthorn* and that worked there so well. Harold’s prosecutors portrayed him as an evil actor, a vile manipulator who “acted in accordance” with his wicked character on at least three occasions.<sup>75</sup> Logic may endorse this

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73. Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

74. See FED. R. EVID. 404.

75. *Id.*

tactic. The law does not.

This Part examines that uncomfortable truth. It assesses the split between what the *Henthorn* courts admitted and what the law, by its terms, actually condones. As we will see, the doctrine here can be dense and difficult, full of subtle distinctions and tempting-but-impermissible turns. But difficulty should offer no excuse. Harold Henthorn should, and I believe could, have been convicted on evidence rightly admissible under the law. Instead he was convicted in part on evidence the prosecution never should have offered, the courts never should have admitted, and the jury never should have seen. He was convicted in part on impermissible character evidence and sits in prison by way of character flaw.

*A. Law*

Begin with a rule. Federal Rule of Evidence 404 reads in full:

**Rule 404. Character Evidence; Crimes or Other Acts**

**(a) Character Evidence.**

**(1) *Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

**(2) *Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

- (i) offer evidence to rebut it; and
- (ii) offer evidence of the defendant's same trait;

and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

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**(3) Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

**(b) Crimes, Wrongs, or Other Acts.**

**(1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.<sup>76</sup>

This is our baseline. It sets the terms for character evidence in federal litigation, and it announces its basic prohibition more than once: In subpart (a) it states that “Evidence of a person's character . . . is not admissible to prove . . . the person acted in accordance with [that] character.”<sup>77</sup> In subpart (b) it notes that “Evidence of a crime, wrong, or other act” is inadmissible to “show that on a particular occasion [a] person acted in accordance with [her] character.”<sup>78</sup> Rule 404's character bar is so important, apparently, that the drafters saw fit to state it twice.

They also defined “character” broadly. Under Rule 404, “character” includes traits and proclivities, penchants and “other act[s]”—all of them.<sup>79</sup> But whatever form character evidence may take, Rule 404's general bar is emphatic: a party may not argue that a person's character (her peaceful nature, say, or her past bank robberies) makes her more likely to have done something in keeping with that character (avoiding physical conflict, say, or robbing another bank). That kind of propensity inference is prohibited. Under Rule 404, that kind of

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*



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character evidence is banned.<sup>80</sup>

There are exceptions. Rule 404(a) makes character evidence admissible in a small set of contexts—like when a criminal defendant offers evidence of his own “pertinent” character trait, or when a party offers evidence bearing on a witness’s character for truthfulness.<sup>81</sup> Rules 413, 414, and 415, in turn, make character evidence admissible if it is of a particular type in a particular kind of litigation: specific acts of sexual misconduct in cases about sexual misconduct.<sup>82</sup> In those instances, character evidence may be used to show propensity: A criminal defendant can offer evidence of his peaceful character to prove he was more likely to sidestep conflict; a party can offer evidence of a witness’s character for untruthfulness to prove that witness more likely to lie; a prosecutor can offer evidence of a defendant’s prior sexual wrongdoing in a case about sexual assault.<sup>83</sup> But these exceptions are targeted, limited, and construed narrowly. None applied in *Henthorn*, and no one suggested they did.<sup>84</sup>

That is a point worth repeating: No exception to the ban on character evidence applied in *Henthorn*. No rule permitted the prosecution to argue that Harold was a bad person by character and therefore more likely to do bad things. No provision allowed the prosecution to claim that because Harold had done evil things before—hurling a beam at Toni, scheming to murder Lynn—he was more likely to have pushed Toni on September 29. And yet this is precisely what the prosecution did.

To be fair, the prosecution would say otherwise. It would say the evidence of Harold’s “other acts”—the beam and the Jeep—was admitted properly, not because it could claim an exception, but because it did not need to claim one at all. Evidence of the beam and the Jeep, the prosecution would say, was not even character evidence. It was evidence of a different cast, offered for a different reason, and admitted through a different door.

It is an appealing argument, forcefully made. It intrigued the courts and succeeded there. But it is still wrong as a matter

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80. *Id.*

81. *Id.*

82. *See id.* at 413–15.

83. *Id.*

84. *See, e.g.,* Order, *supra* note 15.

of law. In *Henthorn* the prosecution offered, and two courts admitted, character evidence for prohibited propensity reasons. That was an error, and a meaningful one—as the pages ahead will show.

### B. *Character Flaws*

The error is not one of misread rules. It is true—and all agree—that Rule 404 permits the introduction of “other acts” (like the beam and the Jeep) for non-character reasons.<sup>85</sup> A prosecutor can introduce evidence of a defendant’s past adventures in computer hacking, for example, not to show a propensity to hack, but to show that the defendant possessed the specialized knowledge necessary to commit that specialized crime. A defendant can offer evidence of an alleged victim’s extramarital cohabitation, in turn, not to show a penchant for promiscuity, but to reveal a potential bias to lie.<sup>86</sup> These are not exceptions to the ban on character evidence. These are routes around that ban—the use of the same evidence for other, permissible reasons.

This is what the prosecution purported to do in *Henthorn*. It claimed to offer Harold’s other acts to show, not propensity, but other things: intent, motive, common plan, preparation, absence of accident, doctrine of chances.<sup>87</sup> But a close review of the evidence, a conscientious study of the arguments, and an assiduous attention to the law reveal something different. They reveal that this was just character evidence in different packaging, propensity evidence masked in an alluring but impermissible guise. And it was that way from the start.

Harold’s lawyers knew from the beginning that the prosecution wished to introduce his other acts. They knew the narrative role those acts would play, the ominous connotations those acts would carry, and the poisonous inference Harold’s jury would inevitably draw. So they moved to exclude them long before trial began.<sup>88</sup>

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

86. See *Olden v. Kentucky*, 488 U.S. 227 (1988).

87. See, e.g., Government’s Response to Henthorn’s Motions in Limine to Exclude 404(b) Evidence, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. Apr. 6, 2015) [hereinafter Government’s Response].

88. See Defendant Henthorn’s Motion in Limine Regarding Proposed Douglas County 404(b) Evidence, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. Mar. 16, 2015); Defendant Henthorn’s Motion in Limine Regarding Proposed

These motions to exclude are neither long nor subtle. They assert, directly, that evidence of the beam and the Jeep is inadmissible character evidence: “The proposed evidence . . . is inadmissible,” Harold’s trial counsel writes, “and exactly the type of evidence that Rule 404[] prohibits.”<sup>89</sup> The prosecution’s response says just the opposite—that this evidence is not character evidence, that it is being offered for other reasons, and that Rule 404 does not forbid its use.<sup>90</sup>

This, then, is the crucial question. Is evidence of the beam and the Jeep propensity evidence, as Harold claims, and therefore inadmissible? Or is it non-character evidence, as the prosecution alleges, and therefore compatible with Rule 404? That is the decisive issue the District Court confronted before trial, and it is the only real issue the Tenth Circuit engaged on appeal. It is also the issue I examine, at long last, here.

### 1. Threshold Matters

Two things should be mentioned at the outset. The first is about combination and conflation in (non-)character argument, the second about relevant precedent.

First, combination and conflation. Rule 404 is explicit: evidence of a person’s other acts “may be admissible for another [non-character] purpose”—like proving knowledge or motive, preparation or plan.<sup>91</sup> If a defendant wishes to introduce a witness’s “other act” of cohabitation to establish bias to lie, for example, he may—provided all other rules allow it.<sup>92</sup> If a prosecutor wants to introduce a defendant’s “other act” of computer hacking to show specialized knowledge, in turn, she may do that too. But contemporary doctrine does not require courts to sniff out those other purposes unassisted, rooting around like legal detectives left alone in the dark. Contemporary doctrine instead places a burden on the proponent of the evidence to “articulate” any permissible

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Grand Lake Deck Incident, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. Mar. 16, 2015); Defendant’s Motion in Limine to Preclude 404(b) Evidence Regarding Rishell Life Insurance Policy, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. Mar. 16, 2015).

89. See Defendant Henthorn’s Motion in Limine Regarding Proposed Douglas County 404(b) Evidence, *supra* note 88, at 10.

90. See Government’s Response, *supra* note 87, at 1.

91. FED. R. EVID. 404(b)(2).

92. See *Olden v. Kentucky*, 488 U.S. 227 (1988).

purpose with precision and specificity, and to do so from the start.<sup>93</sup> Cursory claims and vague hints are not sufficient. Parties must identify what their permissible purposes are—clearly, early, and “precisely.”<sup>94</sup>

Harold’s prosecutors “articulate[d]” many supposedly permissible purposes. In their papers and oral representations, in fact, they listed at least these: motive, intent, plan, preparation, absence of accident, and doctrine of chances. That is “articulation” to be sure, at length and with confidence. It catalogs an array of other purposes, dutifully naming and noting each—if also often mixing them together.<sup>95</sup> There is no lack of formulation here.

But a closer look spots a problem. The problem is not that the prosecutors’ list has too many entries, for the law does not require parties to pick only one or two other purposes—and no party should be punished for having too many arguments instead of too few. Nor is the problem that the prosecution fails to find related precedent, a point addressed more fully below. The problem is that these other purposes are independently untenable and, in the prosecution’s presentation, almost never stand alone. That first problem (of being untenable) is addressed at length in the pages ahead, where I assess, purpose by purpose, why none quite work. But the second problem—the prosecution’s combination and conflation of these other purposes—merits brief mention here too.

I should underscore that the prosecution’s “other purpose” argument is confidently rendered and assertively made. It engages on many fronts at once, leveling many claims and assembling many sources. But too often the prosecution seems to proceed on the theory that the whole of its non-character arguments can be greater than the sum of its parts. It seems to advance the idea that bits and pieces of not-quite-adequate other purposes can combine, somehow, into a passable nonpropensity explanation—that a batch of half steps and near misses, through some curious Rule 404 alchemy, can mix together into something that otherwise works.<sup>96</sup> It is a subtle

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93. *United States v. Birch*, 39 F.3d 1089, 1093 (10th Cir. 1994) (citations omitted).

94. *Id.*

95. See Government’s Response, *supra* note 87, at 11.

96. See, e.g., Answer Brief, *supra* note 20, at 49 (“Each of these proper 404(b) inferences—plan, motive, intent—draws on the doctrine of chances, not on

and clever tactic, if also an occluding one—the kind that makes a cloudy doctrine even harder to see through. But it is not what the law demands. What the law demands is a tenable and independent “other purpose,” a stand-alone non-character reason for evidence to be admitted. It does not permit parties to mix an almost-there argument about identity (say) with a not-quite-right claim about absence of accident. It requires a distinct and sufficient reason, an “other purpose” that works properly and precisely all by itself. Yet a rigorous, unadulterated search for such a purpose is almost entirely absent in *Henthorn*—and to truly troubling effect. I offer that kind of detailed, one-by-one “other purpose” analysis below. The prosecution should have provided it in *Henthorn*—and did not.

But there is a second matter that merits mention here too: pertinent precedent. The parties in *Henthorn* were at no loss for relevant precedent. Questions of character evidence are common in our courts,<sup>97</sup> and both Harold and the prosecution found plenty of precedent to cite—from state courts, from inferior federal courts, and in a way from the United States Supreme Court too.<sup>98</sup>

Much of this precedent cuts in the prosecution’s favor. Some even accepts similar “other purpose” arguments and admits similarly damning evidence.<sup>99</sup> This may be because of the arresting facts of those cases—the violent defendants, the malicious schemes, the terrible crimes. Or it may be because certain flaws in character evidence doctrine have grown ingrained and entrenched, spawning reliance and replicating

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character inferences.”); Government’s Response, *supra* note 87, at 17 (“Each of these proper 404(b) inferences—motive, intent, plan—draw from the doctrine of chances, rather than from character inferences.”). This is, put bluntly, neither careful nor correct.

97. See Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 433 (2006) (noting that Rule 404(b) “generates more published opinions than any other provision of the Rules”). There are surely thousands of Rule 404 issues that do not find their way into published opinions too.

98. See, e.g., *Lisenba v. California*, 314 U.S. 219 (1941); *United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993); *State v. Roth*, 881 P.2d 268 (Wash. Ct. App. 1994).

