

SWISS CHEESE THAT'S ALL HOLE: HOW USING READING MATERIAL TO PROVE CRIMINAL INTENT THREATENS THE PROPENSITY RULE

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Abstract: In *United States v. Curtin*, the Ninth Circuit, sitting en banc, held that Federal Rule of Evidence 404(b) permits a defendant's reading material to be introduced as evidence of his intent to commit a crime. The decision expressly overruled *Guam v. Shymanovitz*, an earlier Ninth Circuit opinion that called the admissibility of reading material into question. This Note argues that the *Curtin* decision failed to appreciate the extent to which reading material may reveal only a defendant's propensity to commit a charged crime, rather than his or her intent to do so. To reduce the possibility that impermissible propensity evidence will be erroneously admitted, this Note proposes that courts considering the admissibility of reading material under Rule 404(b) more closely examine whether the evidence requires an inference about the defendant's character or propensity to commit crimes.

INTRODUCTION

A man and his wife take a romantic walk on the beach to celebrate their anniversary. On the walk, the woman is fatally shot. Her husband sustains several life-threatening gunshot wounds to the right side of his chest, but he survives.¹ Upon regaining consciousness, the man tells the police that a gunman approached the couple during their walk and shot them both. During the investigation, the police discover that the man has had several affairs over the course of his three-year marriage and has been named the beneficiary of his wife's two-million dollar life insurance policy. A search of the couple's home reveals a copy of *Laci: Inside the Laci Peterson Murder*,² a true crime novel about a man convicted of killing his wife, as well as a first-aid book that includes chest diagrams and a chapter on treating gunshot wounds to the chest. The husband is charged with his wife's murder. At trial, the prosecution

1. This hypothetical is loosely based upon the true story of Justin and April Barber, who were shot on a Florida beach in 2002. See Dennis Murphy, *Murder in the Moonlight*, MSNBC, Sept. 8, 2006, <http://www.msnbc.msn.com/id/14738060/>. During Justin's trial for April's murder, the prosecution introduced evidence that Justin had conducted a Google search for the terms "trauma," "cases," "gunshot," "right," and "chest" six months prior to the shooting. *Id.* The prosecution proposed a theory that Justin, who had sustained wounds only on the right side of his chest, had murdered April and shot himself to conceal the crime. Largely on the strength of this evidence, Justin was convicted of murdering his wife. *Id.*

2. MICHAEL FLEEMAN, *LACI: INSIDE THE LACI PETERSON MURDER* (2003).

offers the theory that the defendant killed his wife and then shot himself to make his robbery story seem more plausible. To prove the defendant's intent to commit murder, the prosecution offers the first-aid book and the true crime novel into evidence. Citing the Ninth Circuit's decision in *United States v. Curtin*,³ the court admits both books over the defendant's objections. The defendant is convicted.

Think about the books you have on your bookshelf. If you were charged with a crime, could your reading material be used against you at trial under certain circumstances? In light of *Curtin*,⁴ should you reconsider purchasing a copy of *The Bad Girl's Guide to the Open Road*?⁵ Should you throw out your copy of *How to Pad Your Expense Report . . . And Get Away With It!*?⁶ Could your copy of *Crime and Punishment*⁷ prove the intent element of a murder prosecution? Could *Les Miserables*⁸ prove your intent to commit theft? When appellate courts uphold the admission of reading material to prove an element of a crime, they emphasize that the law does not criminalize the possession of reading material itself.⁹ Closer examination, however, reveals that a defendant is punished for his literary choices anytime a jury infers criminal intent from the defendant's lawful exercise of his First Amendment rights.¹⁰ The potential introduction of reading material as evidence of a defendant's intent can chill the exercise of First Amendment rights and discourage individuals from reading books that

3. 489 F.3d 935 (9th Cir. 2007) (en banc).

4. *Id.* at 956 (holding that a defendant's reading material may be admissible to prove his or her intent to commit a crime).

5. CAMERON TUTTLE & SUSANNAH BETTAG, *THE BAD GIRL'S GUIDE TO THE OPEN ROAD* (Chronicle Books 1999). This tongue-in-cheek manual for women traveling on road trips together includes advice on multiple ways to avoid being cited for a speeding ticket or arrested for DUI, as well as information on "non-gun weapons you already own." *Id.* at 94.

6. EMPLOYEE X, *HOW TO PAD YOUR EXPENSE REPORT . . . AND GET AWAY WITH IT!* (Easy Money Press rev. ed. 2003). In addition to offering advice on the best ways to pad an expense report, this book also offers advice on the best excuses to use if the reader gets caught. In a trial for embezzlement, this book could be admissible to prove an individual's intent to embezzle funds. *See Curtin*, 489 F.3d at 956.

7. FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Sidney Monas, trans., Signet Classics 2006) (1866).

8. VICTOR HUGO, *LES MISERABLES* (Lee Fahnestock & Norman MacAfee, trans., Signet Classics 1987) (1862).

9. *See Curtin*, 489 F.3d at 956; *United States v. Salameh*, 152 F.3d 88, 111–12 (2d Cir. 1998).

