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INTRODUCTION

The American criminal justice system rests on the fundamental notion that criminal actions, not criminal character, warrant criminal punishment.[1] American courts are not to render verdicts based on whether an individual is a bad person or whether an individual has a propensity for criminal behavior.[2] Rather, the system convicts on proof of the crime alleged.[3] Yet, this bedrock principle has been remolded and chiseled down in recent years to the point that this once well-settled exclusion now serves as more of an exception rather than the rule.[4]

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1. *See* Michelson v. United States, 355 U.S. 469, 475 (1948) ("Courts . . . almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.").

2. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (explaining that this principle underlies criminal justice through the general policy of excluding evidence of prior wrongs because, if "propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent must be first declared away").

3. *See* United States v. Cohen, 544 F.2d 781, 785 (5th Cir. 1977) ("[O]ur system of criminal justice focuses solely on the commission of specific forbidden acts, rather than the punishment of those persons who have a criminal or evil character.").

4. *See* Paul S. Milich, *The Degrading Character Rule in American*

In *Huddleston v. United States*, the United States Supreme Court chiseled away at that fundamental bedrock by remolding the character evidence rule.[5] In *Huddleston*, the Court adopted an inclusionary approach to Federal Rule of Evidence 404(b), holding that evidence of prior wrongs is admissible under the rule if offered for a permitted purpose, provided that the evidence passes a Rule 403 balancing test.[6] Furthermore, the Court held that, when proof of the prior wrong is offered for a permissible purpose, a trial judge need only find that the jury "could reasonably find the conditional fact . . . by a preponderance of the evidence."[7] The Court reasoned that the procedural protections that lie within the Federal Rules of Evidence were sufficient to protect a defendant from undue prejudice.[8]

However, since *Huddleston*, states have remained free to implement their own standards of admissibility for evidence of crimes, wrongs, and other acts.[9] Each state, in accordance with its own rules of evidence, has the independent authority to craft a substantive standard of admissibility on top of the procedural

Criminal Trials, 47 GA. L. REV. 775, 776–77 (2013)*;* 1B CIPES, BERNSTEIN & HALL, CRIMINAL DEFENSE TECHNIQUES § 26A.01[3]-15 (Matthew Bender, rev. ed., 2012).

5. 485 U.S. 681 (1988).

6. *Id.* at 687–88. Such permitted purposes include, but are not strictly limited to, "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2).

7. *Id.* at 690. A trial court itself need not find that the government has proved the conditional fact, but only that the jury could reasonably make such a finding. *Id.*

8. *Id.* at 691–92. For example, the Court concluded, based on a review of Rule 404(b)'s legislative history, that a trial court will subject prior wrongs evidence to a Rule 403 balancing test to determine "whether the danger of undue prejudice outweighs the probative value of the evidence." *Id.* at 688 (quoting FED. R. EVID. 404 advisory committee's note). But, the Court acknowledged Congress's intention that the balancing test should be conducted with an eye towards admissibility. *See id.* at 688–89. The Court found that Congress was more concerned with "ensuring that restrictions would not be placed on the admission of [Rule 404(b)] evidence" than with the potential prejudice to the defendant. *Id.*

9. *See, e.g.*, State v. Brooks, 541 So. 2d 801, 814 (La. 1989) (holding that evidence of other bad acts must be "clear and convincing" to gain admissibility); Harrell v. State, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994) (en banc) (rejecting the *Huddleston* preponderance standard of admissibility and holding that "the proper quantum of proof in establishing that the defendant committed the extraneous offense is *beyond a reasonable doubt*.").

safeguards that already exist within its own rules of evidence.[10] Rhode Island is no exception.[11] Yet, the Rhode Island Supreme Court fully adopted the *Huddleston* approach to evidence of crimes, wrongs, and other acts in *State v. Rodriguez*.[12] In doing so, the Rhode Island Supreme Court adopted a new approach to its once-exclusionary rule regarding such evidence.[13]

This Comment will argue that the procedural protections endorsed in *Huddleston* are not adequate to safeguard against improper admission of evidence of prior wrongs. As we reconsider the way courts handle crime and punishment, it is also time to reconsider the fundamental promise of Rule 404(b)'s original exclusionary approach to evidence of prior crimes, wrongs, and other acts. While the potential for undue prejudice is certainly an important interest served by Rule 404(b), the greater, more practical concern lies with the potential erosion of a defendant's presumption of innocence.[14] As such, the Rhode Island Supreme Court should reconsider its adoption of *Huddleston*'s inclusionary approach to Rule 404(b) evidence, and instead require "clear and convincing" proof of evidence of crimes, wrongs, and other acts as a prerequisite to admissibility.

Part I explains how the United States Supreme Court came to adopt the *Huddleston* standard, exploring arguments offered from the United States and the defendant. This Comment will also explore how the procedural protections the Court endorsed in *Huddleston* are inadequate when compared to the consequences of admitting evidence of prior bad acts. Part II explains the Rhode Island Supreme Court's adoption of the *Huddleston* approach to Rhode Island's Rule 404(b) and how its adoption strays from the promises and purposes that once formed the underpinning of the rule excluding character evidence. In Part III, by framing the discussion around the context of current discourse regarding the criminal justice system, this Comment will examine the

10. *See* FED. R. EVID. 1101(a) (describing the binding applicability of the Federal Rules of Evidence to federal courts).

11. *See* State v. Rodriguez, 996 A.2d 145, 151 n.9 (R.I. 2010) (noting that the Rhode Island Supreme Court is "not bound by the United States Supreme Court's interpretation of its rules of evidence.").

12. *See id.* at 151–52.

13. *See id.* at 154 (Robinson, J., concurring).

14. *See* Milich, *supra* at note 4, at 797–99.

unintended consequences associated with remolding Rule 404(b) as an inclusionary rule. Finally, this Comment concludes by offering a clear, bright-line solution: Rhode Island should adopt a "clear and convincing" standard of admissibility for 404(b) evidence.