99. See, e.g., *United States v. York*, 933 F.2d 1343 (7th Cir. 1991) (admitting evidence under the doctrine of chances that the defendant had, years before, killed his wife for insurance money); *State v. Roth*, 881 P.2d 268 (Wash. Ct. App. 1994) (admitting other acts as “plan” evidence).

error across the board. I think it is at least partly the latter, and I hope that this Essay will shed some light on those persistent character flaws, encouraging some careful rethinking of old decisions and forfending similar missteps from being taken next time. But still almost none of those cases merit elaboration here—not *Joe* or *Commanche*, not *Roth* or *York*.<sup>100</sup> But one case does: *Lisenba*.<sup>101</sup>

*Lisenba* holds a privileged place in the prosecution's argument. It is a Supreme Court case, for one—a relative rarity in the character evidence universe. It also stands, the prosecution says, for an important legal endorsement, a knowing and undiluted Supreme Court embrace of the so-called doctrine of chances—a particularly difficult, particularly unusual, particularly relevant, and particularly contentious “other purpose” under Rule 404.<sup>102</sup> This supposed endorsement is far from forthright—for even the prosecution concedes that the Court nowhere “addresse[s] the doctrine of chances” by name.<sup>103</sup> But “if you look at *Lisenba*,” the prosecution assures, the embrace and endorsement are there for all to see.<sup>104</sup> “[I]f you look at *Lisenba*,” they say, all will be clear.

That assurance was enough for the District Court. In fact, it was enough by itself to convince the District Court to write this: “As the government pointed out during oral argument, the Supreme Court has in fact adopted” the doctrine of chances.<sup>105</sup> The court then cited *Lisenba* and nothing more.<sup>106</sup>

But it should not have. For that is not what *Lisenba* says, means, or does. In fact, if “you look at *Lisenba*,” as the prosecution so wisely encouraged, something quite different emerges—not an “adoption” but a brisk buck-passing, not a focused question about the doctrine of chances but a broad query about the due process clause, and not an endorsement of a peculiar line of reasoning but a meaningfully narrower result. Yet in *Henthorn* only Harold's appellate counsel seems to have

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100. See *United States v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *Joe*, 8 F.3d at 1488; *York*, 933 F.2d at 1343; *Roth*, 881 P.2d at 268.

101. 314 U.S. 219.

102. I address the doctrine of chances at length, on *Henthorn*'s facts, *infra* Section II.B.2.e.

103. Reporter's Transcript, Hearing on Pending Motions, Day 2 at 39, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. May 14, 2015).

104. *Id.*

105. Order, *supra* note 15, at 8.

106. *Id.*

spotted these distinctions.<sup>107</sup> Too many others seem not even to have looked.

Had they looked, they would have encountered a wild, brutish, *Henthorn*-like tale. Major Raymond Lisenba—known also as Robert James<sup>108</sup>—was a barber, a conniver, and a murderer. He married often, at least three times, and two of his wives seemed to die by his hand. One wife, a manicurist named Mary, died in bizarre circumstances: she was found, lungs filled with water and head fully submerged, in a local “fish pond”—her left leg blackened and distended from apparent rattlesnake bites.<sup>109</sup> An early investigation of Mary’s death came (in the words of the Court) to “nothing.” But then Lisenba did something eye-catching: he attempted to redeem a double indemnity insurance policy on his now-dead wife.

The insurer refused to pay. Even more, local authorities caught wind of Lisenba’s efforts and reopened their investigation, eventually filing charges—first for incest, then for murder.<sup>110</sup> In the state trial that followed, prosecutors mustered all manner of damaging evidence: an autopsy showing Mary’s unusual condition at the time of her passing, the testimony of a co-conspirator—a man named Hope—who said he bought and sold rattlesnakes on Lisenba’s behalf, and a pair of snakes that prosecutors claimed to be the very ones Lisenba set on Mary.<sup>111</sup>

But there was more too. Prosecutors also introduced evidence of one of Lisenba’s past wives, a woman (unnamed in court records) who died in the bath only weeks after recovering from a jarring car accident. That accident, witnessed only by Lisenba and his then-wife, left the woman’s head gashed, broken, and “badly crushed”—though Lisenba was somehow uninjured, and a “bloody hammer” was found “in the back of

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107. See Defendant-Appellant’s Reply Brief at 7, *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017) (No. 15-1490).

108. *Lisenba v. California*, 314 U.S. 219, 223 (1941) (“The petitioner, who used, and was commonly known by, the name of Robert S. James . . .”).

109. *Id.* at 224.

110. *Id.* Though as scandalous, in its way, as the subsequent murder count, the incest charge is largely unexplained in available records. At most a hazy picture of incestuous conduct with a niece, one Lois Wright, begins to emerge in some of the State’s appellate papers. See Respondent’s Brief at 23–24, *Lisenba v. California*, 314 U.S. 219 (1941) (No. 133).

111. *Lisenba*, 314 U.S. at 224.

the car.”<sup>112</sup> But still Lisenba was not charged for that event, and when his then-wife drowned, he cashed a double indemnity policy on her too.<sup>113</sup>

Like Harold decades later, Lisenba claimed that this “past wife” evidence was admitted in error. He argued that it was character evidence wholly inadmissible under California state law. But California’s trial courts disagreed, admitting the evidence under their own rules of relevance—and then trying, convicting, and sentencing Lisenba to death.<sup>114</sup> The California Supreme Court affirmed that conviction repeatedly—first on direct appeal, then on rehearing, and then again on collateral (state habeas) review. Yet only in his habeas petition did Lisenba raise a federal constitutional issue, arguing that his conviction violated due process.<sup>115</sup> So only on appeal from that suit could *Lisenba* reach the Supreme Court.<sup>116</sup> Once there, this was the only question presented for review: Did Lisenba’s conviction in California run afoul of the Fourteenth Amendment?

The Court’s answer was negative, narrow, and unadorned. On the only issue pertinent to *Henthorn*, in fact, this is all Justice Roberts wrote:

Third. Testimony was admitted concerning the death of James’ former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system. The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State’s law.<sup>117</sup>

That is the relevant holding of *Lisenba*. That is all the Court said. Under the Fourteenth Amendment, California is “free to adopt” and apply its own rules of relevance. The state can do as it wishes. Nothing else, nothing more.

Yet in *Henthorn* prosecutors and courts found something

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112. *Id.* at 225.

113. *Id.*

114. *Id.* at 223.

115. *Id.*

116. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983) (discussing adequate and independent state ground doctrine as a jurisdictional rule).

117. *Lisenba*, 314 U.S. at 227–28 (citing 2 WIGMORE, EVIDENCE § 363 (3d. ed. 1940)).



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else, something more. They found a question about federal rules of evidence and a judicial “adopt[ion],” somehow, of a doctrine as a matter of federal law. But *Lisenba* speaks to none of that. It discusses state evidence rules, not federal, and it holds only that the Constitution leaves states “free” to recognize (or to reject) the doctrine of chances as they see fit. These distinctions are critical, elemental, and not especially elusive. They are there for all who truly “look at *Lisenba*” to see. Yet too many in *Henthorn* still missed them.

And that mattered. It mattered that the prosecution and the courts did not really “look at *Lisenba*,” for it allowed them to find supporting precedent where none actually existed. And it mattered too that the prosecution combined and conflated diverse “other purposes,” for it helped to steer both parties and courts away from a more careful, clear-eyed character evidence approach. Those missteps are remiss, regrettable, and entirely avoidable. Misread precedent and crafty conflation should not, and need not, have clouded Harold’s trial. He, like anyone else, deserved the law scrupulously followed and precedent faithfully applied. He deserved an assiduous, precise, piece-by-piece evaluation of the prosecution’s alleged “other purposes.” I offer that now.

## 2. Specific Applications

By my count, the prosecution in *Henthorn* identified six “other purposes”: intent, motive, (common) plan, preparation, lack of accident, and doctrine of chances. Still another “other purpose,” modus operandi, goes unlisted and undiscussed in the parties’ papers, though it seems to exert a powerful influence on both the prosecution’s arguments and the courts’ analysis despite its absence, so I address it below too.

Two quick qualifications: First, the order of my analysis does not always track that of the parties. Their papers do not always list intent first, for example, but I do. That may seem surprising, especially in an Essay so focused on *Henthorn* as a template, but my tack reflects a more rigorous approach to character evidence, and it will prove more useful in the end. Even more, because I take these “other purposes” seriatim, assessing them claim-by-claim instead of more haphazardly, my “other purpose” discussions can be (re)arranged in a different order if one prefers. The particular ordering I use here

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aims to put some of the more obvious arguments first (like intent and motive) and to leave doctrine of chances for last. The discussion there will make clear why.

Second, though the prosecution lists half a dozen other purposes, my list includes only five, not six—even with modus operandi added to the mix. That is neither careless nor unintentional, nor a shifty reprise of the prosecution's clumsy and repeated conflation of "other purpose" arguments. It is instead a recognition that some of the prosecution's purposes—e.g., intent and motive—are effectively coextensive on *Henthorn's* facts. They rely on the same logic, the same inferences, and the same law—everything, in fact, except the same name. I therefore assess these sibling "purposes" together, starting now with intent and motive.

#### *a. Intent & Motive*

Intent is a permissible non-character purpose. So too is motive. Under Rule 404, a person's crimes, wrongs, or other acts may be used to show that person's intent or motive to do a particular thing in this instance. One act can be used, sometimes, as evidence of intent or motive in another.

But when? When are other acts permissible evidence of motive or intent, and when are they not?

Consider an illustration:<sup>118</sup> Suppose a defendant—call him Bruce—is on trial for assault with a deadly weapon. He has been accused, in this case, of firing a gun at a pair of police officers who he (allegedly) spotted driving slowly up his street. Bruce denies owning a gun, let alone ever shooting one, but prosecutors have evidence to dispute that claim. Even more, they have evidence that Bruce had a warrant outstanding for his arrest—a warrant connected to a robbery charge in another jurisdiction. Bruce admits he knew of this warrant.<sup>119</sup>

It is no mystery why Bruce would fear this evidence. Word of the arrest warrant could cast him in a dim and lawless light, making him seem like a bad person with a propensity to do bad things: if he is subject to a warrant elsewhere, he is more likely to have done something unlawful here—or so the logic would

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118. I base this illustration, loosely, on *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978).

119. Had he not so admitted, it would have been a question of conditional relevance under Rule 104(b). FED. R. EVID. 104(b).

go.<sup>120</sup>

But here the prosecution could make a credible non-character claim. It could argue that evidence of the warrant shows, not that Bruce is congenitally criminal, but that he had a specific and particular reason to fire the gun that day. Bruce knew of the warrant, feared its execution, and shot to avoid apprehension. That was his reason, his intent and his motive. Far from being propensity evidence, the warrant is why Bruce did what he did—the motive he had, the intent he carried. Or so his prosecutors could claim.

Harold's prosecutors claim something similar. They say that Harold's other acts, the beam and the Jeep, reveal his intent to kill Toni on September 29—his reason for action, his motive to do harm.<sup>121</sup> Harold meant to do those evil things before, tossing the beam and collapsing the Jeep, so surely (they say) he intended to do something vile on the cliff top too. By their very nature Harold's other acts confirm his malicious intent and his shameful motive—and therefore sidestep Rule 404. Or so the prosecution believes.

But that is not right. For Harold is not Bruce. Bruce's intent argument can stand independent of any character inference, fully free of propensity's taint. Harold's cannot. His is a propensity argument cloaked in "other purpose" guise—logical, persuasive, but impermissible all the same.

I should make this point particular and plain. So start with Bruce: His warrant is the very reason he fired the shots. It is not two steps removed from his alleged assault, connected by some thin, propensity-based notion that he did something bad elsewhere so he must also have intended to do something criminal here. The warrant is the reason he fired. It created a motive to shoot where none need have existed before. One act gave specific reason for the other. The line between them runs straight, unmediated, and clear of any propensity inference.

But compare Harold: The beam and the Jeep are not the reason he pushed Toni.<sup>122</sup> He pushed Toni because he wanted money—the same (preexisting) reason, perhaps, that he tossed

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120. And it might go just that way once given to the jury.

121. See Government's Response, *supra* note 87, at 16–21.

122. Put slightly differently, Harold did not push Toni *because* Lynn died. Unless, perhaps, he suspected Toni of sabotaging the jacks and scattering the lug nuts more than a decade before . . .

the beam and collapsed the Jeep.<sup>123</sup> That same evil intent traces through the years and across events, running from Jeep to beam and then (apparently) to cliff. But that kind of consistency in motive is not a character solution.<sup>124</sup> It is the crux of a character problem. Neither the beam nor the Jeep gave Harold a new or particular or distinct reason to shove Toni, creating intent where none existed before. They simply illustrated the same alleged intent recurring again and again, a vile character doing despicable things repeatedly, for the same reason, over and over. That is not non-character reasoning. It is an intent argument<sup>125</sup> built entirely and inextricably on a propensity idea: Harold did those other acts with malicious intent before, so he is more likely to have done this with malicious intent here.<sup>126</sup> Harold's prosecutors may call this intent or motive evidence, but it is plain propensity reasoning—and precisely what Rule 404 bans.<sup>127</sup>

One final note here: In their papers, the prosecution leans

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123. It is worth emphasizing that evidence of Harold's odd and extensive insurance purchases was admitted without real question or challenge.