10. Helen A. Anderson, *The Freedom to Speak and the Freedom to Listen: The Admissibility of the Criminal Defendant's Taste in Entertainment*, 83 OR. L. REV. 899, 933 (2004).

could be considered incriminating.¹¹ Because free speech is “the matrix, the indispensable condition, of nearly every other form of freedom,”¹² courts should be wary of any practice that infringes upon or chills this right.¹³

In *Curtin*, the Ninth Circuit, sitting en banc, upheld the practice of admitting reading material under Federal Rule of Evidence (Rule) 404(b) to prove the defendant's intent to commit the charged crime.¹⁴ This Note asserts that cases considering the admissibility of reading material have failed to provide a consistent framework for analyzing this kind of evidence. These cases have also exacerbated existing confusion about the distinction between a defendant's propensity to commit a crime and his intent to do so. Part I provides an overview of the various ways in which prosecutors use a defendant's reading material in federal court to prove the defendant's criminal intent, as well as some of the evidentiary arguments defendants offer to exclude such evidence. Part II focuses on the use of reading material in the Ninth Circuit, analyzing *Curtin* and the case it overruled, *Guam v. Shymanovitz*.¹⁵ Part III discusses the reasoning of the *Curtin* opinion, concluding that the court erred by failing to consider whether the admitted reading material violated the 404(b) propensity rule. Finally, Part IV suggests a framework for evaluating the admissibility of reading material.

11. See *Curtin*, 489 F.3d at 959 (Kleinfeld, J., concurring) (“We ought to be wary when the government wants to use what people read against them Readers should not have to hide what they read to be safe from the government.”); see also *Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998) (“Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct To allow prosecutors to parade before the jury snippets from a defendant's library . . . would compel *all* persons to choose the contents of their libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith prosecutions.”), *overruled by* United States v. *Curtin*, 489 F.3d 935 (9th Cir. 2007) (en banc).

12. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); see also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read”).

13. See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002) (“Any governmental action that interferes with the willingness of customers to purchase books, or booksellers to sell books . . . implicates First Amendment concerns.”); see also *United States v. Giese*, 597 F.2d 1170, 1209 (9th Cir. 1979) (Hufstедler, J., dissenting) (“Freedom of speech would be totally destroyed if the shadow of the prosecutor fell across the pages of the books we read.”).

14. *Curtin*, 489 F.3d at 956.

15. 157 F.3d 1154 (9th Cir. 1998).

I. COURTS HAVE ADMITTED READING MATERIAL AS EVIDENCE WITHOUT ESTABLISHING A CLEAR FRAMEWORK FOR EVALUATING ADMISSIBILITY

For decades, prosecutors have offered reading material as evidence, most often to prove the defendant's state of mind.¹⁶ Extrinsic evidence¹⁷ of a defendant's state of mind becomes particularly important when the defendant places his state of mind at issue, perhaps by asserting that he did not intend to commit the crime but merely fantasized about doing so.¹⁸ When a defendant makes his state of mind a disputed issue, his mental state must be ascertained by drawing inferences from his conduct.¹⁹ Possession of lawful reading material can be a valuable tool for prosecutors because it is considered extrinsic conduct that can provide insight into the actor's state of mind.²⁰

A survey of relevant case law reveals that there is no clear standard for the admission of reading material as evidence in federal court. Although the First Amendment protects an individual's right to read anything he or she wishes to read,²¹ "[t]he First Amendment . . . does not

16. See *infra* Part I.A–C.

17. "[E]vidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990). Evidence that does not meet this test is considered "extrinsic." *Id.*

18. See *Huddleston v. United States*, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."); see also *Curtin*, 489 F.3d at 952 ("We routinely have held that circumstances surrounding an alleged crime become *more* relevant when the defendant makes his intent a disputed issue."); Donald S. Yamagami, Comment, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 564–65 (2001) (discussing the unique challenges of proving a defendant's intent when the defendant argues that he only fantasized about committing the crime but did not intend to commit it); Tatsha Robertson, *Across the Nation, School Attack Plots Pose Legal Challenge*, BOSTON GLOBE, Dec. 16, 2001, at A1 (discussing challenges in prosecuting a case where the defendant asserts that he did not intend to bomb the school but rather only fantasized about doing so); Ihosvani Rodriguez, *Net Sex Cases Tougher to Win; Bexar Prosecutors Haven't Been Seeing as Much Success Lately*, SAN ANTONIO EXPRESS-NEWS, Jan. 25, 2004, at 5B (discussing the challenges prosecutors face when a defendant charged with a sex crime argues that he did not intend to commit the charged act).

19. See *Huddleston*, 485 U.S. at 685.

20. See *Curtin*, 489 F.3d at 948–50 (discussing defendant's argument that he never intended to have sexual relations with a minor and the prosecution's subsequent introduction of stories found on the defendant's person that involved adults engaging in sexual relations with minors).

21. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”²² For this reason, First Amendment challenges to the introduction of reading material as evidence have been largely unsuccessful.²³ With that avenue closed, defendants must resort to exclusion through the Federal Rules of Evidence, arguing that evidence of their literary habits is either irrelevant under Rules 401 and 402, unduly prejudicial under Rule 403, an impermissible use of character evidence under Rule 404, or inadmissible under a combination of these rules.²⁴

Reading material has been excluded as irrelevant under Rules 401 and 402 when the charged crime did not include intent as an element.²⁵ If a court accepts the relevancy of the evidence, a defendant may argue that the reading material is unfairly prejudicial under Rule 403.²⁶ Appellate courts, however, rarely find that the admission of reading material constituted reversible error.²⁷ Even if found to be unfairly prejudicial, the admission of reading material rarely constitutes reversible error.²⁸ Finally, two courts of appeal outside the Ninth Circuit have considered whether the admission of lawful reading material violates Rule 404's prohibition against character evidence, but have reached opposing conclusions.²⁹ The Eighth Circuit held that the defendant's reading material did violate the propensity rule, while the Sixth Circuit held that the reading material was properly offered under the 404(b) intent exception.³⁰

22. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

23. *See* *United States v. Allen*, 341 F.3d 870, 886 n.23 (9th Cir. 2003) (rejecting the defendant's argument that the introduction of Nazi-related literature violated his rights to free speech and association under the First Amendment); *United States v. Salameh*, 152 F.3d 88, 111–12 (2d Cir. 1998) (rejecting the defendant's argument that the admission of terrorist reading material violated his First Amendment rights).