I. THE *HUDDLESTON* STANDARD

In 1985, Guy Huddleston was convicted of selling and possessing stolen videocassette tapes in interstate commerce.[15] Mr. Huddleston's conviction not only left him imprisoned, but it also left a lasting legacy for the interpretation of the admissibility of crimes, wrongs, or other acts.[16] The singular focus of Mr. Huddleston's trial was whether he knew the tapes were stolen; if so, he was certainly guilty of possessing and selling them in interstate commerce.[17] In order to show that Mr. Huddleston had the requisite knowledge, the government made a motion *in limine* to introduce evidence of Mr. Huddleston's similar bad acts under Rule 404(b).[18] The district court admitted evidence of two specific prior bad acts: First, the testimony of Mr. Paul Toney, a record store owner, to whom Mr. Huddleston had allegedly offered to sell stolen television sets; and, second, testimony from "an undercover FBI agent posing as a buyer for an appliance store" to whom Mr. Huddleston had offered to sell "hot" goods.[19]

On appeal, the Sixth Circuit initially reversed, suppressing Mr. Toney's testimony about Mr. Huddleston's offer to sell him stolen televisions.[20] The Sixth Circuit held that the prosecution

15. Huddleston v. United States, 485 U.S. 681, 682 (1988).

16. *See* Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L. REV. 813, 816–17 (1998).

17. *Huddleston*, 485 U.S. at 683.

18. United States v. Huddleston, 802 F.2d 874, 875 (6th Cir. 1986), *rev'd on reh'g*, 811 F.2d 974 (1987).

19. *Huddleston*, 485 U.S. at 683. Specifically, an agent for the FBI testified that Mr. Huddleston offered to sell him 10,000 VHS tapes, indicating that some of the tapes were "hot." Brief for the United States, *Huddleston*, 485 U.S. 681 (No. 87-6), 1988 WL 1031752 at *6. Mr. Huddleston testified in rebuttal that he had told the agent that all of the items he offered to sell "were not hot." Brief for Petitioner, *Huddleston*, 485 U.S. 681 (No. 87-6), 1987 WL 881126 at *10.

20. *See Huddleston*, 485 U.S. at 684.

failed to present "clear and convincing evidence that the television sets [at issue] were stolen."[21] However, upon rehearing, the Sixth Circuit issued a per curiam opinion affirming the district court's admission of Mr. Toney's testimony, and held that the government's burden to introduce the similar acts was by a preponderance of the evidence.[22] This split within the Sixth Circuit Court of Appeals over the standard of admissibility for evidence of crimes, wrongs, and other acts mirrored a similar split among the other circuit courts of appeals.[23] The Supreme Court of the United States granted certiorari to hear Mr. Huddleston's appeal to resolve whether Rule 404(b) requires clear and convincing proof of other bad acts, or whether proof that such bad acts occurred requires proof by a preponderance of the evidence.[24]

In this landmark decision, the Court held that while the text of Rule 404(b)'s contains no explicit standard of admissibility for evidence of crimes, wrongs, and other acts, the admission of such evidence hinges on conditional relevance.[25] As such, the standard

21. *See id.*

22. *See id*. The Sixth Circuit explained:

> [I]n light of the recent decision of another panel of this court in *United States v. Ebens* . . .we now conclude that the clear and convincing evidence standard does not govern the admissibility of "similar acts" evidence sought to be admitted under [Rule] 404(b). Applying the preponderance of the evidence standard adopted in *Ebens*, we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here.

United States v. Huddleston, 811 F.2d 974, 975 (6th Cir. 1987) (per curiam) (citations omitted).

23. *See Huddleston*, 485 U.S. at 686 n.2. The Court summarized the split amongst the circuits:

> The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act.

Id. (citations omitted).

24. *See id.* at 685 (citing Huddleston v. United States, 484 U.S. 894 (1987)).

25. *See id.* at 689. This discrete procedural decision is the primary cause of the erosion of Rule 404(b)'s promise to preserve each defendant's

of admissibility requires only that a jury could reasonably find that the other act occurred by a preponderance of evidence.[26] The Court reasoned that procedural mechanisms built into the Federal Rules of Evidence were sufficient to safeguard against the introduction of "unduly prejudicial evidence," and laid out the procedural protections within the Rules as follows:

> [T]he protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[27]

This decision was fatal to Mr. Huddleston's appeal for relief, and precluded a heightened, clear and convincing standard of admissibility for evidence introduced under Rule 404(b).[28]

As for Mr. Huddleston's particular situation, the Court affirmed the Sixth Circuit's judgment, holding that because a jury could have reasonably found that the televisions were stolen when Mr. Huddleston possessed and sold them, the evidence was properly admitted.[29] On a much larger scale, this decision resolved a circuit split in holding that the standard for admitting evidence of a defendant's prior bad act is merely a trial court's determination that a reasonable jury could find that the a prior bad act occurred by a mere preponderance of the evidence.[30]

presumption of innocence before a jury. *See infra* Parts II & III.

26. *See id.* at 689–90.
27. *Id.* at 691–92 (citations omitted).
28. *See id.*
29. *Id.* at 692.
30. *Id.* at 690.

II. RHODE ISLAND'S RULE 404(B)

A. *Crafting a Rule for Evidence of Crimes, Wrongs, and Other Acts*

Before 1987, Rhode Island law was generally opposed to the use of specific instances of an accused's prior bad acts in criminal cases.[31] As the Rhode Island Supreme Court noted in 1896, "[p]articular acts or instances of misconduct *cannot be proved*; nor rumors and reports. . ."[32] Thus began the inquiry: when is evidence of crimes, wrongs, and other acts admissible, and exactly how much proof is needed to show that the act occurred?