124. The prosecution in *Henthorn* repeatedly misses this point. In fact, the prosecution frequently and aggressively advances a rank misunderstanding of Rule 404 logic and law. An example: "But all 404(b) evidence is based on repetition. In every case of 404(b) evidence, a fact from the defendant's past (or his future) makes a disputed fact from his present case more likely to be true because of similarities between the acts, i.e., the repetition involved." Answer Brief, *supra* note 20, at 57. To put it mildly, this is wrong. Indeed, even accounting for adversarial overstatement, this summary is mistaken at its core. I address pieces of this summary at greater length *infra*, Section II.B.3.b. But I should say, even now, that but a cursory review of the relevant doctrine—or quick skim of a decent Evidence textbook (of which there are many)—could have forefended this inaccurate "it's all similarity" claim. There are ample instances in which "Rule 404(b) evidence" is *not* "based on repetition" or "similarities." *See, e.g.*, *United States v. Peltier*, 585 F.2d 314, 314 (8th Cir. 1978). And there are ample instances, too, in which Rule 404(b) prohibits the introduction of evidence because a particular similarity—namely, a person's character—is most salient. The prosecution's claim here is thus too narrow and too broad, ignoring Rule 404 arguments that are not based on repetition while overstating those that are.

125. Or, as the prosecution drifts into calling it, a malice argument. *See* Government's Response, *supra* note 87, at 16–17.

126. It is worth emphasizing that the prosecution effectively, if inadvertently, concedes this very point. In its response to Henthorn's Motions in Limine, the prosecution writes that "Henthorn's prior attempt on Toni's life is proof that he harbored the mens rea for first-degree murder." Government's Response, *supra* note 87, at 16. About this, the government is probably right: Harold meant to kill Toni, both here and there. But this point, if right, also gives the prosecution's propensity game away. Trying to kill Toni was just what Harold did—his type of conduct, his brand of crime.

127. And, again, for good reason. *See supra* notes 5 & 6 and accompanying text.

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heavily on Edward Imwinkelried’s thoughtful “treatise on uncharged misconduct evidence.”<sup>128</sup> In particular, to support its claim that the beam (if not the Jeep<sup>129</sup>) is pertinent to prove Harold’s intent to harm Toni, the prosecution quotes Professor Imwinkelried’s assertion that “uncharged conduct may be logically relevant to prove malice,” at least when the targeted victim is the same.<sup>130</sup>

That seems entirely right. But it is also only half of the question. “Relevant” does not always mean admissible, and logic does not always guide the law.<sup>131</sup> To be admissible, evidence must be relevant and also free of impermissible propensity reasoning. In the language of the Federal Rules of Evidence, it must satisfy Rules 401, 402, and 403—and also 404. I do not doubt that Harold’s other acts are “logically relevant” to his intent on September 29. But that is less than the law requires, even if it is all the prosecution claims. By its own admission, the prosecution argues that because Harold intended to kill Toni before he was more likely to have intended to kill her on September 29. That is a “logical” argument, no doubt, but it is also a propensity one. It is therefore barred, without more, by the terms of Rule 404.<sup>132</sup>

*b. Plan & Preparation*

But the prosecution does not argue only intent and motive. Harold’s prosecutors also argue plan and preparation, claiming that Harold’s other acts prove he planned and prepared to murder Toni that dark September day. Even if intent and motive fail, they say, Harold’s acts can come in this other way.

It is an argument with a certain appeal. Harold did seem to “plan” his attack on Toni, to “prepare” to kill her somehow, and to labor at it until he succeeded. Even more, his “plan” to kill Toni looks a bit like his “plan” to murder Lynn so many years before. The one, as the prosecution writes, may even

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128. See Government’s Response, *supra* note 87, at 16–17.

129. By comparison, the Jeep seems irrelevant to Harold’s intent vis-à-vis Toni. He would not meet her until years after the Jeep collapsed.

130. *Id.*

131. See HOLMES, *supra* note 73.

132. And to the extent that Professor Imwinkelried, the prosecution, or the courts claim otherwise, see Government’s Response, *supra* note 87, at 17. Rule 404 makes plain that they are wrong.

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seem like a “repeat[]” of the other.<sup>133</sup>

But that does not make Harold’s other acts permissible “plan” or “preparation” evidence under Rule 404. It makes them propensity evidence—impermissible “other act” examples of Harold doing the same kind of thing over and over, time and again.

Consider another illustration: Suppose a defendant—call her Danette—is on trial for credit card fraud. She has been accused, in this case, of making frequent and expensive purchases—a refrigerator, a computer, a car—using other people’s credit cards. Danette denies making any of these purchases, let alone all of them, but prosecutors have evidence to dispute that claim. Even more, they have evidence that Danette recently shoplifted a pair of credit card “skimmers”—small machines, legal but favored by scammers, that imperceptibly capture and cache credit card numbers for later use. Danette does not deny owning these devices.

As with Bruce, it is no mystery why Danette would worry about this evidence. Information about the skimmers could cast her as a ready and willing thief, a devious person with a propensity to do devious things: if she stole the tools of fraud, she is more likely to steal and defraud elsewhere too—or so the logic would go.

But here, as with Bruce, the prosecution could make a credible non-character claim. It could argue that evidence of the skimmers shows, not that Danette is criminal by character, but that she had a coherent, connected, multi-step scheme—a plan to make the very unauthorized purchases now charged.<sup>134</sup> Danette acquired the skimmers, lifted the credit card numbers, and then bought things unlawfully. That was her “overarching” operation,<sup>135</sup> her conjoined and connected plot. Far from being propensity evidence, the skimmers are an inextricable part of the story of the charged offense, an early chapter in the tale of this charged crime. They are constituent parts of an integrated plan. Or so her prosecutors could claim.

Harold’s prosecutors claim something similar. They say that Harold’s other acts, the beam and the Jeep, reveal a

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133. *Id.* at 13.

134. Danette also had the means to do it.

135. *See, e.g.,* Daggett v. State, 187 S.W.3d 444, 452–53 (Tex. Crim. App. 2005); United States v. Posner, 865 F.2d 654, 658 (5th Cir. 1989).

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“common plan” and preparation too.<sup>136</sup> Those other acts, they argue, show that Harold had a pattern: he bought “life insurance on women with whom he had built a trusting relationship and then kill[ed] them to profit from their death[s].”<sup>137</sup> Evidence of his other acts, the beam and the Jeep, merely lays this pattern bare, making clear his “repeated” and shameful endeavors—and therefore avoiding the prohibition of Rule 404. Or so, again, the prosecution believes.

But that, again, is not right. For Harold is not Danette. Danette’s plan and preparation argument can work without any character inference, entirely clean of propensity’s stain. Harold’s cannot. His is a propensity argument simply shrouded in “other purpose” labels—overstated, overbroad, and impermissible just the same.

I should make this point equally careful and clear. So start with Danette: Her theft of the skimmers was part of an “overarching” plan. It was one piece of a single plot—an early, incorporated step toward the perpetuation of credit card fraud.<sup>138</sup> The skimmers were not evidence of Danette doing the same thing over and over, “planning” the same type of crime time and again. Nor were they two steps distant from her purchases, linked by some scant, propensity-based notion that she did something fraudulent elsewhere so she must have done something similarly fraudulent here. Danette’s theft of the skimmers was part of a single entwined venture—a “constituent part[] of [an] overall scheme.”<sup>139</sup> She stole the skimmers so she could commit the fraud. The link between skimmer and fraud is sharp, direct, and free of any propensity inference.

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136. Government’s Response, *supra* note 87, at 12.

137. *Id.*

138. I should note that this “plan” argument works even though Danette’s acts are significantly different. Stolen skimmers are not the same as fraudulent credit card purchases—the only thing linking them being the criminal penchant of the perpetrator. The prosecution’s claim in *Henthorn* that “common plans always result from . . . repeated behavior” is thus over- and under-inclusive: it improperly excludes “plans” consisting of dissimilar acts (like Danette’s), even though Rule 404 intends to capture them; and it includes “plans” of mere repetition (like Harold’s), even though Rule 404’s bar on propensity reasoning clearly means to set them apart. See Government’s Response, *supra* note 87, at 13. Even more, the prosecution’s related *res gestae* argument fares no better, and the district court was right to reject it. See Order, *supra* note 15, at 14 (“The deck incident cannot reasonably be viewed as part of the *res gestae* of the alleged murder.”).

139. State v. Kirsch, 662 A.2d 937, 943 (N.H. 1995).

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But compare Harold: The beam and the Jeep are not part of Harold's cliff-top plan. They are not constituent steps toward September 29, as if Harold threw the beam or broke the jacks to lure Toni, months or years later, to her death in the park. They are simply evidence of Harold doing (or trying to do) the same thing over and over: inflicting harm on a heavily-insured spouse. That is all those acts could show. Even the prosecution's own papers, which build entirely from the premise of "repeated behavior," confirm this point.<sup>140</sup>

It is true, of course, that Harold's conduct suggests a pattern. His acts, all three, are somber and deadly reverberations of some "common" elements: insurance, spouse, secluded locale. But "plan" evidence demands more than just features in "common," and patterns often cause character complications, not character cures.<sup>141</sup> That Harold did the same thing more than once—buying insurance, harming a spouse—tells us something: that he is dangerous, that he is brazen, that he has a penchant for harming his wives. But it does not prove a "common plan" or preparation in the way the law requires. The beam and the Jeep were not part of a unified, connected, "overall scheme." They were merely evidence of Harold's proclivity for committing and recommitting the same kind of crime—his propensity to do "repeated" bad things. Rule 404 prohibits precisely that.

And for good reason too. If Rule 404 permitted evidence based only on repetition, the bar on character would dip toward nothing. Parties could offer all manner of other act evidence—old bank robberies, recent criminal assaults—whenever they could spot something vaguely "patterned" or "common" between events: a weapon used, an amount taken, an intended outcome, a time of day. It would be all-too-easy, the "plan" (or preparation) purpose opening wide to the introduction of blatant propensity evidence: an old bank robbery admitted because of a "common plan" to threaten tellers or a "pattern" of taking money, a criminal assault admitted because of a "common plan" to harm victims or a "pattern" of throwing fists, a prior offense admitted because of a "common plan" to commit felonies and a "pattern" of trying not to get caught. That result would be peculiar, extreme, and entirely incompatible with the

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140. Government's Response, *supra* note 87, at 13.

141. *Id.*



text and spirit of Rule 404. It would revive the very “once a criminal, always a criminal” notion that Rule 404 aims to reject.<sup>142</sup> Yet that is precisely what the prosecution in *Henthorn* advocates, building its “plan” argument on a foundation of nothing more than “repeated behavior” and ending with a theory that proves far too much. By fact and by law, Harold’s other acts did not show “plan” or “preparation.” They were impermissible propensity evidence here too.<sup>143</sup>

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142. More than a dozen years ago, the Texas Court of Criminal Appeals put it plainly:

Unfortunately, courts frequently admit evidence of extraneous acts under this exception not to show acts the defendant took in preparation for the ultimate charged offense, but to show repeated acts that are similar to the charged offense. Repetition of the same act or same crime does not equal a “plan.” It equals the repeated commission of the same criminal offense offered obliquely to show bad character and conduct in conformity with that bad character—“once a thief, always a thief.” This bad-character-conformity purpose, whether express or not, is precisely what is barred by Rule 404(b). Thus, if the proponent is unable to articulate exactly how an extraneous act tends to prove a step toward an ultimate goal or overarching plan, the evidence is not admissible to prove part of a “plan.”

Daggett v. State, 187 S.W.3d 444, 451–52 (Tex. Crim. App. 2005) (citations omitted). *But see* People v. Ewoldt, 867 P.2d 757 (Cal. 1994) (understanding “plan” as the same kind of acts repeated over and over again); Miguel Mendez & Edward Imwinkelried, People v. Ewoldt: *The California Supreme Court’s About-Face on the Plan Theory for Admitting Evidence of An Accused’s Uncharged Conduct*, 28 LOY. L.A. L. REV. 473, 505 (1995) (advocating for a return to a pre-*Ewoldt* approach).