24. *See infra* Parts I.A–C and accompanying text.

25. *See infra* note 36 and accompanying text.

26. *See infra* notes 49–53.

27. *See infra* note 49 and accompanying text.

28. *See infra* note 53 and accompanying text.

29. *See* *United States v. Johnson*, 439 F.3d 884 (8th Cir. 2006); *United States v. Stotts*, 176 F.3d 880 (6th Cir. 1999).

30. *Johnson*, 439 F.3d at 889; *Stotts*, 176 F.3d at 890–91; *see infra* notes 73–87 and accompanying text.

A. *The Relevance of Reading Material Under Rules 401 and 402 Depends Primarily on Whether Intent Is an Element of the Charged Crime*

Rules 401 and 402 establish the general framework for the admission of relevant evidence. Rule 402 mandates that relevant evidence should be admitted at trial, unless excluded by another evidentiary rule, such as Rule 403 or 404, by the United States Constitution, or by an Act of Congress.³¹ Under Rule 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”³² Therefore, relevant evidence must fulfill two prongs: the materiality prong and the probative worth prong.³³ For evidence to be material, it must bear on an element of a charge or defense.³⁴ Once the materiality prong is satisfied, “[t]he probative worth prong sets an extremely low standard” for admission of evidence, requiring only that the evidence have any tendency to make a material fact more or less probable.³⁵

Courts have rejected the defendant’s reading materials as immaterial under Rule 401 when the charged crime does not require the prosecution to prove the defendant’s state of mind.³⁶ For example, in *United States v. Ellis*,³⁷ the prosecution successfully introduced the defendant’s copy of

31. FED. R. EVID. 402.

32. FED. R. EVID. 401.

33. See Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 540–41 (2004); 1 MCCORMICK ON EVIDENCE § 185, at 637 (John W. Strong, et al. eds., 5th ed. 1999) [hereinafter MCCORMICK ON EVIDENCE].

34. See Nicolas, *supra* note 33, at 540–41; MCCORMICK ON EVIDENCE § 185, *supra* note 33, at 637.

35. Nicolas, *supra* note 33, at 541; see also MCCORMICK ON EVIDENCE § 185, *supra* note 33, at 640–41 (“An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence.”).

36. See *United States v. Holt*, 170 F.3d 698, 702 (7th Cir. 1999) (holding that the trial court improperly admitted evidence that the defendant sold *The Anarchist Cookbook* in his store because the book was “entirely unrelated” to the charged crime of gun possession); *United States v. Ellis*, 147 F.3d 1131, 1135 (9th Cir. 1998) (rejecting the admission of a book about guns and firearms where the defendant was charged with possession of guns and firearms but intent was not an element of the charge); *United States v. McCrea*, 583 F.2d 1083, 1086 (9th Cir. 1978) (expressing vexation at the prosecution’s introduction of reading material that was “entirely unnecessary” to support the charged crime of possessing an unregistered destructive device).

37. 147 F.3d 1131 (9th Cir. 1998).

*The Anarchist Cookbook*³⁸ to show that the defendant intended to commit the charged crime of knowingly possessing stolen explosives.³⁹ On appeal, a Ninth Circuit panel reversed the defendant's conviction because intent was not an element of the charged crime and "[o]ne cannot logically infer *possession* of firearms and explosives . . . from mere possession of books about guns, bombs, and related subjects."⁴⁰ However, once the evidence is found to be material, the low probative worth standard, which requires only that the evidence have "any tendency"⁴¹ to make a material fact "more probable or less probable,"⁴² provides little ground for exclusion.⁴³

B. When Applying Rule 403, Appellate Courts Rarely Find Abuse of Discretion or Reversible Error in the Introduction of Reading Material

When a trial court has deemed a defendant's reading material relevant under Rules 401 and 402, the evidence still may be excluded under Rule 403.⁴⁴ Rule 403 permits a trial court to exclude evidence when the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁴⁵ The rule grants considerable discretion to the trial judge to make this determination,⁴⁶ and appellate

38. *The Anarchist Cookbook*, first published by William Powell in 1971 to protest the United States' involvement in the Vietnam War, contains instructions for manufacturing explosives, drugs and other illegal items. WILLIAM POWELL, *THE ANARCHIST COOKBOOK* (1971).

39. *Ellis*, 147 F.3d at 1134–35.

40. *Id.* at 1135 (quoting *United States v. Giese*, 597 F.2d 1170, 1187 (9th Cir. 1979)).

41. FED. R. EVID. 401.

42. *Id.*

43. *See* *United States v. Patterson* 431 F.3d 832, 840 (5th Cir. 2005) (holding that an admitted magazine was probative of whether the defendant used marijuana); *United States v. Stotts*, 176 F.3d 880, 891 (6th Cir. 1999) (holding that bomb-making books were probative of whether the defendant intended to use the components found in his home to create destructive devices); *United States v. Ford*, 22 F.3d 374, 381–82 (1st Cir. 1994) (holding that the defendant's book about methamphetamine manufacturing was a "tool of the drug trafficking trade" and therefore probative of his intent to distribute cocaine and marijuana).