The Rhode Island Supreme Court squarely addressed the issue of *when* evidence of an individual's prior wrongs is admissible in *State v. Colangelo*.[33] In *Colangelo*, the Court upheld the admission of the defendant's prior immoral sexual conduct, which the government had used to support the defendant's conviction for being a "common cheat."[34] The defendant had been proselytizing, referring to himself as the "Nazarene Christ," and used this identity to solicit money by invoking his powers to cure illness, preach, and sell various knickknacks.[35] At trial, the government presented evidence that the defendant had primarily directed his efforts toward women, whom he had conned into "giv[ing] him either gratuitous service or [supplying] him with

31. *See* Heather E. Marsden, Note, State v. Hopkins*: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders*, 3 ROGER WILLIAMS U. L. REV. 333, 333 n.4 (1998) ("Before Rhode Island enacted evidentiary Rule 404(b), the Rhode Island Supreme Court had followed a similar common-law rule.") (citing State v. Jalette, 382 A.2d 526, 531–32 (R.I. 1978)).

32. Folwell v. Providence Journal Co., 37 A. 6, 8 (R.I. 1896) (emphasis added) (quoting 3 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 1226 (Chicago, Callaghan & Co. 1893)). While *Folwell*'s proposition came in a libel case, the notion rings true for any specific instance of prior misconduct: there is an inherent difficulty in proving them. *Cf.* R.I. R. EVID. 405 advisory committee's note ("[J]ust when a specific act has some bearing on the case is an everchanging concept."). While the method of proof for evidence of prior bad acts is not the subject of this article, the governing law is surely a close cousin of the question presented about the standard of admissibility for Rule 404(b) evidence. *See id.* The issue of *when* evidence of prior misconduct is admissible is closely related to *how* that evidence is proved. *See id.*

33. 179 A. 147 (R.I. 1935).

34. *Id.* at 149.

35. *Id.* at 148.

funds to meet his living expenses and financial obligations."[36] The government put forth evidence of the defendant's prior "immoral sexual conduct toward females who were under his protection in care," to bolster the proof that the defendant had the requisite bad intent to make false representations.[37] The Rhode Island Supreme Court upheld the presentation of evidence to the jury because the conduct was inextricably "connected with . . . [his] scheme to deceive and defraud."[38] The court also recited its general rule "that in the trial of a criminal offense evidence of other and distinct criminal acts is generally prejudicial and inadmissible," and exceptions to this rule should be "invoked with caution."[39] Given the ample proof presented and the special relevance to the charged offense, the defendant's prior wrong was not protected by the rule of exclusion because it was offered "to establish guilty knowledge, intent, motive, design, plan, scheme, system, or the like."[40]

This formulation served as the basis for the Rhode Island's treatment of evidence of crimes, wrongs, and other acts. As the Rhode Island Supreme Court summarized in *State v. Sepe*:

> It is a generally accepted rule that evidence indicative of a bad character or a criminal disposition on the part of a defendant is inadmissible to prove the likelihood that he committed a particular offense. These authorities nevertheless recognized certain exceptions to the general rule. Although these exceptions cannot be stated with categorical precision, evidence of other conduct, even if criminal, is competent to prove the specific crime charged

36. *Id.*
37. *Id.* at 149.
38. *Id.* The court explained how the evidence was relevant to whether the defendant was guilty of the charged offense:

> Any evidence which showed that, during the very period when he was making [representations that he had spiritual healing powers] and in the very house in which he was practicing what he claimed to be divine healing, he was also engaged in immoral sexual conduct toward females who were under his protection and care, was admissible as strongly tending to prove that, when he made these representations, he knew them to be false and that he was acting in bad faith.

Id.
39. *Id.*
40. *Id.*

> when it tends to establish (1) motive, (2) intent, (3) the absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or (5) the identity of the person charged with the commission of the crime on trial.[41]

Therefore, as the Rhode Island Supreme Court undertook an effort to codify its rules of evidence, Rhode Island caselaw reveals that the common-law rule regarding prior bad acts was considered a "general rule of exclusion."[42]

B. *Codifying the Rhode Island Rules of Evidence*

In 1987, the Rhode Island Supreme Court adopted the Rhode Island Rules of Evidence, in keeping with a nationwide movement on the part of states to codify uniform rules of evidence.[43] Rhode Island's Rule 404(b) now provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable.[44]

Rule 404(b)'s advisory committee notes explain that "Rhode Island law provide[s] for certain exceptions to this *general rule of exclusion*."[45] As such, during "the trial of a criminal offense 'evidence of other and distinct criminal acts is generally prejudicial and inadmissible.'"[46] Rhode Island courts have since

41. 410 A.2d 127, 130 (R.I. 1980) (citations omitted).

42. State v. Lemon, 497 A.2d 713, 720 (R.I. 1985).

43. Mia Ruscetta, *The Tangled Web of Other Bad Acts*, 49 R.I. B.J. 11, 11 (June 2001). The Rhode Island General Assembly subsequently adopted the Rhode Island Supreme Court's proposed rules of evidence, and the rules took effect on October 1, 1987. 1987 R.I. Pub. Laws ch. 381, § 1 (codified as amended at R.I. GEN. LAWS § 9-19-42 (1987)).

44. R.I. R. EVID. 404(b).

45. ERIC D. GREEN & ROBERT G. FLANDERS, RHODE ISLAND EVIDENCE MANUAL § 404.02, at 96 (2005 ed.) (emphasis added).

46. *Id.* (quoting State v. Ryan, 321 A.2d 92, 95 (R.I. 1974)).

supplemented Rule 404(b)'s permissible uses with two judicially crafted exceptions: the complete story and lewd disposition doctrines.[47]

The Rhode Island Supreme Court's adoption of the Rhode Island Rules of Evidence did not mark a sea of change in the judiciary's approach towards its evidentiary framework. In fact, within Eric D. Green's *Analysis of Changes in Rhode Island Law of Evidence Under Draft Proposed Rules*, any mention of an analog of Federal Rule 404(b) was noticeably absent.[48] The permissible inference is that Rhode Island, in codifying its Rules of Evidence, did not alter the rule for *when* evidence of prior crimes, wrongs, and other bad acts is admissible.[49] Thus, Rhode Island's adoption of a set of evidentiary rules simply codified the existing caselaw surrounding evidence of crimes, wrongs, and other acts. Rhode Island's exclusionary approach to such evidence, coupled with the caselaw's strong cautionary approach towards admitting such evidence, was still good law at the time of Rhode Island's codification of its Rules of Evidence. Still, Rhode Island—even after enacting its Rule 404(b), drafting advisory committee notes, and developing pre-codification caselaw on the subject—had yet to set a bright-line, substantive standard for the admissibility of evidence pertaining to a defendant's prior bad acts.