143. On this point, the prosecution also makes the peculiar claim that the evidence in *Henthorn* is different, and therefore admissible, because it concerns Harold’s “deliberative process,” not his “inherent tendencies.” *See* Government’s Response, *supra* note 87, at 14. How Harold thinks, the prosecution contends, is categorically different than how Harold acts—at least under Rule 404. *Id.*

But this argument finds no support in logic or in law. By its terms, Rule 404 applies just as powerfully and just as directly to evidence about a person’s “active deliberative process,” *id.*, as it applies to anything else—so long as the pertinent logic is built on a foundation of propensity. It is no better to say, under Rule 404, that a person deliberates in a particular way and therefore is more likely to have deliberated that way here than it is to say that a person acts in a particular way and is therefore more likely to have acted in that way here. Both are propensity claims through and through, so both are prohibited by the letter and the spirit of Rule 404. *See* FED. R. EVID. 404. The *reductio ad absurdum* offered by the prosecution—“[a] person cannot have a character trait for buying life insurance,” *see* Government’s Response, *supra* note 87, at 14—only proves as much. Rule 404 does not, and should not, turn on empty linguistic distinctions or self-serving shifts in levels of abstraction.

*c. Absence of Accident (or Lack of Mistake)*

But the prosecution in *Henthorn* argues still more. It argues that Harold's other acts also qualify as "absence of accident" evidence—proof that what happened to Toni was no slip-up or mistake. In the prosecution's papers, this "accident" claim is invariably tangled up with others, a quick phrase or half-sentence inserted in passages largely about other things: intent, plan, doctrine of chances.<sup>144</sup> But absence of accident<sup>145</sup> is a permissible "other purpose" all by itself—a claim with its own doctrine, its own reasoning, and thus its own treatment here.

The idea of absence of accident evidence is simple: Some acts can prove that others were not blunders. One act can show that the next was not a mistake.

But if the idea of absence of accident is straightforward, its application can be complex. So consider a third illustration: Suppose a defendant—call her Sonya—is on trial for maiming her brother. She has been accused, in this case, of deliberately dumping a pot of scalding oil on her sibling's left arm. Sonya does not deny that her brother is injured, or that she dropped the pot, but she argues that the burn was an accident—a clumsy kitchen mishap, not an intentional (and criminal) pour. Prosecutors have evidence to counter that story: the testimony of Sonya's injured brother and a photo of his burn. Even more, they have evidence that Sonya once spilled blistering oil on a cousin, an event for which she pled accident and was never charged.

It is obvious why Sonya would be concerned about this old spill here. News of her cousin's misfortune could cast her as a serial abuser, a nasty person with a propensity to do nasty things: if she doused one relative with boiling oil before, she is more likely to have done it to another this time too—or so the logic would go.

But here the prosecution could make a credible non-character claim. It could argue that evidence of the cousin shows, not that Sonya has a penchant for felonies, but that

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144. See, e.g., Government's Response, *supra* note 87, at 13, 14, & 17; Answer Brief, *supra* note 20, at 49.

145. This "other purpose" is sometimes called "lack of mistake" as well. See, e.g., *United States v. Kendall*, 766 F.2d 1426, 1439 (10th Cir. 1985) (relying on the language of an older version of Rule 404).

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there was no accident with her brother that day. Sonya once burned her cousin, accidentally or not, so she knew the risks of hot oil. The event with her brother thus could not have been a bungle or a mishap. She meant it. Far from being propensity evidence, the cousin's burn proves Sonya did not blunder with her brother. It shows an absence of accident, a lack of mistake. Or so her prosecutors could claim.

But note quickly the looming (analytical) risk: This accident logic, reasonable as it seems, very nearly replicates the intent and motive arguments discussed and debunked above. It veers very close, that is, to saying that the brother's burn could not be accidental because the cousin's earlier burn proves that Sonya tends to do this sort of thing on purpose. That is not an irrational supposition. But it is still propensity reasoning. Call it intent or absence of accident or lack of mistake, it is still barred by Rule 404.

But Sonya's prosecutors could offer plausible rejoinder. They could say that their absence of accident argument does not depend on propensity or intent. It depends instead on notice and knowledge: Since Sonya injured someone with hot oil before, she should be on special notice now of its dangers—a kind of specialized personal knowledge of its perils and threats. And since Sonya had that specialized knowledge of the hazards of hot oil, the event with her brother could not have been an accident—even if the event with her cousin still was—for Sonya would have been especially wary of oil's dangers either way. She knew better because of what happened before, so she surely did not slip up here.

This is not the tightest of arguments. It is looser, no doubt, than many parties might prefer.<sup>146</sup> But still it has two significant benefits: One, it leaves the prior incident exactly where it started, unchanged and unmodified, for Sonya could have learned plenty about hot oil even if the cousin incident was an accident. The “notice” accident theory works, that is, without recasting the past. And, two, this argument is truly free of character, for it does not require the inference that spilling scalding oil is the type of thing Sonya tends to do by design. The “notice” accident theory works, that is, without

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146. It is so loose, in fact, that it might not satisfy the requirements of Rule 403. See FED. R. EVID. 403 (permitting courts to exclude evidence when the probative value of that evidence is substantially outweighed by, inter alia, the risk of unfair prejudice).

propensity.

Harold's prosecutors can claim neither advantage. For one, they cannot hold his old acts constant. Instead they must recast and recategorize them as intentional, for the beam and the Jeep would be wholly irrelevant if truly accidents. (What would an accidental tire-repair tragedy teach Harold about vigorous hiking seventeen years later? And what would an accidental wood beam injury teach Harold about cliff-top safety?) Nor can Harold's prosecutors sidestep propensity. Instead they must revive and rely on it, for their argument depends entirely on Harold having a tendency—a character—to intend to do particular things. Seen clearly, the prosecution's absence of accident claim is but a reprise of their unavailing intent argument: Harold's past acts were not accidents, so this was not either; he did those things on purpose, so he is more likely to have done this on purpose too. As the prosecution uses them, in fact, the beam and the Jeep could not be awful but instructive mishaps, tragic lessons learned by a once-blundering defendant. They could offer Harold no instruction and provide him no "notice." They could only be evidence of Harold doing the same thing over and over: deliberate, committed, and repeated attempts to isolate a victim, to inflict harm, and to reap reward. That may be a sane argument, a logical inference, and a reasonable conclusion. But it is also prohibited propensity reasoning by yet another name.

*d. Modus Operandi*

One other name—modus operandi—goes mostly missing in the prosecutors' papers. It does not appear among their long list of "other purposes," hinting (perhaps) that the prosecution found a modus operandi argument too unconvincing to make. But a close look at these papers suggests something different—not a forgone argument, but a powerful shadow influence. It suggests an almost magnetic modus operandi pull on the prosecution's Rule 404 approach even as the words themselves still go unsaid. I thus address that "other purpose" here.

Modus operandi is a time-tested "other purpose" under Rule 404. It permits parties to offer a person's other acts to establish that person's distinctive manner of operating—his fingerprint approach, his signature crime, his modus operandi. Mere similarity and "prosaic commonality" are not enough

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here.<sup>147</sup> To satisfy *modus operandi*'s high bar,<sup>148</sup> evidence must reveal a method that is peculiar, specific, idiosyncratic—remarkable enough to “ earmark [the relevant acts] as the handiwork of the same individual.”<sup>149</sup> A handful of pedestrian “things in common” will not do.

Consider an illustration:<sup>150</sup> Suppose a defendant—call him Parker—is on trial for printing and passing counterfeit bills. He has been accused, in this case, of deliberately using a stack of fake fifty-dollar notes, made on his sophisticated home-press, to fund a weeklong excursion to Las Vegas. Parker does not deny that he visited Las Vegas, or that he spent (and lost) a good deal of cash while there, but he argues that the bills at issue were not his—not produced on his machine, not pulled from his pocket. Prosecutors have evidence to counter Parker's denial: statements from casino employees, testimony from expert witnesses, surveillance video showing Parker passing phony bills. Even more, they have evidence that Parker was convicted of printing and passing counterfeit bills once before—in Atlantic City, at a casino, eight years ago.

It is no surprise why Parker would be anxious about this evidence. News of his prior counterfeiting conviction could cast him as a chronic swindler, an underhanded person with a propensity to do underhanded things: if he printed and passed counterfeit bills before, he is more likely to have done it again—or so the logic would go.

But here the prosecution could make a credible non-character claim. It could argue that evidence of the Atlantic City counterfeiting proves, not that Parker has a tendency to swindle, but that his Las Vegas adventure follows a distinctive and idiosyncratic style—a particular *modus operandi* all Parker's own. Parker once printed and passed counterfeit bills in an unusual and distinguishing manner, and that manner matches what happened in Las Vegas almost perfectly: the bills bore identical serial numbers and reproduced a unique printer's glitch; they came on identical (and rare) cotton-stock

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147. *United States v. Trenkler*, 61 F.3d 45, 54 (1st Cir. 1995) (citations omitted).

148. At least when the evidence is offered by a prosecutor. See *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991) (discussing *modus operandi* evidence offered by a criminal defendant).

149. *Trenkler*, 61 F.3d at 53.

150. I base this illustration, loosely, on *United States v. Burchfield*, 719 F.2d 356 (11th Cir. 1983).

paper and used identical (and rare) plant-based dyes; they reiterated an identical (if tiny) joke in the Treasury Secretary's signature and repeated an identical misspelling of *pluribus* as "*plurubus*." Whoever did the one surely did the other, not because of some noxious propensity to counterfeit, but because no one else does things quite that way. Las Vegas could only be Parker's crime. It bears his mark. Far from being propensity evidence, Atlantic City fingers Parker by excluding all others—a kind of identity argument by way of *modus operandi*. Or so his prosecutors could claim.

Harold's prosecutors seem to claim something similar. They seem to argue that Harold has a signature method, a unique way of operating that traces from Toni all the way back to Lynn: he ensnares trusting women, secures exorbitant insurance coverage on them (typically without their knowledge), and then kills them to collect. That is his blueprint, his *modus operandi*—even if in their papers Harold's prosecutors call it something different and less apt. Or so they seem to believe.

But that (again) is not right. For Harold (again) is not Parker. Parker's *modus operandi* argument works free of any character inference, close to but still distinct from any claim about propensity. Harold's does not. His *modus operandi* argument, to the extent it is there at all, simply rehearses the impermissible plan and intent theories refuted above—coherent, rational, but still infirm.

I should make this point equally sharp and exact. So recall Parker. His Atlantic City conviction does more than reveal the kind of pedestrian, superficial similarities that countless counterfeiters would share: bill denomination, say, or mendacious goal. It shows a distinctive and idiosyncratic style, a manner of counterfeiting that no one else uses. Specifics matter here: the serial numbers and printer glitches, the paper and dye, the jokes and misspellings. These are unusual, if not unique, markers. They are specific indicators of Parker's method, not broad or banal similarities found among disparate crimes. They show how Parker operates—and no one else.

But note, importantly, how this argument must work. It cannot work by saying that this is simply "Parker's kind of crime"—that he counterfeited this way before so he is more likely to have counterfeited the same way here—for that argument "would amount to the crassest form of propensity

reasoning.”<sup>151</sup> It can only work by saying that the details show that no one else could have done this, even if Parker denies doing it here. The two crimes, Atlantic City and Las Vegas, are so distinctive and so similar that they must come from the same hand. It must be Parker because it simply cannot be anyone else.

Now compare Harold. His other acts do not reveal a distinctive method or an idiosyncratic approach. They reveal only the scantest outlines of what so many “black widows” and “bluebeards”<sup>152</sup> do: find a partner, buy insurance, kill for profit, and hope to get away with it. Harold’s prosecutors do not detail a peculiar approach or a signature crime, nor do they provide details that distinguish Harold’s supposed method from that of any other scheming spouse. They simply list a loose collection of superficial “things in common”—curious (but different) events, secluded (but different) locations—and thereby draw thin, porous lines between two points. That does not meet *modus operandi*’s high bar. It merely implies that Harold does vile but undifferentiating things over and over. The prosecution’s “things in common”<sup>153</sup> argument is thus exactly like their intent, motive, plan, preparation, and absence of accident arguments before it: an argument that quickly distills into little more than the claim that shoving Toni is simply Harold’s “type of crime.” That may be a reasonable conclusion. It is probably true. But it is also, like so many of the prosecution’s other arguments, prohibited propensity reasoning

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151. FISHER, *supra* note 6, at 171.