44. FED. R. EVID. 403.

45. *Id.*

46. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 4.12, at 632–33 (3d ed. 2007).

courts will not find error in the admission of evidence unless the trial court committed an “abuse of discretion.”⁴⁷

Once a trial court admits reading material into evidence, a defendant faces a difficult road on appeal. Because Rule 403 requires that the danger of unfair prejudice “substantially outweigh” the probative value of the evidence, an appellate court is unlikely to overturn a trial judge’s decision to admit reading material that is highly probative of the defendant’s intent to commit a crime.⁴⁸ Furthermore, the deferential standard of review means that an appellate court will rarely find that the trial court erred in admitting reading material, even when the resulting potential for prejudice to the defendant is very high.⁴⁹ For example, in *United States v. Ford*,⁵⁰ the First Circuit held that the trial court did not abuse its discretion by allowing the prosecution to admit the defendant’s book, *Secrets of Methamphetamine Manufacture*,⁵¹ to prove the defendant’s intent to distribute cocaine and marijuana.⁵² Even if an appellate court does find that a trial court abused its discretion and thereby committed error, a defendant’s conviction will not be overturned if the error is deemed “harmless.”⁵³ Once a trial court admits reading

47. *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997); *see also* *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005) (“An abuse of discretion arises when the district court’s decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.”).

48. *See* *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998) (upholding admission of a bomb-making book that provided an exact blueprint for the bomb that the defendants were charged with detonating because the probative value of the evidence was “significant”).

49. *See, e.g.*, *United States v. Patterson*, 431 F.3d 832, 839–40 (5th Cir. 2005) (holding that trial court did not abuse its discretion in admitting a copy of *High Times Magazine* because defendant’s possession of the magazine made it more likely that the defendant used marijuana); *United States v. Allen*, 341 F.3d 870, 887 n.25 (9th Cir. 2003) (holding that the trial court did not abuse its discretion in admitting the defendants’ Nazi-related literature “in light of the government’s heavy burden of proving racial animus”); *United States v. Viehhaus*, 168 F.3d 392, 398 (10th Cir. 1999) (holding that the district court did not abuse its discretion in finding that the probative value of “racist and inflammatory literature” outweighed any prejudicial effect); *United States v. Ford*, 22 F.3d 374, 381–82 (1st Cir. 1994) (holding that the prejudicial effect of *Secrets of Methamphetamine Manufacture* did not substantially outweigh the probative value of the book, even though the defendant was not charged with distributing or manufacturing methamphetamine, because the book is “a tool of the drug trafficking trade”).

50. 22 F.3d 374 (1st Cir. 1994).

51. UNCLE FESTER, SECRETS OF METHAMPHETAMINE MANUFACTURE (Festering Publications 7th ed. 2005).

52. *Ford*, 22 F.3d at 381–82.

53. *See, e.g.*, *United States v. Walters*, 351 F.3d 159, 168–69 (5th Cir. 2003) (holding that admission of *The Anarchist Cookbook* did not support reversal in light of the other evidence against the defendant); *United States v. Rogers*, 270 F.3d 1076, 1081 (7th Cir. 2001) (holding that the

material, the defendant will have difficulty showing either that the trial court admitted the material in error or that an erroneous admission substantially affected the trial outcome.⁵⁴

C. Even if Reading Material Is Highly Relevant, Its Introduction Violates the Rule 404 Propensity Rule if It Is Used to Show that the Defendant Had a Propensity to Commit the Charged Crime

Rule 404, the so-called “propensity rule”⁵⁵ forbids the admission of evidence of a defendant’s character or actions when such evidence is used to show that the defendant has a propensity to commit a certain type of crime.⁵⁶ The term “character evidence,” which is often used synonymously with the term “propensity evidence,” is generally defined as “evidence offered solely to prove a person acted in conformity with a trait of character on a given occasion.”⁵⁷ For example, evidence of a defendant’s criminal history is inadmissible if it is used to show that the defendant has previously engaged in criminal behavior and is therefore more likely to have committed the charged crime.⁵⁸ The Rule does not reject character evidence on relevancy grounds.⁵⁹ In fact, the evidence may be highly relevant. Other things being equal, the fact that a person committed a crime in the past makes him “statistically more likely than a

erroneous admission of irrelevant, misleading, and prejudicial portions of *The Anarchist Cookbook*, including the title, did not justify reversal of the defendant’s conviction); *United States v. McCrea*, 583 F.2d 1083, 1086 (9th Cir. 1978) (holding that the erroneous admission of irrelevant and prejudicial literature was harmless in light of “overwhelming evidence which [was] properly admitted”). *But see, e.g., United States v. Ellis*, 147 F.3d 1131, 1136–37 (9th Cir. 1998) (reversing the defendant’s conviction because there was “grave doubt” as to whether the erroneous and prejudicial admission of the defendant’s book affected the verdict) (citing *United States v. Collicott*, 92 F.3d 973, 984 (9th Cir. 1996)).

54. *See supra* notes 49–53 and accompanying text.

55. *E.g., United States v. Coleman*, 22 F.3d 126, 132 (7th Cir. 1994); *Thompson v. United States*, 546 A.2d 414, 418 (D.C. 1988); 2 WEINSTEIN’S FEDERAL EVIDENCE § 404.10[1], at 404-12.1 (Joseph M. McLaughlin, et. al. eds., 2d ed. 2007).

56. *See* FED. R. EVID. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .”); FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

57. 1 MCCORMICK ON EVIDENCE § 186, *supra* note 33, at 649; *see also United States v. Johnson*, 439 F.3d 884, 887 (8th Cir. 2006).

58. *See Johnson*, 439 F.3d at 887; *United States v. Sampson*, 385 F.3d 183, 192 (2d Cir. 2004).