C. *Rhode Island Adopts the* Huddleston *Approach*

Two recent cases reveal that the Rhode Island Supreme Court has attempted to suppress confusion surrounding admissibility of evidence of crimes, wrongs, and other acts.[50] However, the court resolved this confusion in favor of an approach not supported in its precedent. First, in *State v. Gaspar*, the Rhode Island Supreme Court overturned a trial court's decision to admit Rule 404(b) evidence by way of Rule 403.[51] In *Gaspar*, the State of Rhode Island prosecuted the defendant for first-degree sexual assault.[52]

47. Ruscetta, *supra* note 43, at 11.

48. *See* Eric D. Green, Annotation, *Analysis of Changes in Rhode Island Law of Evidence Under Draft Proposed Rules*, R.I. CT. R. ANN. 990, 990 (1985).

49. *See id.*

50. *See* State v. Rodriguez, 996 A.2d 145 (R.I. 2010); State v. Gaspar, 982 A.2d 140 (R.I. 2009).

51. *Gaspar*, 982 A.2d at 147.

52. *Id.* at 145. The defendant faced six counts of first-degree sexual

The facts revealed at trial were sexually explicit in nature.[53] The defendant's first trial on this matter ended with a jury deadlock, and resulted in a mistrial.[54] His second trial resulted in his conviction on five of six counts of first-degree sexual assault.[55] On appeal, the defendant argued, *inter alia*, that the government's presentation of testimony from the defendant's former sexual partner, was inadmissible under Rule 404(b).[56] However, the Rhode Island Supreme Court declined to address the defendant's argument directly, and instead applied Rule 403, finding that the likelihood that the sexually graphic testimony would "confuse the jury and invite an emotional response" outweighed its probative value.[57] The court declined to discuss whether the evidence had been properly admitted under Rule 404(b) because the nature of the evidence necessitated suppression under Rule 403.[58] Notably, the Rhode Island Supreme Court, for the first time, cited with approval the United States Supreme Court's interpretation in *Huddleston*, which set the stage for a more formal adoption of its reasoning.[59]

One year later, in *State v. Rodriguez*, the Rhode Island Supreme Court formally adopted the *Huddleston* approach to Rule 404(b).[60] The court recited the familiar procedure for considering the admissibility of Rule 404(b) evidence when challenged on

assault—one for each sexual act performed on the victim on the night of the alleged encounter. *Id.*

53. *See id.* at 142–45.

54. *Id.* at 145.

55. *Id.*

56. *Id.* at 145–46.

57. *Id.* at 147, 149.

58. *Id.* at 145.

59. *See id.* at 148. The court endorsed *Huddleston* and noted that R.I. R. EVID. 403 provides a procedural safeguard against the admission of 404(b) evidence:

> Rule 403 cuts across the rules of evidence and is always a consideration in a trial justice's ruling on the admissibility of Rule 404(b) evidence. . . . Similar approaches have been endorsed by the federal courts applying the substantially analogous Federal Rules of Evidence 403 and 404(b).

Id. *See also* Huddleston v. United States, 485 U.S. 681, 688 (1988) (noting that evidence properly offered under Federal Rule of Evidence 404(b) "is subject only to general strictures limiting admissibility such as Rules 402 and 403")).

60. 996 A.2d 145, 151–52 (R.I. 2010).

appeal.[61] First, evidence of other crimes, wrongs, or acts must be offered for a proper purpose under Rule 404(b).[62] This procedural protection is installed within the rules of evidence to prevent the introduction of other-act evidence for the purpose of establishing someone's propensity to act in kind."[63] The Rhode Island Supreme Court then formally adopted the *Huddleston* approach:

> First, a trial justice may exclude evidence of a prior act under Rule 104(b) of the Rhode Island Rules of Evidence if she concludes that the jury could not reasonably find by a preponderance of the evidence that the prior act occurred. Second, a trial justice may exclude evidence under Rule 403 of the Rhode Island Rules of Evidence if she finds that its probative value is substantially outweighed by the potential for unfair prejudice. Lastly, a trial justice must, upon the request of counsel, issue a cautionary instruction to the jury reminding it not to consider the evidence for propensity purposes.[64]

In doing so, the court implicitly concluded that these procedural protections were sufficient to guard "against admitting unfairly prejudicial prior bad acts evidence."[65]

The Rhode Island Supreme Court relied on a strict reading of Rule 404(b) to adopt the *Huddleston* approach to evidence of prior bad acts.[66] After parsing the language of Rhode Island Rule of Evidence 404(b), the court determined that the rule's "exceptions" indicated that the rule is one of inclusion, not exclusion. Although the court had previously described the rule's opening sentence—that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith"[67]—serves as its "'general

61. *See id.*
62. *See id.* at 150–52.
63. *See id.*; R.I. R. EVID. 404(b). Just as the United States Supreme Court held in *Huddleston*, the Rhode Island Supreme Court found that the proper purpose requirement stands as the first guard against inappropriate admission of prior misconduct evidence. *See* Huddleston, 485 U.S. at 691 (1988); *Rodriguez,* 996 A.2d at 151.
64. *Id.* at 151–52 (citations omitted) (citing *Huddleston*, 485 U.S. at 689–91).
65. *See id.* at 151.
66. *See id.* at 150–51.
67. *Id.* at 150 & n.7 (quoting R.I. R. EVID. 404(b)).