152. The term “bluebeard” derives from an old French folktale written by Charles Perrault. See CHARLES PERRAULT, HISTOIRES OU CONTES DU TEMPS PASSE (1697). Perrault’s villain—ugly, wealthy, and called Bluebeard—kills wife after wife, only stopping when he is killed himself by a suspicious spouse and her resourceful siblings. *Id.* Some say that Perrault’s tale reaches farther back, past the seventeenth century, to the story of a serial killer in Brittany named Gilles de Rais. See MARGARET ALICE MURRAY, THE WITCH-CULT IN WESTERN EUROPE: A STUDY IN ANTHROPOLOGY 267 (1921). Others find different sources. But whatever Bluebeard’s lineage, he has since become an archetype for murderous husbands—iconic enough to have been repeated or reprised on stage, page, and screen. See, e.g., CHARLES DICKENS, CAPTAIN MURDERER (1860); STEPHEN KING, THE SHINING (1977). The “bluebeard” term was even mentioned in a recent issue of the New Yorker magazine. See Alec Wilkinson, *The Serial-Killer Detector*, THE NEW YORKER (Nov. 27, 2017).

153. This is the problem with the *Ewoldt* decision too: it purports to be about the “other purpose” of “plan,” but it is really just *modus operandi* logic without the factual or analytical rigor. *People v. Ewoldt*, 867 P.2d 757, 757 (Cal. 1994).

in its “crassest form.”<sup>154</sup>

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That is a point worth repeating: None of the prosecution’s initial handful of “other purposes” work. Intent, motive, plan, preparation, absence of accident, and modus operandi all offer potential nonpropensity uses, at least on other facts in other cases. But none work in *Henthorn*. In *Henthorn* they are mere labels, putative “other purposes” attached mistakenly to what are propensity arguments at their core. The prosecution has not sidestepped Rule 404 by way of these other purposes. In different ways, over dozens of pages, it has simply used Harold’s other acts—the beam and the Jeep—to suggest that pushing Toni is his type of crime. Killing wives is what Harold does, time and again, as a matter of his loathsome tendencies and wicked character.

It is a persuasive point, vividly made. Few juries would doubt it. But it is also prohibited by the level terms of Rule 404. And for good reason too. We do not exclude character evidence because we are blind to its power or oblivious to its allure. We exclude it because it does both more and less than it should: it proves too little, tempts too much, and entrenches an assumption—“once a thief, always a thief”<sup>155</sup>—deeply anathema to our notion of justice. Yet this “once and always” idea is precisely what Harold’s prosecutors offer. Their intent, motive, plan, preparation, absence of accident, and modus operandi claims are all built on the forbidden ground of propensity. It was an error for the courts to accept them.

But not an uncommon one. *Henthorn* is just one Rule 404 case among thousands in the federal courts. In the state courts there are thousands more. In some of these cases courts are careful about character—measured in their approach to character limits, fastidious in their evaluation of “other

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154. FISHER, *supra* note 6, at 171. It bears mention that modus operandi is a misfit in *Henthorn* for another reason too: Harold does not contest identity. Unlike Parker, who concedes that a crime was committed but disputes that he did it, Harold claims there was no crime to charge. He doesn’t say Toni was pushed by some unknown figure; he says no crime occurred at all. Put differently, he doesn’t say someone else pushed Toni; he says that no one did. That is not a clean fit with modus operandi, an “other purpose” focused largely on figuring out a perpetrator’s identity.

155. *Daggett v. State*, 187 S.W.3d 444, 451–52 (Tex. 2005) (citations omitted).



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purpose” claims.<sup>156</sup> But in some cases courts are not. They are casual in their approach to character evidence and cursory in their assessment of “other purposes” overall. That may be understandable given how logical, linear, and alluring propensity inferences can be—and how esoteric “other purpose” analysis can seem by comparison. But it is still unfortunate. Parties, even distasteful and despicable parties, deserve better. They deserve adversaries conscientious about character evidence and judges unforgiving about character misuse. They deserve, in *Henthorn* and elsewhere, a law uninfected by character flaws.

*e. Doctrine of Chances*

Yet one “other purpose” remains. That “other purpose”—the so-called doctrine of chances—is controversial in theory, uncommon in caselaw, and sometimes sensational in fact. (Recall *Lisenba*.) It is also, if treated smartly and separately, the closest thing to a tenable “other purpose” argument that Harold’s prosecutors have. I turn to the doctrine of chances now.

The doctrine of chances builds from a simple intuition: some things do not happen by chance. Some recurring events, “if similar enough and rare enough,” cannot be ascribed entirely to fate.<sup>157</sup> When a man somehow loses a dozen vintage cars in a series of suspicious fires, when a child somehow appears at school every Monday with the same improbable bruising, when a woman somehow wins the lottery two or three times in one lifetime—luck is not to blame. It is not providence or fortune or “innocent coincidence.”<sup>158</sup> It is design.<sup>159</sup>

The most famous doctrine of chances case, *Rex v. Smith*, comes from far away and long ago. It comes from London, in 1915, though the facts may still seem quite apt.<sup>160</sup> There three wives died, one after the other, each by drowning in the bathtub.<sup>161</sup> The wives’ husband, George Joseph Smith, claimed

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156. See, e.g., *State v. Kirsch*, 662 A.2d 937 (N.H. 1995).

157. FISHER, *supra* note 6, at 200.

158. *Id.*

159. *Id.*

160. *Rex v. Smith*, 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

161. *Id.* Smith’s former wives were named Burnham and Lofty. The death of his third wife, Mundy, led to his murder charge. *Id.*

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all three drownings came by accident and cursed his dreadful luck—even as he collected on their wills. But the prosecutor, the jury, and the Justices at Old Bailey did not believe him.<sup>162</sup> They thought Smith killed all three intentionally. Fate alone, they reasoned, could not be so cruel.

The giveaway, to them, was Smith's repetition. He was doomed in the eyes of the jury, that is, because the drownings happened three times. Had but one wife perished in the bathtub, Old Bailey's Justice Scrutton said, "the circumstances might seem . . . to be quite consistent, or very nearly quite consistent, with accident . . ." <sup>163</sup> But when others died in the same improbable way—not just one but two—chance could no longer explain it. It must be something else:

If they found an accident which benefited a person, and they found that that person had been sufficiently fortunate to have that accident happen to him a number of times, benefiting him each time, they [would draw] a very strong and frequently an irresistible inference that the occurrence of so many accidents benefiting him was such a coincidence that it could only have happened by design.<sup>164</sup>

Evidence of Smith's past wives—Ms. Burnham and Ms. Lofty—was thus admitted against him. Smith was convicted after only eighteen minutes of jury deliberation.<sup>165</sup> The doctrine of chances seemed to have found its solid, if distant, foothold.

But questions remain. One is whether Scrutton's "irresistible inference" is truly free of propensity—or whether the doctrine of chances is simply impermissible character reasoning by yet another name. A second is whether, assuming the doctrine of chances is analytically valid, *Henthorn's* facts even fit.

The first question is not new. It has troubled the doctrine of chances from the very beginning, and its answers now split into two basic camps—one sketched most famously by Professor Imwinkelried, the other by Professor Paul Rothstein.

Professor Imwinkelried believes that the doctrine of

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162. *Id.*

163. See FISHER, *supra* note 6, at 196–97 (reprinting *Prisoner Sentenced to Death. The Closing Scenes*, THE TIMES, July 2, 1915, at 4).

164. *Id.*

165. *Id.* at 197.

chances steers clear of propensity reasoning. He admits the doctrine treads perilously close to it, tempting and even inviting the jury to make improper propensity inferences all on its own.<sup>166</sup> But he thinks the doctrine still sidesteps character, for it does not “compel[] jurors to focus” there.<sup>167</sup> At most, he says, it “invites the trier to compare” two things: the accused’s alleged experience and “statistical data.”<sup>168</sup> If the disparity between those two things is relatively minor—small or nonexistent—then there is no anomaly to explain and no inference of wrongdoing need follow. The doctrine of chances would thus say very little about three gloves lost on a winter playground or two fender benders in lower Manhattan. But if the disparity between experience and data is significant—too large to excuse as mere happenstance, too big to comport with “everyday, human experience”<sup>169</sup>—then there is an anomaly to examine and an inference of guilt to apply. The doctrine would thus have very much to say about four car-destroying fires, or one regularly- and similarly-bruised child, or one person winning the lottery two times over, or three wives drowning in similar bathtubs. It is not a question of propensity, Imwinkelried claims, but a matter of probability.<sup>170</sup>

Professor Rothstein disagrees. He does not question the value of “data” or the relevance of lived experience. Nor does he deny the intuitive force of the doctrine of chances overall—the sense that “it is safe to infer [a] person is not innocent”<sup>171</sup> when the improbable events around that person somehow multiply: the fires, the bruises, the lotteries, the tubs. He simply thinks that the anchor of all of this—the doctrine itself, as well as Imwinkelried’s justification—remains unchanged. It is all still premised on propensity, improper character reasoning at its resilient core.

And, he adds, good statistics do not prove otherwise. If anything, in fact, Imwinkelried’s “data” leave out the most crucial part: They point to a disparity (between the small

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166. Edward Imwinkelried, *The Use of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 585–92 (1990).

167. *Id.*

168. *Id.* at 588.

169. *Id.*

170. *Id.*

171. Paul Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1262–63 (1995).

chance that all of the events are “innocent” and the larger chance that they are not so blameless) but then do nothing to explain it. They highlight a gap in explanation but then leave it open. And that gap can only be filled in one way:

[I]t is only because a guilty person would have the propensity to repeat the crime. If it were not for the propensity to repeat, . . . the probability that an innocent person and a guilty person would be charged repeatedly would be identical.<sup>172</sup>

On numbers and on logic, Professor Rothstein is right. The relevant probability would indeed hold steady across all actors unless there was something to connect the acts: the fires, the bruises, the lotteries, the tubs.<sup>173</sup> The critical question, then, is what might connect them. The doctrine of chances convincingly shows what the connection cannot be: it cannot be fate, luck, chance, or coincidence. Professor Imwinkelried and Justice Scrutton are correct about that. But Imwinkelried and Scrutton then elide what the connection must be instead: it must be propensity. It must be the intentional, repeated scheming of the defendant—the penchant of that defendant to commit similar crimes in similar ways over and over: to set similar fires, to inflict similar bruises, to contrive similar lotto victories, to drown similar victims. That is the step Imwinkelried and Scrutton skip over. That is the necessary doctrine of chances premise they do not make plain—compelling, convincing, and improper character reasoning all over again.

And the doctrine’s defenders say as much, even if they do not see it. In *Rex v. Smith*, for example, Justice Scrutton asserts that, once chance is removed, the series of events “could only have happened by design.”<sup>174</sup> In his own work, Professor Imwinkelried agrees, citing Scrutton’s “design” language in support of his tighter focus on “relative frequency.”<sup>175</sup> And in *Henthorn* too, the prosecution follows in lockstep, crafting an

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172. *Id.*

173. The British Royal Statistical Society agrees with Rothstein. See FISHER, *supra* note 6, at 200.

174. *Id.* at 196 (reprinting *Prisoner Sentenced to Death*).

175. Edward Imwinkelried, *The Dispute of the Doctrine of Chances*, 7 CRIM. JUST. 16, 54 (Fall 1992) (citing Scrutton’s “design” passage).

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argument—and an evocative “figure”—that leads to the same blunt conclusion: “Because it is unlikely the accidents happened by chance, they are likely the product of design.”<sup>176</sup> It cannot be chance, in short, so it must be “design.” It cannot be fate or fortune, so it must be who the defendants are and what the defendants do.

That may be true of Harold Henthorn, of George Joseph Smith, and of others like them. Slaying spouses may be their enduring “design.” But that truth only lays the propensity premise of the doctrine of chances bare: We believe Harold (or George) did this thing on purpose, just like we believe he did those other things on purpose, because that is what Harold (or George) does and “designs” to do. It is his penchant, his proclivity, his kind of crime. It is his character. Even in the words of its chief advocates, then, the doctrine of chances relies on character logic. Its “irresistible inference” is propensity reasoning in subtle but ineluctable form.<sup>177</sup>

If this is true—and I am confident that it is—two consequences follow: One is that the doctrine of chances is not a legitimate “other purpose” under Rule 404. It is logical in its outlines but still character at its core, so courts should prohibit its use altogether—and if lawmakers wish the doctrine to be available as a true propensity exception, they should revise the code. The other consequence is that the prosecution in *Henthorn* cannot rely on the doctrine of chances either. It fails, like the many “other purposes” before it, to provide a permissible basis on which to admit evidence of Harold’s other acts. It offers no non-character reason to introduce evidence of the beam and the Jeep.