59. *Michelson v. United States*, 335 U.S. 469, 475–76 (1948). *Michelson* was decided before the Federal Rules of Evidence were introduced but has been cited with approval in cases decided after the Federal Rules were adopted. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988).

law-abiding citizen to commit a second similar crime.”⁶⁰ Rather, the propensity rule is a policy decision, grounded in the common law,⁶¹ that supports “the underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is.”⁶²

There are exceptions to the propensity rule. For instance, Rule 404(b), a “rule of inclusion,”⁶³ allows a defendant’s “other crimes, wrongs, or acts” to be introduced into evidence when the prosecution does not offer the evidence to show that the defendant has a propensity to act in a certain way.⁶⁴ This rule only governs extrinsic evidence; it does not provide a framework for analyzing evidence that is “inextricably intertwined” with the charged crime.⁶⁵ Although Rule 404(b) is most often used to introduce evidence of illegal acts, such as a prior criminal conviction, a defendant’s possession of lawful reading material has also been admitted through this rule because Rule 404(b) applies to all prior acts, not merely those that are illegal.⁶⁶ The language of Rule 404(b) suggests several permissible purposes for which other crimes, wrongs, or acts may be admitted as evidence: to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁶⁷ Thus, when a defendant argues that his reading material is

60. *Thompson v. United States*, 546 A.2d 414, 418 (D.C. Cir. 1988).

61. *Id.*

62. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013–14 (9th Cir. 1995) (quoting *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993)); *see also Thompson*, 546 A.2d at 419 (“[T]he now well-entrenched propensity rule is thought to be indispensable to the presumption of innocence.”).

63. *United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007) (en banc); *see also United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (“The Second Circuit evaluates Rule 404(b) evidence under an ‘inclusionary approach’ and allows evidence ‘for any purpose other than to show a defendant’s criminal propensity.’”) (quoting *United States v. Pitre*, 960 F.2d 1112, 1118 (2d Cir. 1992)). *But see* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 432 (1978 & Supp. 2007) (“In retrospect, the phrasing of the inclusionary version [of Rule 404(b)] in the main volume [of FEDERAL PRACTICE AND PROCEDURE] is unfortunate as it has, perhaps, led some courts to describe Rule 404(b) as admitting all evidence of other crimes ‘unless the evidence tends to prove only the defendant’s criminal disposition.’”).

64. *See* FED. R. EVID. 404(b).

65. *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987) (quoting *United States v. Aleman*, 592 F.2d 881, 885 (5th Cir. 1979)); *see also United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996). “[E]vidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.” *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990). Evidence that does not meet this test is considered “extrinsic.” *Id.*

66. *Curtin*, 489 F.3d at 943 n.3.

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

impermissible character or propensity evidence, the prosecution may respond by offering the evidence under Rule 404(b)'s intent exception.⁶⁸

Several courts have recognized that the Rule 404(b) intent exception has the capacity to swallow the general rule against admission of propensity evidence.⁶⁹ The exception bleeds into the rule because it can be difficult, perhaps even impossible, to distinguish the intent to commit a criminal act from a predisposition to perform criminal acts.⁷⁰ “Where the prior crime evidence is offered to prove the defendant’s ‘tendency’ or ‘mental attitude (intent) along that particular line of crime,’ we are admitting evidence ‘*precisely* for the reason that the original rule excluded it.’”⁷¹ To guard against the admission of propensity evidence, the critical inquiry, therefore, is not whether the evidence has any tendency to prove a material issue, such as intent, but rather whether the evidence “proves a material issue without requiring any inference to the defendant’s criminal disposition.”⁷²

Courts have excluded evidence if conclusions about an individual’s intent first require an inference about his character or propensity to act in a certain way.⁷³ For example, in *United States v. Johnson*,⁷⁴ an Eighth

68. See *Curtin*, 489 F.3d at 942.

69. E.g., *United States v. Matthews*, 431 F.3d 1296, 1313 n.1 (11th Cir. 2005) (Tjoflat, J., concurring); see also *United States v. Macedo*, 371 F.3d 957, 966 (7th Cir. 2004) (“We have long recognized that the permissible use of prior bad act evidence to prove intent or lack of mistake may have the potential impermissible side effect of allowing the jury to infer criminal propensity.”).

70. *Thompson v. United States*, 546 A.2d 414, 420 (D.C. Cir. 1988); see also *United States v. Jones*, 389 F.3d 753, 756 (7th Cir. 2004) (“Propensity and intent are two different things, however, even if only a fine line sometimes distinguishes them.”), *vacated and remanded on other grounds*, 545 U.S. 1125 (2005).

71. Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 158 (1989) (quoting Julius Stone, *The Role of Exclusion of Similar Fact Evidence in America*, 51 HARV. L. REV. 988, 1032–33 (1938)).

72. WRIGHT & GRAHAM, *supra* note 63, at 432; see also *Matthews*, 431 F.3d at 1313 n.1 (Tjoflat, J., concurring) (“If the inferential chain must run through the defendant’s character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line.”); Ordovery, *supra* note 71, at 158.

73. See *United States v. Johnson*, 439 F.3d 884, 887–89 (8th Cir. 2006) (holding that pornographic stories depicting violence against young girls were inadmissible under Rule 404(b) to prove that the defendant knowingly and intentionally possessed child pornography because the conclusion that the defendant intended to possess child pornography required the conclusion that the defendant had a “predisposition” or “inherent tendency” to possess child pornography); *United States v. Heidebur*, 122 F.3d 577, 581 (8th Cir. 1997) (holding that the evidence that the defendant abused his twelve-year-old stepdaughter was inadmissible to prove that he knowingly possessed pornographic photographs of her because the conclusion about the defendant’s state of mind required the conclusion that he had a propensity to commit that kind of crime).

74. 439 F.3d 884 (8th Cir. 2006).