exclusionary"'[68] provision, Rule 404(b)'s second sentence—that "such evidence may be 'admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. . .'"[69]—plainly conveys an inclusionary approach to such evidence.[70] The court reasoned that the rule is one of *exclusion* only when such evidence is offered for propensity purposes, but when evidence is offered for a permitted purpose—i.e., any purpose other than "to prove that the accused has a criminal disposition and, therefore, is more likely to have committed the crime for which he stands accused"—the rule morphs into one of *inclusion*.[71] In other words, "the second sentence in Rule 404(b) is . . . a simple reiteration of the broad admissibility principles that undergird our rules of evidence."[72]

While the Rhode Island Supreme Court did not frame it as such, the inclusionary approach to Rule 404(b)'s second sentence marks a change in Rhode Island's evidentiary framework. As Justice Robinson pointed out in his concurrence, "it is inaccurate to state that our rules of evidence are undergirded by 'broad admissibility principles.'"[73] Justice Robinson disagreed with the court's "implication that this Court should interpret Rule 404(b) as a rule of *inclusion*."[74] In fact, not only did Justice Robinson not find that the Rhode Island Rules of Evidence were based upon the principles of "broad admissibility," he also did not "locate an opinion from [the court] which characterizes the rule in that manner."[75] Rather, he explained, "several opinions of [the court] clearly indicate that Rule 404(b) should be viewed as a rule of *exclusion*."[76] As Justice Robinson made clear, *Rodriguez* turned Rhode Island's traditionally exclusionary approach to Rule 404(b) on its head.[77]

68. *Id.* (quoting State v. Gaspar, 982 A.2d 140, 148 (R.I. 2009)).
69. *Id.* (quoting R.I. R. EVID. 404(b)).
70. *Id.* at 150–51.
71. *See id.*
72. *Id.* at 151.
73. *Id.* at 154 (Robinson, J. concurring) (quoting majority opinion).
74. *Id.*
75. *Id.*
76. *Id.* (collecting cases).
77. *See id.* at 154–56. Justice Robinson further explained that the court has historically treated evidence of prior wrongs as "presumptively inadmissible." *Id.* (citing State v. Gomes, 690 A.2d 310, 316 (R.I. 1997).

III. THE TROUBLE WITH *HUDDLESTON* AND *RODRIGUEZ*

The Rhode Island Supreme Court's newly adopted inclusionary approach to Rule 404(b)—even when applied to only a single sentence of the rule—directly conflicts with the rule's underlying purposes.[78] It has been argued that three policies justify Rhode Island's Rule 404(b): (1) "to prevent jurors from unjustly convicting a defendant based on their presumptive belief that the accused is a bad person"; (2) "to prevent jurors from convicting a defendant based on their belief that the prior bad acts indicate an ongoing propensity in the accused to commit the charged crime"; and, (3) because "admit[ting] prior uncharged misconduct evidence may impose an unreasonable burden on the defendant."[79] However, one scholar raised a loftier goal that Rule 404(b) aims to serve.[80] Instead of focusing on the propensity inference, to which a jury may assign improper weight, Professor Paul Milich argues that the better justification for Rule 404(b) is to preserve the presumption of innocence for *all* defendants who stand accused of a crime.[81] The crux of this argument is that Rule 404(b) ensures that every defendant—the sinner and the saint alike—is equally entitled to the same presumption of innocence.[82] This is indeed the most significant promise underpinning Rule 404(b): regardless of what prior acts trail a defendant as he enters the courthouse, he approaches the jury with a presumption of innocence.[83]

Framing Rule 404(b) as an evidentiary rule that guarantees the presumption of innocence challenges *Rodriguez*'s adoption of *Huddleston*. When considering the admission of Rule 404(b) evidence in light of undue prejudice alone, the procedural safeguards may seem adequate.[84] For example, the Rhode Island Supreme Court vigorously applied Rule 403's balancing test to

78. *See* Marsden, *supra* note 33, at 340–42.
79. *Id.* at 341–42.
80. *See* Milich, *supra* note 4, at 791–97.
81. *See id.*
82. *See id*. at 795.
83. *See id.* at 795–96. Rule 404(b) is not so much concerned with a jury's overvaluation of prior bad acts as it is with requiring a jury "to give the benefit of the doubt and then some to a fellow citizen who stands in jeopardy of tasting the state's awesome power to take away that citizen's liberty." *Id.*
84. *See* State v. Rodriguez, 996 A.2d 145, 151–52 (R.I. 2010).

suppress evidence in *Gaspar*.[85] However, the court's reconstruction of Rule 404(b) as a rule of inclusion conflicts with the more persuasive rationale underlying the rule—the presumption of innocence.[86] When a Rhode Island trial court applies *Rodriguez*'s inclusionary approach to Rule 404(b), it considers the evidence with an eye towards "broad admissibility principles."[87] This umbrella of broad admissibility allows for evidence, previously scrutinized and disfavored in Rhode Island, to begin its "lubricated" path towards admission.[88]

The first problem with *Huddleston* lies within its lack of substantive protections at the outset of the Rule 404(b) inquiry. In *Huddleston*, the Court denied the defendant's argument that the trial court should make a preliminary finding as to whether the government proved the occurrence of the prior bad act before determining whether the government had articulated a permitted purpose for the evidence under Rule 404(b).[89] The Court's decision to deny a preliminary finding under Rule 104(a), and instead couching that finding under Rule 104(b), allows the flow of Rule 404(b) evidence into trial courts, thus stripping away Rule 404(b)'s protection. Rather than requiring a preliminary finding of admissibility prior to the Rule 404(b) proper purpose determination, the Court placed the trial court's decision too far along the procedural framework of the rules of evidence. Each of these rules build procedural, or mechanical, protections against admitting potentially prejudicial evidence; however, substantive protection, at the outset of the introduction of prior bad acts evidence, is warranted to adhere to Rule 404(b)'s purposes.

Rhode Island's adoption of this approach is equally

85. State v. Gaspar, 982 A.2d 140, 147–48 (R.I. 2009).

86. *See Rodriguez*, 996 A.2d at 155 (Robinson, J., concurring); *see also* Milich, *supra* note 4, at 794–96.

87. *See Rodriguez*, 996 A.2d at 151 (majority opinion).