Yet this last point has a consequence all its own. If the doctrine of chances is impermissible ab initio, flawed as a matter of theory and fractured as a matter of doctrine, then the second question I ask above—whether *Henthorn* fits—is irrelevant. It hardly matters whether Harold’s facts line up with a doctrine that cannot work.

But I should answer that question anyway. The question is so central to the prosecution’s approach in *Henthorn*, so vital to its success in court, that it demands some evaluation even if it is (or should be) entirely inapt. So, assuming that the doctrine

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176. See, e.g., Government’s Response, *supra* note 87, at 9.

177. FISHER, *supra* note 6, at 196 (reprinting *Prisoner Sentenced to Death*).

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of chances is analytically valid, does *Henthorn* fit on its facts? The answer may well be no.

The concern is not that Harold's story appears too plausible. His tale is improbable, even incredible, by its own terms. It is unlikely that all of these misfortunes—the cliff, the beam, the Jeep—would befall (or “benefit[]”<sup>178</sup>) one person merely by chance.

But the doctrine of chances requires more than an improbable story. It requires that the relevant misfortunes be two things more: independently rare and sufficiently similar.<sup>179</sup> It is not clear either of those requirements are satisfied in *Henthorn*.

First, *rare*. One requirement of the doctrine of chances is that the acts in question be individually unusual—infrequent as winning the lottery, uncommon as drowning in the tub. Almost everyone in *Henthorn* seems to assume that Harold's acts meet this threshold—that the Jeep and the beam and the cliff were sufficiently improbable events all on their own. But that assumption depends on two premises, neither of which is beyond serious doubt.

One premise concerns data—the numbers, surveys, and studies necessary to show that the cliff and the beam and the Jeep are statistically unlikely. I do not have that data. I have no surveys to show that these events are (or aren't) statistically anomalous, no studies to prove that they are (or aren't) commonplace—nor have I combed the archives to find them. But no one in *Henthorn*—not the prosecution, not the courts—offered such data either. To repeat: no one in *Henthorn* presented data about these events, relying instead on a bland conjecture about rarity and an unstated assumption about available support. That would seem an odd and important gap in argument, a signal omission by the party that bears the burden of justifying a doctrine of chances claim. But still this crucial data goes missing, replaced by empty assertion, affected intuition, and a veiled invitation to employ the very propensity inference the prosecution claims to avoid.

But that first doubtful premise simply leads to another. It leads to a question about abstraction—or the appropriate level of detail at which to assess these events. In claiming rarity,

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178. *Id.*

179. FISHER, *supra* note 6, at 200.

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Harold's prosecutors pick a level of abstraction convenient to them, focusing (more or less) on the specific details of Harold's alleged acts: not just car trouble, but night-time flat tires on secluded mountain roads; not just home-renovation injuries, but two-by-four wooden beams heaved wantonly off darkened cabin decks. This particular level of specificity does not seem patently unreasonable. It does not appear definitively *wrong*. But it is not clearly *right* either, and it was apparently chosen without analysis, discussion, consideration, or caveat. Everyone in *Henthorn*, both court and party, simply assumes that it is the right level, the right choice. Yet that assumption leaves a crucial part of the prosecution's case unquestioned, presumed rather than probed. Worse still, that assumption may prove too much, for it risks turning the doctrine of chances into an "other purpose" that swallows the character rule. At the prosecution's chosen level of specificity, after all, everything looks rare: every trip to the supermarket looks anomalous because of the different items purchased; every jog around the block looks unique because of the different number of strides. But that can hardly be the appropriate doctrinal standard, and it can scarcely obscure what makes *Henthorn* truly odd: not the individual occurrences but the combination of events; not the events independently but the fact that these things keep happening to Harold—a point that only confirms the doctrine of chance's character core.

And there is another doctrine of chances requirement too: *similar*. To fit the doctrine, the pertinent acts must be, not just anomalous, but analogous—as comparable as two lotto victories, as similar as two deaths in the tub. Unlike rarity before it, this similarity question receives significant attention in *Henthorn*, the Tenth Circuit even labeling it the "lynchpin" of the case's analysis—and then deeming the factual overlap more than adequate.<sup>180</sup> But like rarity before it, this similarity question is not so easily answered. Both "lynchpin" label and legal conclusion may well be wrong.

For one there is a problem of facts: It is not clear that Harold's alleged acts—the beam, the Jeep, the cliff—are sufficiently similar on their own terms. Flat tires are very different from secluded clifftops; two-by-fours are quite unlike

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180. *United States v. Henthorn*, 864 F.3d 1241, 1249 (10th Cir. 2017). I address the incongruity of this label at some length below, *infra* Section II.B.3.b.

windy precipices and rocky terrain. Compared to the pertinent acts in other doctrine of chances cases, in fact—*Rex v. Smith's* tub drownings,<sup>181</sup> *United States v. Woods'* cyanosis victims,<sup>182</sup> *United States v. York's* apocryphal lottery wins<sup>183</sup>—the events in *Henthorn* bear little similarity at all.

But there is some. *Henthorn's* events are comparable in two noteworthy ways: Harold's wives were killed or injured, and those wives were heavily insured. These are similarities—undeniable, tragic, and true. In their way they link the three events together. But those links are still meager, these similarities still the scantest and most superficial kind. They capture an overlap that hits only at the surface and a correspondence that is almost too easy to spot: if this kind of “similarity” is sufficient, countless events would also prove sufficiently alike—every bank robbery or Ponzi scheme, every counterfeit bill or forgery, every plane flight or detour to the corner store.

They also reveal a crucial shift in the prosecution's perspective. They show a turn, strategic if also unstated, to a very different level of abstraction—a move from close in to far back. When assessing rarity, the prosecution narrows in and peers closely, emphasizing nuanced particulars and specific details: secluded mountain roads, off-trail escarpments, mysterious purchase patterns, darkened cabin decks.<sup>184</sup> Yet when assessing similarity, the prosecution draws back and looks impressionistically, highlighting only the most general of threads: extensive insurance coverage, targeted spouse.<sup>185</sup> I do not claim that one vantage is necessarily better than the other—that narrow or general or something in between should always control. I simply note that the prosecution's approach here is oblique, inconsistent, and opportunistic—and yet its choices and changes go unaddressed by both party and court.

One additional point: the doctrine of chance's “similarity” requirement has clear echoes in other places. It resembles, in part, some of the “other purposes” discussed at length above:

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181. 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

182. 484 F.2d 127 (4th Cir. 1973).

183. 933 F.2d 1343 (7th Cir. 1991).

184. See, e.g., Answer Brief, *supra* note 20, at 5–8 (“[A] remote spot rarely visited by park-goers due to its mix of technical and challenging terrain: tree slopes, cliff faces, and talus fields . . .”).

185. See, e.g., Government's Response, *supra* note 87, at 6 (“The remote areas, the insurance policies, the effort to avoid witnesses . . .”).



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plan, preparation, and modus operandi. Those too looked at the factual overlap among events, the parallels (or not) among various acts. Those too invoked (at times) the vocabulary of “similarity.” But that does not make the doctrines identical. The doctrine of chance’s similarity analysis is distinct from the analysis of the others, focused on a different “other” use and built into a doctrine very much its own. On Harold’s facts, of course, the outcome is consistent: “similarity” does not work in any “other purpose” context, faltering with modus operandi (for example) as much as with the doctrine of chances. But that should not invite haphazard “other purpose” mixing and matching. The doctrine of chances, like the “other purposes” before it, should rise or fall on its terms alone.

On those terms, the doctrine of chances misses the mark in *Henthorn*. It does not seem to work there, even assuming it can ever work at all. And I do not think it can. I believe, like others, that the doctrine is hopelessly flawed in its very conception—infected by Justice Scrutton’s “irresistible inference” at its core. The doctrine of chances thus fails in *Henthorn* on fact, on logic, and on law.

### 3. The Courts

But still the courts were persuaded. Both the trial judge and the appellate panel found the prosecution’s character claims convincing, allowing the evidence of the beam and the Jeep to come in. A few brief words about those courts thus seems in order here.

#### *a. District*

I have addressed one thing about the District Court’s decision in *Henthorn* already. I have discussed the court’s too-credulous approach to *Lisenba*, a case that does not say what the prosecution suggested or what the District Court found. About that, at least, I need not say more.

But I should make explicit something I have only implied so far: the District Court did not assess the character question in *Henthorn* with the rigor or precision demanded by the Rule. Instead it engaged Rule 404 in uneven fits and starts, mingling moments of scrupulous evaluation with passages of meaningful inaccuracy: a careful review of Tenth Circuit precedent

followed by an unfounded gloss on *Lisenba*,<sup>186</sup> a fastidious consideration of *res gestae* matched with a fumbling review of “intent,”<sup>187</sup> a faithful presentation of Rule 404’s key language mixed with a conflation of separate “other purposes,”<sup>188</sup> an alertness to the dangers of character evidence paired with a mingy understanding of propensity.<sup>189</sup> This patchy analysis did harm in *Henthorn*. It kept the court from assessing the crucial character question with the appropriate, even requisite care and concern. It also allowed the parties’ misconceptions about Rule 404 to creep in and entrench—avoidable errors hardening into stubborn character flaws—and then presented an awkward anchor for Harold’s appeal.

*b. Circuit*

That appeal was inevitable. Harold’s turn to the Tenth Circuit was fated from the moment the jury found him guilty—though with one noteworthy change in cast: By the end of his trial, Harold had run out of money to pay his lawyers. His private counsel ended their service. A public defender took the reins.

This new counsel took a surprising tack. It chose to focus, almost entirely,<sup>190</sup> on the doctrine of chances, not by noting that Professor Imwinkelried’s statistics disguise a propensity premise, but by claiming those statistics point in two ways at once: they point away from accident and also away from deliberate malfeasance.<sup>191</sup> In their words:

Say the probability that a given incident was accidental is 5% and the chance it was intentional is 95%. As the incidents add up, the chance that all of them were accidents decreases significantly ( $.05 \times .05 \times .05 = .00125$ ). But the chance that all of them were intentional also decreases, to

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186. *See*, Order, *supra* note 15, at 7–8.

187. *Id.* at 9, 14.

188. *Id.* at 9 (“Whether it is called the doctrine of chances or lack of accident . . .”).

189. *Id.*

190. Harold’s new counsel also revisited some familiar character arguments and reemphasized others, like the admission of Harold’s “other acts” running afoul of Rule 403. *See* Appellant’s Opening Brief at 25, *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017) (No. 15-1490).

191. *Id.* at 19–20.

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about 86% (.95 x .95 x .95 = .8574). In other words, as the incidents increase in number, the objective probability that they shared a common cause actually decreases. . . . Thus, to infer that each of the incidents was intentional actually cuts against the objective probabilities that the doctrine of chances supposedly rests on.<sup>192</sup>

It is a clever argument, concisely made. It unsettles the prosecution's claim that Harold acted intentionally on that rocky cliff that day. It also has the potential, if accurate,<sup>193</sup> to turn Professor Imwinkelried's data-based defense of the doctrine of chances straight on its head—the very same numbers cutting against the doctrine as for it.

But it was never, in *Henthorn*, likely to work. The turn to statistics there looked odd from the outset, more esoteric distraction than assertive defense. In a case about deceitful marriages, murky excuses, and violent deaths, the defense's figures and formulas were always going to seem abstruse and peripheral—a hazy sidelight too far removed from the case's character core. Where Harold's counsel could have engaged the character question directly, it chose instead to proceed elliptically. Where Harold's counsel could have talked familiar evidence law and logic, that is, it chose instead to talk numbers—and the court was never likely to follow.

Nor was the prosecution. Far from trailing Harold's detour into statistics, in fact, the prosecution was happy on appeal to stick to old character ground: it rehearsed familiar arguments, like Harold killed for money; it reiterated familiar misstatements, like “all 404(b) evidence is based on repetition . . . [and] similarities between acts”;<sup>194</sup> and it rebuilt familiar conflation, like “these proper 404(b) inferences—plan, motive, intent—draw[] on the doctrine of chances.”<sup>195</sup> It did not, until very late in its brief, rise to take Harold's statistical bait—and it rose then only to deem the numbers irrelevant,

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192. *Id.* (citation omitted).