Circuit panel excluded evidence that was offered to show the defendant's intent, but merely showed the defendant's propensity to commit the charged crime.⁷⁵ In *Johnson*, the prosecution admitted the defendant's lawful reading material, which described the violent rapes of two adolescent girls, to show that the defendant knowingly possessed unlawful photographs of minors "engaging in sexually explicit conduct."⁷⁶ Although the defendant did not dispute that he downloaded the child pornography files onto his computer, he argued that he "inadvertently downloaded the images while searching for legitimate online material."⁷⁷ On appeal, the prosecution asserted that the similarities between the stories and the violent acts depicted in some of the pictures showed that the defendant had an interest in that kind of sexual material and was therefore more likely to possess child pornography.⁷⁸ The court disagreed, holding that the material was inadmissible under Rule 404(b) because the stories did not show the defendant's knowledge or intent, but rather only showed that the defendant was the type of person who would possess child pornography.⁷⁹ Additionally, the court found that the admission of the material was not harmless error and ordered a new trial.⁸⁰

In contrast to the Eighth Circuit's analysis, the Sixth Circuit upheld the admission of reading material under Rule 404(b)'s intent exception without evaluating whether the evidence required an inference regarding the defendant's propensity to commit crimes.⁸¹ In *United States v. Stotts*,⁸² the defendant was charged with using or carrying a destructive device during and in relation to a drug trafficking offense, as well as using or carrying an unassembled destructive device.⁸³ Federal agents raided the defendant's home after firemen observed an explosion at the

75. *Id.* at 888–89.

76. *See* 18 U.S.C.A. § 2252 (West 2008); *see also Johnson*, 439 F.3d at 887.

77. *Id.* at 888.

78. *Id.* at 887–88.

79. *Id.*

80. *Id.* at 889.

81. *See United States v. Stotts*, 176 F.3d 880, 890–91 (6th Cir. 1999). The Second Circuit has also upheld the admission of evidence that the defendant possessed child pornography under the 404(b) intent exception. *See United States v. Brand*, 467 F.3d 179, 199 (2d Cir. 2006). Because child pornography is not lawful reading material, its possession and admission are beyond the scope of this article.

82. 176 F.3d 880 (6th Cir. 1999).

83. *Id.* at 884.

defendant's home.⁸⁴ The Sixth Circuit panel held that “various bomb-making books” found in the defendant's residence were properly admitted to show that the explosion was caused by a destructive device, rather than the accidental commingling of chemicals, and that the defendant intended to build another destructive device using incendiary components found in his home.⁸⁵ The books included *The Anarchist Cookbook*, *Poor Man's James Bond*, and *The Black Book of Revenge—The Complete Manual of Hard-Core Dirty Tricks and Schemes*.⁸⁶ The appellate court noted that the books “instruct how to make bombs from common, everyday materials,” but neither it nor the district court discussed whether any of the books found in the defendant's apartment actually contained instructions for assembling bombs from the physical materials found in the apartment.⁸⁷

In sum, the circuits that have addressed this issue have held that a defendant's reading materials are admissible to show the defendant's intent when intent is an element of the charged crime.⁸⁸ However, at least one court has rejected a defendant's reading material on the grounds that the reading material showed the defendant's propensity to commit a crime, rather than his intent to do so.⁸⁹

II. *UNITED STATES v. CURTIN* OVERRULED A NINTH CIRCUIT BAN ON THE ADMISSION OF READING MATERIAL AS EVIDENCE OF A DEFENDANT'S CRIMINAL INTENT

The use of reading material as evidence of a defendant's intent has created controversy in the Ninth Circuit. This controversy culminated in a closely decided en banc opinion that firmly established the admissibility of reading material under Rule 404(b).⁹⁰ In 1998, *Guam v. Shymanovitz* held that reading material was inadmissible to prove a defendant's intent to commit a crime.⁹¹ The court rejected the evidence

84. *Id.* at 883.

85. *Id.* at 890–91.

86. *Id.* at 883.

87. *See id.* at 883–84, 890–91.

88. *See supra* Part I.A.

89. *See United States v. Johnson*, 439 F.3d 884, 888–89 (8th Cir. 2006).

90. *United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007).

91. *Guam v. Shymanovitz*, 157 F.3d 1154, 1160 (9th Cir. 1998), *overruled by United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007) (en banc).

on several grounds: irrelevant under Rule 401,⁹² unduly prejudicial under Rule 403,⁹³ and as evidence of the defendant's character in violation of Rule 404.⁹⁴ Relying primarily on *Shymanovitz*, a Ninth Circuit panel in *United States v. Curtin* overturned the defendant's conviction for crossing state lines with intent to have sexual relations with a minor because the trial court had erroneously admitted the defendant's reading material as evidence of his intent.⁹⁵ The Ninth Circuit agreed to hear the case en banc, eventually overruling *Shymanovitz* and upholding the admission of reading material under the Rule 404(b) intent exception.⁹⁶

A. *Guam v. Shymanovitz Questioned the Admissibility of Reading Material to Prove Criminal Intent and Imposed a Ban on the Introduction of Reading Material Through Rule 404(b)*

In *Shymanovitz*, the Ninth Circuit addressed the question of whether sexually explicit magazines found in the defendant's apartment were admissible under Rule 404(b) to show that the defendant "intentionally engaged in sexual contact for the purpose of sexual arousal or gratification."⁹⁷ The defendant, a middle school guidance counselor, was charged with sexually abusing eleven boys.⁹⁸ During trial, a police officer described the graphic content of the magazines in detail, including an article about a father and son engaging in sexual conduct, and an article about a priest and a young boy engaging in sexual conduct.⁹⁹ The defendant was convicted and sentenced to serve four consecutive life sentences plus twenty-one years.¹⁰⁰ Appealing his conviction, the defendant argued that the trial court abused its discretion in admitting testimony about his sexually explicit magazines.¹⁰¹

On appeal, the Ninth Circuit addressed the prosecution's argument that the magazines were admissible under Guam's equivalent to Rule

92. *Id.* at 1158.