88. *See* Milich, *supra* note 4, at 780.

89. Huddleston v. United States, 485 U.S. 681, 687–88 (1988). The defendant in *Huddleston* argued for the same type of threshold inquiry put forth in this Article: that "[a]s a prerequisite to admitting misconduct evidence under 404(b), the government must prove the misconduct by clear and convincing evidence." Brief for Petitioner, *Huddleston*, 485 U.S. 681 (1988) (No. 87-6) at *31. While the defendant in *Huddleston* offered three other solutions, the clear and convincing requirement is most persuasive here. *See id.* at *30–31.

inadequate.[90] First, the stage at which a trial court determines whether the government has proven the occurrence of the crime, wrong, or other bad act by a preponderance of the evidence happens *after* the trial court has begun the move towards admissibility.[91] The trial court undertakes this analysis *after* finding that the evidence has been offered for a permitted purpose, and *after* it has determined that the evidence is relevant under Rule 402.[92] Again, this is all beneath the umbrella of "broad admissibility principles," which significantly alters the traditional approach to Rule 404(b) evidence.[93] Under this umbrella, the trial court may be unable to treat the evidence with as much caution or subject it to as careful a weighing process as once before.[94] Thus, all that is left for the trial court to substantively determine is whether Rule 104(b)'s conditional relevance requirement has been met.[95] In other words, the occurrence of the prior bad act—i.e., the fact underlying the conditional relevance inquiry—is subjected to a mere preponderance of the evidence standard.[96] The relevance of the evidence relies only upon the determination that a jury could reasonably find that it is more likely than not that the defendant committed the prior crime, wrong, or other act.[97] This places evidence that is inherently and unfairly prejudicial, upon the scales of justice for a fifty-fifty balancing test.

The preponderance standard for admissibility is too low at this stage of the trial court's *Huddleston* inquiry. The approach lends itself to far too much discretion at the trial court level.[98] Furthermore, the inquiry essentially becomes subjective: The

90. *See Rodriguez*, 996 A.2d at 151–52 ("[A] trial justice may exclude evidence of a prior act under Rule 104(b) . . . if she concludes that the jury could not reasonably find by a preponderance of the evidence that the act occurred.") (citing *Huddleston*, 485 U.S. at 690).

91. *See id.*

92. *See id.*

93. *See id.* at 153–54 (Robinson, J., concurring).

94. *Id.* at 154 (regarding "evidence of prior wrongs [as] presumptively inadmissible").

95. *See id.* at 151–52 (majority opinion) (citing Huddleston v. United States, 485 U.S. 681, 690 (1988)).

96. *See id.*

97. *See id.*

98. *See* Milich, *supra* note 4, at 790 ("[T]he character rule . . . has been getting clobbered in our courts. This has been easy to accomplish where the rule poorly constrains and so much is left to the barely controlled discretion of the trial judge.").

trial court considers the purported similar act in light of all of evidence presented, and determines whether, in the eyes of a reasonable jury, there is enough evidence to tip the scale towards admissibility.[99] Now, in light of the umbrella "inclusion" approach, the hurdle over which the evidence must climb has already been lowered substantially.[100] To add to this, the mere preponderance of proof standard further greases the wheels of the evidentiary inquiry towards admissibility. This increases the chance for unpredictable case-by-case determinations dependent upon the trial court judge's sole discretion as to whether there is just enough evidence to tip the scale.[101] Especially in close cases, such a fifty-fifty inquiry seems too light when considering the drastic effect such evidence may have on a defendant's presumption of innocence in the minds of jurors. Leaving the introduction of evidence that is widely considered inflammatory and infectious up to a coin flip is not the type of protection envisioned by Rule 404(b). The *Rodriguez* approach in Rhode Island has couched any substantive protection of Rule 404(b)'s promise too far along the route of admissibility. The timing of this inquiry is too late, and the standard for admissibility is too low.

Second, the procedural safeguards within the Rhode Island Rules of Evidence should serve more as a backstop for substantive protection from the admission of crimes, wrongs, and other bad acts rather than as the frontline protection. The procedural dams endorsed in *Rodriguez*—Rule 104(b)'s conditional relevance requirement, Rule 403's balancing test, and a Rule 105 limiting instruction—should act as fallback protections against which a trial court examines the introduction of Rule 404(b) evidence.[102] This is consistent with the original intent and approach behind Rule 404(b): a general approach of exclusion.[103] While Rule 403's

99. *See Rodriguez*, 996 A.2d at 151–52 (citing *Huddleston*, 485 U.S. at 690).

100. *See id.* at 154 (Robinson, J., concurring).

101. *See* Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1092 (2005) ("[T]he unarticulated exception to the propensity ban leaves courts confused over its outer boundaries . . . ."); *see also* Milich, *supra* note 4, at 790.

102. *See id.*

103. *See* GREEN & FLANDERS, *supra* note 48, § 404.02 (characterizing Rule 404(b) as a "general rule of exclusion"). *But see* State v. Lemon, 497 A.2d 713,

balancing test is perhaps the best justification for the *Rodriguez* approach to Rule 404(b),[104] it still proves insufficient when the defendant's presumption of innocence is at stake. As one commenter explained:

> The Supreme Court's decision in *Huddleston* will effectually ease the burden for the proponent of other-acts evidence. The burden is on the opponent of the evidence to convince the court that the danger of admitting the evidence "substantially outweighs" its probative value. This is an onerous burden for the opponent of the evidence. The opponent's burden of overcoming Rule 403, the inclusionary approach to Rule 404(b), and Rule 104(b)'s liberal standard for proving that the defendant committed the extrinsic act will combine to ease the task of getting other-acts evidence admitted at trial.[105]

This is yet another concern with the inclusionary approach to Rule 404(b)—it infects the way each of the procedural protections are purported to work.[106] This becomes all the more antithetical to Rule 404(b)'s promise to protect the presumption of innocence when one considers *how* a defendant can reasonably defend that presumption when the jury hears evidence of his or her other crimes, wrongs, and bad acts. What sort of case can the defendant put on to push back against Rule 403's weighing test, which is "substantially" tilted against him or her?[107] Furthermore, in

720 (R.I. 1985) (placing this "general rule of exclusion" in the context of a non-exhaustive list of exceptions).