193. I make no claim about the accuracy of Harold's claim here. Intriguing as the argument may be, it requires one to hold constant all manner of things—like the probability of the pertinent events and the independence thereof—that may resist such holding. I take no position on any of that here.

194. Answer Brief, *supra* note 20, at 57. I should reiterate that this portion of the prosecution's argument is particularly, and problematically, misguided. *See supra* note 124.

195. Answer Brief, *supra* note 20, at 57.

“faulty,” and flawed.<sup>196</sup>

Yet the prosecution, in its protracted appellate papers,<sup>197</sup> did more than that too. It also made an appeal to human instinct, a play to emotion and revulsion by way of graphic image: it inserted, into its merits brief, full-color photographs of the Granby cabin, the Sedalia Jeep, and (most stunningly) Lynn’s swollen and bloodied face.<sup>198</sup> The ploy was unmistakable, unabashed—the photos spread across the full first half of the prosecution’s brief. But it was awkward and ironic too—*awkward* because the precise look of the cabin is irrelevant to anything of consequence on appeal, *ironic* because the gruesome image of Lynn can only do precisely what the prosecution claims to be avoiding so skillfully. It can only cast Harold as a man of dangerous and murderous character, a despicable person with a penchant to do harm.<sup>199</sup>

But the Tenth Circuit panel was still persuaded. It affirmed the district court in all parts. The appellate court did not quite mimic all that the district court did or echo all that the district court said. Nor did it get every issue wrong.<sup>200</sup> But still the Tenth Circuit stumbled in *Henthorn*. It embedded, rather than uprooted, the case’s deepest errors. And it entrenched the very worst of *Henthorn*’s character flaws.

The court’s missteps begin at the very beginning. For the Tenth Circuit, even in its introductory framing, misstates the law. As the panel presents it, Rule 404 admits “all evidence of other crimes or acts except that which tends to prove *only* criminal disposition.”<sup>201</sup> In the court’s eyes, that is, Rule 404 is but a “criminal” character rule.

But that is not so. Rule 404 says nothing about barring

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196. *Id.*

197. *Id.* The prosecution’s Answer Brief alone runs more than 70 pages.

198. *Id.* at 19, 25, 34.

199. To ask the question bluntly: Why else include it? No matter how dreadful it was, the condition of Lynn’s face is entirely irrelevant to anything of substance in *Henthorn*. No claim of probity, pertinence, or similarity justifies the photograph’s inclusion. The only reason to present the image, haunting and grave, is to stoke the viewer’s visceral fire—and, in so doing, to paint Harold as dangerous as a matter of character. That may be effective strategy; it may even have worked in *Henthorn* itself. But it is precisely what the prosecution claims not to be doing in the rest of its brief, and it is precisely what Rule 404 prohibits.

200. The court is crisp and deliberate, for example, in its evaluation of conditional relevance. *United States v. Henthorn*, 864 F.3d 1241, 1254–55 (10th Cir. 2017); FED. R. EVID. 104(b).

201. *Henthorn*, 864 F.3d at 1248 (citation omitted).

evidence “*only* [of] criminal disposition.”<sup>202</sup> By its bare terms, in fact, the rule prohibits the introduction of all “[e]vidence of a person’s character”<sup>203</sup>—traits and acts that bespeak a person’s criminal inclinations *and* her peaceful penchants, her malicious propensities *and* her benevolent proclivities. By its bare terms, that is, the rule addresses far more than character evidence “*only*” in criminal cases and far more than evidence “*only*” of a lawless “disposition.”<sup>204</sup> Yet the Tenth Circuit elides this plain text. It distorts the scope of this key prohibition and thus bungles its doctrinal foundation—a small framing error that exposes big flaws.

And there’s more. The Tenth Circuit also mishandles Rule 404’s “other purposes”—overemphasizing some things, underemphasizing others, and generally skimming only the surface of these “other purposes” themselves. Three telling examples:

*One*, the court overemphasizes “similarity.” It deems “similarity,” not just an occasionally pertinent Rule 404 factor, but the very “lynchpin of *Huddleston* relevance.”<sup>205</sup> Even more, it implies, by use of that daunting “lynchpin” label, that the Court has declared “similarity” the most critical of all “other act” inquiries.

But that (also) is not so. For one, there is a problem of authority. The “lynchpin” label is not a Supreme Court creation or a crisp hierarchical command. It is not compelled by doctrine. In fact, it finds no foothold in *Huddleston* itself, a case that addressed similarity, not as a “lynchpin,” but as a targeted inquiry germane to the case’s facts.<sup>206</sup>

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202. *Id.*; FED. R. EVID. 404.

203. FED. R. EVID. 404. As noted *supra* Section II.A, Rule 404’s ban has exceptions, some listed in Rule 404 itself, others in Rules 413, 414, and 415. *Id.*; FED. R. EVID. 413–15.

204. FED. R. EVID. 413–15. The logic underlying the character ban—the fear of evidence outweighed or of a party punished for conduct not at issue—may point most powerfully to concerns about evidence of criminal disposition. But the text of the Rule clearly does not stop there. *Id.*

205. *Henthorn*, 864 F.3d at 1249.

206. *Huddleston v. United States*, 485 U.S. 681 (1988). “Similarity” was pertinent in *Huddleston* because of the particular “other purpose” theory proposed there: the prosecution claimed that Huddleston’s “other acts”—two separate sales of likely-stolen products—put him on notice that the charged sale was also of stolen goods. Those other acts proved, the prosecutors claimed, that Huddleston must have known he was peddling stolen merchandise in this instance too. *Id.* On that theory, “similarity” clearly matters: the more similar the other acts, the more notice they might have actually provided. But that does not mean that similarity

There is also a problem of concept. For the idea of “similarity” is neither as expansive nor as useful as the Tenth Circuit here suggests. In some character contexts, in fact, “similarity” makes no difference. In some “other purpose” settings, that is, there is no call for “similarity” between acts at all. Consider “intent” and “plan”:<sup>207</sup> One act can motivate another even if the two are significantly different—an arrest warrant for robbery, say, motivating a subsequent gunfight.<sup>208</sup> One act can form part of a plan, in turn, even if it bears little “similarity” to what comes next—pilfered computer hardware, say, facilitating a scheme to commit credit card fraud.<sup>209</sup> In cases like that, and in plenty of others, the pertinent acts are diverse, varied, far from factually similar—and yet Rule 404 loses no “lynchpin” at all.

It is true, no doubt, that “similarity” sometimes matters. It matters, in particular, for *modus operandi*.<sup>210</sup> But Harold’s prosecutors never argued that specific “other purpose,” nor should they have succeeded even if they did.<sup>211</sup> The supposed “similarities” in *Henthorn* are but “prosaic commonalities”<sup>212</sup>—vague, undifferentiating overlaps<sup>213</sup> that fall far short of establishing a fingerprint method or a “signature crime.”<sup>214</sup> The supposed “similarities” in *Henthorn* are thus too much and too little at once: more than enough “similarity” where none is needed, far too little where the law demands a great deal. The Tenth Circuit’s survey of “similarity” in *Henthorn* is thus worse than misguided. It is analytically overstated, factually unconvincing, and doctrinally miscast.

*Two*, the Tenth Circuit underemphasizes the doctrine of chances and the limits of *Lisenba*. It assigns the doctrine of chances a lesser, even secondary status—a supporting

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always matters in Rule 404 questions—and the *Huddleston* Court never says it does. *Id.* It also never uses the word “lynchpin.” *Id.*

207. See *supra* Sections II.B.2.a & II.B.2.b.

208. See *supra* Sections II.B.2.a & II.B.2.b

209. See *supra* Sections II.B.2.a & II.B.2.b.

210. See *supra* Section II.B.2.d.

211. See *supra* Section II.B.2.d.

212. *United States v. Trenkler*, 61 F.3d 45, 54 (1st Cir. 1995).

213. See, e.g., *United States v. Henthorn*, 864 F.3d 1241, 1251 (10th Cir. 2017) (“remote location . . . delayed emergency responders”). Those are hardly specific or distinguishing features. One might even imagine that, in a place like Rocky Mountain National Park, emergency responders are always delayed.

214. *United States v. LeCompte*, 99 F.3d 274, 278 (8th Cir. 1996) (quotation marks omitted).

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character role at best. And it misreads *Lisenba* too, glossing clear over the limits of that sensational case.

The Tenth Circuit says very little about the doctrine of chances in *Henthorn*. It does rely heavily on that doctrine's dubious logic, grafting it awkwardly onto "other purposes" like "intent."<sup>215</sup> But the court almost never incants the doctrine's own name.<sup>216</sup> Only in a footnote, more than halfway through its decision, does the doctrine get its own airing. Only in a footnote does the court place the doctrine of chances at center stage.<sup>217</sup>

And there, in that footnote, the court misleads on substance and confuses on structure. On substance, the court's footnote is doctrinally inaccurate: it underplays the doctrine's complexity and controversy; it presumes (without support or elaboration) that the non-character logic of one "other purpose" (like "intent") can transfer seamlessly to any other; and it neglects (again) to "look at *Lisenba*"<sup>218</sup> carefully, misreporting twice that the Supreme Court "invoke[d]" the doctrine of chances there.<sup>219</sup> Even more, on structure, the Tenth Circuit's footnote misperceives the case: it implies that the doctrine of chances is peripheral, even unnecessary in *Henthorn*—that Rule 404's other "other purposes" work so well that the doctrine of chances merits no real mention in the body of the opinion at all. But that too is critically mistaken. For had the Tenth Circuit assessed those "other purposes" more methodically, it would have confronted a tricky *Henthorn* truth: *Henthorn* is a doctrine of chances case or nothing at all. If the doctrine of chances does not work there, on its own terms, nothing does.<sup>220</sup> Yet the Tenth Circuit, spellbound (perhaps) by Harold's sensational story, did not assess those "other purposes" methodically. It searched instead for factual "similarity" and, on the rest, simply skimmed.

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215. *Henthorn*, 864 F.3d at 1252 ("Indeed, the prior incidents make it more likely that the charged offense was the product of design . . .").

216. *Id.* Like Professor Imwinkelried, the Tenth Circuit turns to the language and the logic of probabilities in *Henthorn*, writing that "the use of prior incidents . . . rests on a logic of improbability." *Id.* Unlike Professor Imwinkelried, however, the Tenth Circuit does not understand this as an argument limited to the doctrine of chances, rooting it instead (inaptly) in "intent, motive, and plan." *Id.*

217. *Id.* at 1252 n.8.

218. Reporter's Transcript, Hearing on Pending Motions, Day 2 at 39, *United States v. Henthorn*, No. 14-cr-00448-RBJ (D. Colo. May 12, 2015).

219. *Henthorn*, 864 F.3d at 1252 n.8.

220. *See supra* Section II.B.2.a–d.

So, *three*, the court assumes too much and says too little. It glosses where it should examine closely, skims the surface where it should dig in.

A close review of its “proper purpose” analysis, in fact, finds almost no real digging at all. That analysis reads, nearly in full:

The government was required to prove Henthorn committed a specific intent crime: first-degree murder requires a “willful, deliberate, malicious, and premeditated killing.” It offered the prior acts evidence to prove “Henthorn’s intent, motive, and plan,” and to “establish that the death of Toni was no accident.” The district court admitted the evidence to “rebut[] the defense of accident or to show[] plan and intent.” These purposes are specifically contemplated by Rule 404(b) and are plainly proper. Henthorn does not argue otherwise.<sup>221</sup>

There is no mistaking the court’s conclusion: there is no character evidence problem in *Henthorn*. According to the Tenth Circuit, Harold’s other acts—the beam and the Jeep—were properly admitted to prove “intent, motive, and plan.”<sup>222</sup> But this (again) is mistaken on the merits. By prevailing law and logic, it is demonstrably wrong, as the pages above have shown.<sup>223</sup>

Yet here, in this short paragraph, there are two problems more. One is about the party’s positions: Harold does indeed “argue otherwise.” His defense, both before trial and after verdict, hinges almost entirely on the notion that Rule 404 bars evidence of the beam and the Jeep. That Rule 404’s “other purposes” are not “plainly proper” on these facts is the core of Harold’s case. It is central, not incidental, to his strategy—the very heart of his defense. His papers indeed “argue otherwise”—early, often, and energetically.<sup>224</sup>

The other is about engagement: the court’s “proper purpose” analysis barely even broaches the question. It says little about what intent or motive or plan or preparation or

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221. *Henthorn*, 864 F.3d at 1248–49 (citations omitted).

222. *Id.* at 1252.

223. *See supra* Part II.