93. *Id.* at 1160.

94. *Id.* at 1159.

95. *Id.* at 1092.

96. *United States v. Curtin*, 489 F.3d 935, 953–56 (9th Cir. 2007).

97. *Shymanovitz*, 157 F.3d at 1157.

98. *Id.* at 1155.

99. *Id.* at 1155–56.

100. *Id.* at 1156–57.

101. *Id.* at 1157.

404(b)¹⁰² to prove the defendant's intent to engage in sexual contact for the purpose of sexual arousal or gratification.¹⁰³ The court rejected this argument, holding that while the prosecution had to prove that the defendant intended to touch the victims, the elements of the sexual crime did not require the prosecution to prove that the defendant intended to touch the victims for the purpose of sexual arousal or gratification.¹⁰⁴

After analyzing the intent element of the criminal statute, the court proceeded to question whether possession of reading material could *ever* be relevant to show a defendant's intent to engage in a specific kind of conduct.¹⁰⁵ The court observed that, "at the very most," the reading materials tended to show that the defendant had an interest in gay male erotica, "and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind."¹⁰⁶ Furthermore, the court held that "possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b)" because Rule 404(b) contemplates only the introduction of "bad" acts.¹⁰⁷ According to the court, "a wide gulf separates the act of *possessing* written descriptions or stories about criminal conduct from the act of *committing* the offenses described."¹⁰⁸ Finally, the court rejected the evidence under Rule 403, asserting that the evidence's probative value was substantially outweighed by the danger of unfair prejudice,¹⁰⁹ and reversed the defendant's conviction.¹¹⁰

102. 6 GUAM CODE ANN. § 404(b) (2006) is a rule of evidence identical to FED. R. EVID. 404(b) in all pertinent respects.

103. *Shymanovitz*, 157 F.3d at 1157.

104. *Id.* at 1158 ("[T]he charges based on sexual contact require the government to prove that any touching on Shymanovitz' part was intentional, and that a reasonable person could construe the touching to be for a sexual purpose The test, under the sexual contact statute, is an objective not a subjective one. In short, it is the character of the touching that is at issue, not the purpose of the intentional toucher.").

105. *Id.* ("The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401."); *see also id.* at 1158 n.8 ("[W]e disagree with [other] cases' holdings that a defendant's possession of reading materials depicting or describing criminal conduct tends to establish that the defendant engages in or has engaged in such conduct.").

106. *Id.* at 1158–59.

107. *Id.* at 1159. The court does not explicitly define a "bad" act, but suggests that it encompasses "certain types of conduct generally condemned by society." *See id.*

108. *Id.*

109. *Id.* at 1160.

110. *Id.* at 1161.

B. *In United States v. Curtin, an En Banc Ninth Circuit Panel Unequivocally Upheld the Admissibility of Reading Material Under Rule 404(b)*

United States v. Curtin involved a sting operation designed to apprehend sexual predators who targeted minors over the Internet.¹¹¹ The defendant, a California resident, had several Internet chat conversations with an adult detective posing as “Christy,” a fourteen-year-old girl.¹¹² After several conversations, the defendant and “Christy” agreed to meet in Las Vegas, Nevada.¹¹³ When the defendant arrived at the agreed upon location, law enforcement officials arrested him and charged him with crossing state lines with the intent to engage in a sexual act with a juvenile in violation of 18 U.S.C. § 2423(b).¹¹⁴ At trial, the defendant argued that he did not have the requisite intent because he thought the individual with whom he corresponded was an adult woman pretending to be a young girl.¹¹⁵

To rebut this defense, the prosecution successfully introduced graphic sexual stories that were found on a personal digital assistant (PDA) in the defendant’s possession at the time of his arrest.¹¹⁶ The stories contained a wide variety of sexually deviant acts, and the prosecution specifically sought to introduce stories that involved incestuous sexual relations between adults and minors.¹¹⁷ The trial court instructed the jury to consider the stories for the limited purpose of evaluating the defendant’s intent, not his proclivity to commit illicit sexual acts.¹¹⁸ Curtin was convicted and appealed his conviction to the Ninth Circuit, arguing that his stories were improperly admitted propensity evidence under Rule 404(b) and that their admission was unduly prejudicial under Rule 403.¹¹⁹ A three-judge panel interpreted *Shymanovitz* as imposing a ban on the introduction of reading material through the Rule 404(b) intent exception.¹²⁰ Relying on *Shymanovitz*, the appellate court held that

111. *United States v. Curtin*, 489 F.3d 935, 936 (9th Cir. 2007) (en banc).

112. *Id.* at 937–38.

113. *Id.*

114. *Id.* at 938.

115. *Id.* at 938–39.

116. *Id.* at 939–40.

117. *Id.* at 941–42.

118. *Id.* at 941.

119. *Id.* at 942.