104. *See* GREEN & FLANDERS, *supra* note 48, § 403.02 ("In Rhode Island, the trial judge has the traditional discretion to exclude logically relevant evidence that is unfairly prejudicial.").

105. Jane C. Hofmeyer, Case Note, *A Relaxed Standard of Proof for Rule 404(b) Evidence:* United States v. Huddleston, 6 COOLEY L. REV. 79, 91 (1989) (citations omitted). While Hofmeyer agrees with the Court's approach in *Huddleston*, her outline of the way Rule 403 works in conjunction with the admission of 404(b) evidence is on point here.

106. *See* Huddleston v. United States, 485 U.S. 681, 687–91 (1988). The other admissibility considerations—relevance under Rule 402, sufficient factual basis under Rule 104(b), and avoidance of unfair prejudice under Rule 403— are colored by the trial court's proneness to admissibility. *See id.* The same is true with the Rhode Island Supreme Court's holding in *State v. Rodriguez*. 996 A.2d at 151–52.

107. *See* CIPES ET AL., *supra* note 4, § 26A.01[3]. Furthermore, this may raise constitutional questions as to the defendant's Fifth Amendment right to

cases where the prior bad act is not so egregious, Rule 403 is unlikely to bar the evidence.[108] For example, the introduction of a defendant's prior nonviolent drug offense would not likely *substantially* outweigh the probative value of that evidence.[109] Thus, Rule 403 proves inadequate to keep these types of crimes from sullying a defendant's presumption of innocence. Moreover, courts should not even engage in these mini-trials centered on the underlying fact on which conditional relevance hinges.[110]

The final procedural protection endorsed in *Rodriguez* is a Rule 105 limiting instruction.[111] There has been much debate as to whether such limiting instructions, particularly those directed towards Rule 404(b) evidence, are all that effective.[112] Then, there is the ultimate decision of whether a trial court judge will issue a limiting instruction at all.[113] Again, there is still a real concern that the adoption of an inclusionary approach to Rule 404(b) has damaged each these procedural protections along the route towards admissibility.

Rodriguez couches protection too far along the road to admissibility, which, when coupled with the potential for unpredictable, case-by-case determinations as to whether the government has carried its burden of proof, signals that the procedural safeguards, without more, are inadequate. These

avoid self-incrimination as well as his Sixth Amendment right to confront his accused. *See* U.S. CONST. amends. V, VI.

108. *See* R.I. R. EVID. 403; *see also* State v. Pratt, 641 A.2d 732, 742 (R.I. 1994).

109. *See* R.I. R. EVID. 403.

110. Time saved should not outweigh the potential for time served; administrative convenience in avoiding mini-trials over character evidence ought to tilt towards the presumption of innocence.

111. *Rodriguez*, 996 A.2d at 152.

112. *See* Nicole M. Priolo, Topical Survey, *Can A Curative Instruction Effectively Remedy Impermissible References to A Defendant's Past Criminal Behavior?*—State v. Gallagher, *654 A.2d 1206 (R.I. 1995)*, 30 SUFFOLK U. L. REV. 583, 588 (1997) (explaining that the Rhode Island Supreme Court's overturning a conviction based on the lack of effectiveness of the trial court's limiting instruction in the face of admission of character evidence "weakens the strength of the curative instruction"); *see also* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408–09 (2013).

113. In Rhode Island, this question is answered depending on the nature of the crime charged. *See, e.g.*, Ruscetta, *supra* note 43, at 49–50 (explaining the different treatment in Rhode Island of sexual offenses and non-sexual offenses with respect to Rule 105 instructions).

procedural safeguards are especially inadequate in light of Rule 404(b)'s promise that each defendant is entitled to a presumption of innocence. Therefore, substantive protection installed at the outset of the introduction of Rule 404(b) evidence is required.

IV. THE SOLUTION: SUBSTANTIVE PROTECTION

The allure to use other acts evidence lies in its ability to fill in gaps where the prosecution would otherwise need traditional evidence.[114] Prior bad acts evidence plants the bad seed of the defendant's character into the mind of the jury, allowing the jury to fertilize the prosecution's theory of the case by filling in small holes along the way. But the entire point behind Rule 404(b) is to act as a filter, to protect the case from that kind of improper exposure.[115] In this way, procedural protection has proven inadequate.[116] It is as if the protection of the rules evaporates once evidence of crimes, wrongs, or other bad acts comes into play. The defendant faces extensive litigation over each procedural dam, while simultaneously unable to rely on any realistic substantive protection. Counsel for the defendant is also faced with a Hobson's choice as the trial proceeds: call attention to the evidence in closing argument, or let it linger hoping that the seed has not yet planted in the mind of the jury. Without a substantive stopgap, the defendant's presumption of innocence is left entirely to a balancing act: does the evidence tend to show that the defendant engaged in prior misconduct by a preponderance of the evidence?[117]

The Rhode Island Supreme Court should adopt a more substantive protection against the inherent threat to just verdicts posed by evidence of crimes, wrongs, and other acts. The court can do so by making the standard of admissibility a threshold issue for Rule 404(b) evidence.[118] Rather than continue to follow the *Huddleston* approach and couch a preponderance of the evidence showing within Rule 104(b), the court can make

114. *See* Milich, supra note 4, at 782–84.
115. *See* State v. Garcia, 743 A.2d 1038, 1053 (R.I. 2000).
116. *See supra* Part III.
117. *See* State v. Rodriguez, 996 A.2d 145, 151–52 (R.I. 2010).
118. *See, e.g.*, Brief for Petitioner at *30–31, Huddleston v. United States, 485 U.S. 681 (No. 87-6) (listing various approaches to admissibility of Rule 404(b) evidence).