224. *See, e.g.*, Government’s Response, *supra* note 87; Appellant’s Opening Brief, *supra* note 190.



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absence of accident or lack of mistake or doctrine of chances or modus operandi actually are—and even less about where they work, how they sidestep propensity (if and when they do), and why they supposedly apply “proper[ly]” here.<sup>225</sup> All told, in fact, the court’s “proper purpose” analysis says almost nothing at all: it provides no definitions, assesses no risks, and makes no distinctions; it offers no measured deliberations on the question of character and gives no thoroughgoing evaluations of even the parties’ own claims. It simply submits a paragraph, less than fifty words, that states a conclusion and no more—an *ipse dixit* in place of detailed analysis, a bare assertion in lieu of careful review.<sup>226</sup>

Of course there is more to the opinion. There are more pages, more citations, and (many) more claims about “similarity.” But this additional material is unavailing, orthogonal, and paradoxical at its core: *unavailing* because the court’s extensive “similarity” discussion is inaccurate and beside the point; *orthogonal* because the court’s evaluations of conditional relevance and Rule 403 are two steps removed from the case’s character heart; *paradoxical* because the court’s expansive study of Harold’s past—including its remarkably detailed retelling of Lynn’s death—reveals the problems of, not the solutions for, character evidence. The Tenth Circuit does not assure that Harold was convicted properly, in line with required procedure and free from the taint of character evidence. It confirms instead that Harold is a dangerous and despicable man, one who has done bad things before and is therefore more likely to have pushed Toni in the park that day.

And that may be true. Harold may be an appalling person and a murderous man. But that is not the point. By logic it is compelling. By law it is an invalid basis for admission of evidence, for conviction, or for failure on appeal.

c. *Next?*

With this, at least, Harold’s counsel agreed. They too found fault with the Tenth Circuit’s decision—its doctrine and its distinctions, its conclusions and its law. And so, not long after the Tenth Circuit’s decision, Harold filed a petition for writ of

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225. *Henthorn*, 864 F.3d at 1249.

226. *Id.*

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certiorari at the Supreme Court—a last-gasp request for more judicial review.<sup>227</sup>

His petition was denied.<sup>228</sup> With no reference to the merits and no allusion to the facts, the Court tersely rejected Harold's appeal, stating only that it would not hear his case—and that Justice Gorsuch, once of the Tenth Circuit, played no part in considering the question.<sup>229</sup>

That is hardly a surprise. Troubling as *Henthorn* is, and common as *Henthorn's* character flaws may be, it was always an unlikely candidate for Supreme Court intervention—more scandalous than legally significant, more sensational in fact than salient in law. Even more, the prevalence of *Henthorn*-type errors may have hurt, not helped, the case's chances for further review. Supreme Court Rule 10 focuses on “conflict” between courts, after all, not on common missteps made by many courts.<sup>230</sup>

But perhaps the Court will take up these character questions another day. Perhaps the Court will note the prevalence of Rule 404 issues in the lower courts, the frequency of propensity questions, and the ubiquity of *Henthorn*-like character flaws—and take a case like *Henthorn* accordingly. If it does, it will have a valuable opportunity, a chance to be deliberate where lower courts have been hasty, clear-eyed where lower courts—like those in *Henthorn*—have been distracted and run askew. It will have occasion, in short, to outline Rule 404 with the precision and care the doctrine merits. But perhaps even that remains unlikely.

### III. FROM COURTROOM TO CLASSROOM

But *Henthorn* can still be useful even as the Court steers clear. It can provide, and has already provided, a service going forward—not in the courtroom, but in the classroom. This Part briefly studies how.

For the last three years, I have co-taught a class<sup>231</sup> almost

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227. *Henthorn v. United States*, 114 S.Ct. 348 (2018).

228. *Id.*

229. *Id.*

230. *See* SUP. CT. R. 10 (noting that “a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law”). To be sure, *Henthorn* did misstate the rule of law. *See supra* Section II.B.3.b.

231. With Professor Amy Griffin. We call the class Applied Evidence.

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entirely about *Henthorn*. As happens in many classes, the teacher here may have learned more than the students—about *Henthorn*, about course and case management, about character flaws. But the students (I hope) learned a good deal too, not just about character evidence, but about how errors grow entrenched in law and doctrine, and how scarce, uneven, and narrow the paths can be to constructive change.

#### A. *Genesis*

The origins of this course were as fortuitous as they were formulated. We did not set out to build a class around *Henthorn*. We set out to build a writing-focused supplement to a standard Evidence course, a co-enrollment addition for students in search of extra writing opportunities.

Then *Henthorn* found us. Two former students, Ann Stanton and Erin Butler, knew I was assembling a case file for a nascent “evidence writing” course. They had read about *Henthorn* in local papers and, having already taken Evidence, spotted its central questions and awkward answers. They generously flagged *Henthorn* for me, even providing links to some of the case’s key documents. I read all they sent me and more.

The choice was clear. *Henthorn* was almost too perfect: a pending case, being litigated in federal court, about a tragic event that happened just a few years before and just a short drive away. Even better, it was a pending case with pressing evidentiary issues and a live, manageable, easy-to-access file. We pulled the papers, (re)read the accounts, and even listened to Harold’s haunting 911 calls. The class’s focus and file were set.

#### B. *The Lessons*

But not everything has been so pedagogically easy. Some things about *Henthorn* bedevil the students, and the Tenth Circuit’s recent decision will do nothing to help that.

The trouble is never the facts. *Henthorn*’s tale always rivets the students—the same story that enthralled the courts gripping them too. But these students, perhaps more than the courts, are often bothered by the law. They are concerned by the dense and (perhaps) unworkable structure of Rule 404, the

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clunky framework that fumbles the law's intuitive ban on propensity evidence.<sup>232</sup> And they are alarmed by the blunt truth that the *Henthorn* courts and prosecutors, once and again, got it wrong.

This is not because the students are naïve. Like all law students, they have seen and studied judicial missteps before. But it is one thing for a single case in a class of many to go astray, and quite another for an entire course to be built on a proceeding, pending just miles away, that seems to veer, and then stay, so blatantly off course. That makes the legal mistakes appear relentless, inescapable, even distressing. And it risks instilling a kind of enduring uneasiness in all of us, a special type of frustration since the blunders are so close, so insistent, and yet so hard to remedy. One difficult lesson of the course, then, has been just that: that we can learn from errors but not always do much to fix them, and that those who dig the deepest cannot always make or modify the rules.<sup>233</sup>

But there are more. Another lesson is more hopeful: we can spot and study the errors in *Henthorn*, but we need not repeat them. If we work diligently enough, we can get character evidence right, unlocking Rule 404's critical protections and sidestepping these familiar character flaws. That sidestepping is the substantive meat of our course—the topic of the most discussion and the subject of our most intensive writing assignments. It is also the most maddening part of *Henthorn*. For the flaws there (and elsewhere) are not inevitable. We can avoid them, as teachers and as students—and clear-eyed courts and prosecutors can avoid them too.

The challenge for them, as for us, is not in the law or the inference. Those all can understand. The challenge is in the habits of our thinking and the clarity of our approach. The law of character evidence is easy to articulate and, at times, easy to apply—at least when the facts line up. But when the facts run crooked—when they muddy clear character waters, when they don't readily help convict a guilty man—things grow harder: the law counters our most basic instincts, the rules complicate seemingly simple results.

This is what happened in *Henthorn*. The facts were

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232. See especially Josiah Beamish, *A Tale of Two Wives: 404(b) Evidence Simplified*, 89 U. COLO. L. REV. 293 (2018).

233. In this sense, the class was like a *vox clamantis in deserto*.

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complicated, compelling but crooked; the law, faithfully applied, seemed to help a murderer. So here our habits of thinking can falter. Our clarity of character approach can give way—a cloudy understanding of “intent and motive” coming to overwhelm our ban on propensity evidence, a clumsy take on “similarity” becoming too much and too little at once. In *Henthorn*, this happened, over and over, to prosecutors and to courts.

And it can happen to students as well. They too find Harold awful and repugnant, and they too sometimes find our healthier habits of character analysis giving way to an urge to convict. But our class here serves a purpose: It reminds of the need for rigor and precision in analysis at all times—the need for careful definition, scrupulous application, and proper analogy no matter what the underlying facts. None of us wishes to see a guilty man acquitted. But all of us prefer to see the rules of evidence applied faithfully, soundly, and evenhandedly—whatever result that may bring. And so here there is a lesson too: There is no obvious solution for confounding cases like *Henthorn*,<sup>234</sup> but there is at least one shared truth: Harold Henthorn—dangerous and despicable Harold Henthorn—deserves the same rules of evidence the rest of us do.

That may be easier to say than to do. It is difficult to teach by way of a case where the result seems cosmically right but the reasoning legally wrong—both erroneous and not harmless.<sup>235</sup> It is surely difficult to prosecute and adjudicate that kind of case too. But that is also a lesson, a question, and ultimately a test: Can we maintain our commitment to Rule 404, not just when it seems ethically simple, but when it seems morally fraught? Can we uphold the requirements of character evidence where we worry about what those requirements demand? Or will we bend, even buckle, and fumble our way through hard cases by way of character flaw? Our students, the lawyers and leaders of tomorrow, will have to answer those questions now.

One last lesson: the story does not end here. It does not end for us, and it may not end for Harold. For us, there remains the enduring challenge of character evidence and the

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234. *But see* Beamish, *supra* note 232.

235. *See, e.g.*, 28 U.S.C. § 2111 (2012).

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persistent hope that we—as students and teachers, as practitioners and judges—will get it right. Character flaws may be persistent and pervasive, but they are not inevitable. *Henthorn* can help us root out and remedy them, if not in that case then at least in the next.

For Harold, of course, there is no more hope of Supreme Court intervention—no sliver of a possibility that the Court will grant certiorari, review his case, and vacate his conviction.

But even if Harold's conviction had been vacated, he would not have been in the clear. For one, he could have been retried for murdering Toni—and the prosecution could well have earned a conviction without relying on impermissible character evidence. For another, he could still be tried for murdering Lynn, since charges for the Jeep incident may finally—so many years later—be brought.<sup>236</sup> These belated charges would not seem surprising, rash, or coincidental. After reading the story of Harold and Toni, in fact, they might only seem too late. But note why. These charges would be unsurprising because Toni and Lynn—their fates and misfortunes, their difficulties and deaths—seem connected. And they are. But they are connected only by way of something the law demands we ignore in evidence. They are connected only by way of Harold Henthorn and his loathsome character flaws.

#### CONCLUSION

It may seem odd to say so much about a single case. And it may seem strange to write a law review Essay that looks so much, at first glance, like an appellate brief.

But there is a special, unruly allure to *Henthorn* and a broader, more ambitious agenda to this particular Essay. Unlike so many cases, *Henthorn* plays out like a gritty parable, a story reminiscent of a pulp folktale. It sets good against evil, truth against deception, life against death. And its characters,

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236. According to reports, Douglas County law enforcement officials believe they have the evidence necessary to build a case against Harold for Lynn's murder. But they also plan to defer filing charges until *Henthorn* runs its full course. See Brian Maass, *Investigation Into Death of Henthorn's First Wife Placed on Hold*, CBS DENVER (Nov. 23, 2015), <http://denver.cbslocal.com/2015/11/23/harold-henthorn-douglas-county-murder-investigation-stopped/> [https://perma.cc/DR58-5SD7] (“[Sheriff] Spurlock said ‘We believe we have a case we could file. We believe there is enough evidence.’ But he said it makes more sense to sideline the Douglas County case so the federal case can continue unfettered . . .”).

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as we see them, seem almost like caricatures: the cunning and duplicitous schemer, the trusting and guileless victims, the skeptical and bereaved families. And so perhaps, as with other parables, we can learn more from *Henthorn* than expected—more about our instinctive reactions, more about the law in application, more about evidence of character.

That is the hope of this Essay. It aims to review *Henthorn* on its own terms, retelling the tale of a noble prosecution gone significantly awry. But it aims to do more than that too. It aims to search out the theory behind the practice, to sketch a clean path through some persistent evidentiary perils, and to find the lessons for the many in the story of this one. If we can understand *Henthorn*—both as case and as parable—we can understand far more than *Henthorn* too.

It is important that we do. For questions of character evidence are more than just common in modern courts. They are critical, even decisive—a point on which cases rise and fall, a pivot around which verdicts turn. That is reason enough to do all we can to get things right in every case. And it is reason to worry that, without our best efforts, character flaws will, like character itself, long endure.