admissibility a threshold issue and require a trial justice to make an initial factual finding under Rule 104(a).[119] Furthermore, the court should raise the standard to require a finding of clear and convincing proof of the defendant's crime, wrong, or other bad act.[120] Substantive protection, by way of a clear and convincing standard of admissibility at the outset of the government's introduction of 404(b) evidence, coupled with the *Rodriguez*'s procedural protections, best serves the promises at the heart of Rule 404(b).[121]

This approach best affirms the promise that each defendant in a criminal case, who "starts his life afresh when he stands before a jury, a prisoner at the bar," is indeed presumed innocent.[122] As Justice Robinson articulated in *Rodriguez*, Rhode Island has a long-standing, well-established approach to regard Rule 404(b) as a general rule of exclusion.[123] In fact, Justice Robinson also argued to make the Rule 404(b) a threshold inquiry, by first installing a presumption against admissibility and second placing the burden of admissibility onto the evidence's proponent.[124] This is precisely in keeping with the need for substantive protection before the procedural mechanism of *Rodriguez* and *Huddleston* engage and the wheels towards admissibility are greased.

Requiring clear and convincing proof of evidence of a defendant's crime, wrong, or other bad act would also alleviate the concerns with case-by-case determinations as to which evidence will come in and which will not.[125] As this standard of

119. *See id.*

120. *See id.* Before *Huddleston*, "[t]his test [was] followed by the Seventh, Eighth, Ninth, and D.C. Circuits." *Id.* at *30.

121. *Rodriguez*, 996 A.2d at 151–52.

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

123. *See Rodriguez*, 996 A.2d at 154 (Robinson, J., concurring) ("I have yet to locate an opinion from this Court which characterizes the rule [as a rule of inclusion]—whereas several opinions of this Court clearly indicate that Rule 404(b) should be viewed as a rule of *exclusion*.").

124. *Id.* at 150–52 (majority opinion) (stating that the court should "expressly recognize that there is (1) a rebuttable presumption against the admissibility of Rule 404(b) evidence and (2) a principle that the proponent of Rule 404(b) evidence bears the burden of establishing its admissibility.") (footnote omitted).

125. *See id.* at 150–52. By adopting a broad inclusionary approach to the latter sentence of Rhode Island's Rule 404(b), the Rhode Island Supreme

admissibility is stricter than that of a showing by a preponderance of the evidence, the Rhode Island Supreme Court's application of its standard of review for reversible error is reduced. This bright-line rule would help eliminate unpredictable trial court rulings on admissibility of Rule 404(b) evidence, especially in close cases. A bright-line, upfront rule for admissibility would also avoid potential missteps along the path of various interlocking procedural safeguards in the rules of evidence.

Rather than focus on the intangible concern of a jury's undue prejudice and overemphasis on evidence of crimes, wrongs, and other acts, the Rhode Island Supreme Court can place a substantive roadblock on the frontline of such evidence's admissibility. In keeping with the underlying promise and purposes of Rule 404(b), Rhode Island's courts should serve as gatekeepers *against* admission of evidence of crimes, wrongs, and other acts. Only when evidence of a defendant's crimes, wrongs, and other acts are proven by clear and convincing evidence and admitted for a proper purpose under Rule 404(b) should it gain admission to the sanctum of the jury's deliberations. Together, substantive and procedural protections equally respect fundamental fairness and the presumption of innocence for each defendant who approaches the jury, "a prisoner at the bar."[126]

The greatest power of Rule 404(b) evidence lies within its ability to sprinkle seeds of doubt against the defendant's presumed innocence. Courts can prevent juror-mind-wandering and gap-filling as to whether the defendant has a guilty past, and focus them on whether the defendant is guilty based on the facts presently before the jury. This is best achieved with a substantive measure of protection—a bright-line, predictable standard of admissibility for evidence of a defendant's other crimes, wrongs, or acts.

CONCLUSION

Re-invigorated by the study of mass incarceration, legal scholars, jurists, prosecutors, defense counsel, and others alike

Court forgoes the benefits that a clear and convincing standard offers when determining admissibility of evidence and omits necessary protections to the defendant. *See id.*

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

have begun to reconsider the ways in which the criminal justice system ought to work. In light of this conversation about the merits of crime and punishment, the time is now due to reaffirm substantive protection against character evidence. As explained above, the procedural filters the Court endorsed in *Huddleston*, and which Rhode Island Supreme Court adopted in *Rodriguez*, are insufficient. Substantive protection in the form of clear and convincing evidence is necessary. Evidence of a defendant's crimes, wrongs, and other acts measured against a clear and convincing standard of admissibility best adheres to the exclusionary purpose to Rule 404(b). The Rhode Island Supreme Court has the power to right this wrong.

This is not a question of a wayward, activist judicial imposition onto the Rhode Island Rules of Evidence. Rather, it is a question of fundamental fairness and presumption of innocence, read together with the inherent purpose of the rule: to bar evidence of an individual's characteristic to prove he acted in conformity therewith at the time of the charged offense. Rule 404(b) ought to be treated as an exclusionary rule because it was designed as one. Reading the rule as one of exclusion promotes fundamental fairness, giving an accused individual and his counsel a direct opportunity to challenge evidence before the inevitable flow of prior misconduct evidence flows forthwith. Rather than reciting the protection of procedural dams, the Rhode Island Supreme Court can provide substantive protection to charged individuals facing admission of evidence of crimes, wrongs, and other acts. Ensuring substantive protection by adopting a standard of evidence that requires clear and convincing proof of an individual's prior bad acts would help move the criminal justice system towards a more perfect system—one that convicts in the right way for the right reasons.

Raising an evidentiary standard of admissibility may be a small solution, but it strives to restore two bedrock values of the criminal justice system: fundamental fairness and the presumption of innocence. The way to do this is to provide more protection, not less. In the absence of legislative action, the court can re-sculpt Rule 404(b) to layer substantive protection on top of the procedural blocks already in place. It is time to reconsider *Huddleston*/*Rodriguez* and restore the character evidence rule in Rhode Island.