120. *See United States v. Curtin*, 443 F.3d 1084, 1090–94 (9th Cir. 2006), *rev’d en banc*, 489

the stories were “no more than character evidence introduced to show propensity,” and remanded the case for a new trial.¹²¹

The Ninth Circuit granted rehearing en banc to reevaluate the admissibility of reading material.¹²² In the opinion written by Judge Trott, who dissented in the original *Curtin* decision, the eight-judge majority explicitly rejected the *Shymanovitz* rule requiring that acts admitted under Rule 404(b) be “bad” acts,¹²³ as well as any bright-line rule excluding literature as evidence of a defendant’s intent to commit a crime.¹²⁴ Citing *Huddleston v. United States*¹²⁵ throughout the opinion, the *Curtin* court also held that the defendant’s reading material became more relevant because he had put his intent “at issue” by asserting that he had merely fantasized about having sexual relations with minors.¹²⁶ Using the Rule 401 standard of admissibility—that the evidence have any tendency to make a material fact more or less probable than it would be without the evidence—the court concluded that the stories were relevant and admissible to show the defendant’s intent to engage in

F.3d 935 (9th Cir. 2007). Although the *Curtin* panel interpreted *Shymanovitz* as imposing a complete ban on the use of a defendant’s reading material to show his or her intent to commit a crime, a Ninth Circuit panel admitted reading material as evidence of a defendant’s intent five years after *Shymanovitz* was decided. See *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003). In *Allen*, the court upheld the admission of the defendants’ “Nazi-related literature” over the defendants’ First Amendment and Rule 403 objections. *Id.* at 885–88. The defendants were charged with “intimidating or interfering with a person’s housing rights on account of ‘race’ or ‘color.’” *Id.* at 887. Distinguishing *Shymanovitz*, the court observed, “[k]ey to our reasoning [in *Shymanovitz*] was the fact that the testimony was highly prejudicial and was not relevant to proving any of the elements of the crime for which the defendant was convicted.” *Id.* at 887 n.25. Unlike *Shymanovitz*, the charged crime in *Allen* required the government to prove that the defendant’s actions were racially motivated. *Id.* The court did not consider Rule 404(b) in reaching its decision, suggesting that *Allen* characterized the *Shymanovitz* Rule 404(b) discussion as dicta. See *id.*

121. *Curtin*, 443 F.3d at 1093 n.2.

122. *Curtin*, 489 F.3d at 937.

123. *Id.* at 943 n.3 (“The other ‘act’ does not need to be ‘bad,’ just relevant in such a way as to avoid being nothing more than character or propensity evidence.”).

124. *Id.* at 953–56.

125. 485 U.S. 681 (1988). This case resolved a circuit split pertaining to the standard of proof a trial court should apply when evaluating whether a defendant committed the prior act that the prosecution seeks to admit under Rule 404(b). *Id.* at 690–91. The court selected the lesser standard but noted that other safeguards protect a defendant from the prejudicial effects of such evidence. The opinion highlights the propensity rule, specifically the requirement that the evidence be introduced “for a proper purpose,” as one such safeguard. *Id.* at 691.

126. *Curtin*, 489 F.3d at 944–45, 950–52; see also *Huddleston*, 485 U.S. at 685 (“Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.”).

sexual relations with a minor.¹²⁷ The court declined to consider the prosecution's alternate argument that the stories were admissible because they were "inextricably intertwined" with the charged crime.¹²⁸ The court nevertheless reversed the defendant's conviction and remanded his case for a new trial, pursuant to Rule 403, holding that the trial court had abused its discretion by not reading all of the stories before they were admitted.¹²⁹ As a result of the failure to carefully read and redact the stories, irrelevant and extremely prejudicial material had been introduced in addition to the material that pertained directly to the issue of the defendant's intent to engage in sexual relations with a minor.¹³⁰

Five judges concurred in the court's decision to reverse the conviction, but passionately critiqued the majority's interpretation of Rule 404(b).¹³¹ In Judge Kleinfeld's concurring opinion, the "pseudo-dissenters"¹³² expressed concern about setting a precedent that could allow a wide variety of reading material to come in through the court's newly opened door.¹³³ The opinion also questioned the relevance of the stories, asserting that they were fantasy and therefore made it neither more nor less likely that the defendant intended to engage in the acts the stories described.¹³⁴ These judges shied away from a complete ban on the use of reading material as evidence, and distinguished the defendant's stories, which were fantasy, from a how-to manual that could be more probative of a defendant's intent.¹³⁵ Finally, the concurring opinion asserted that because "[p]erverse sexual desire is a

127. *See Curtin*, 489 F.3d at 948.

128. *Id.* at 942 n.2. If the court held that the reading material was "inextricably intertwined" with, or intrinsic to, the charged crime, then Rule 404(b) would not provide a bar to admission of the evidence. *See United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987).

129. *Curtin*, 489 F.3d at 956–59.

130. *Id.* at 957–58.

131. *Id.* at 959–65 (Kleinfeld, J., concurring).

132. Although Judge Kleinfeld ultimately concurred with the majority's disposition of the case, the bulk of his opinion addresses the majority's Rule 404(b) decision. *See id.* Therefore, even though the opinion is technically a concurrence, it reads like a dissent. *See id.*

133. *See id.* at 959 ("Can the government introduce a defendant's copy of *The Monkey Wrench Gang*, *Lolita*, or *Junky*, to prove intent? DVDs of *The Thomas Crown Affair* to prove intent to rob a bank, or *Dirty Harry* to prove intent to deprive someone of civil rights? . . . Readers should not have to hide what they read to be safe from the government.") (citations omitted).

134. *Id.* at 961.

135. *Id.* ("If a person is accused of planting a sophisticated bomb on a train, his possession of an instruction manual and the train schedule might tend to prove his guilt.")

trait of character,” the stories violated Rule 404(b)’s prohibition against evidence introduced to show the defendant’s propensity to commit the crime.¹³⁶

Two brief concurring opinions followed Judge Kleinfeld’s concurrence. Judge Wardlaw, in her opinion, shared Judge Kleinfeld’s concern that “[t]he use of lawful reading material to prove intent is a dangerous business.”¹³⁷ Unlike her colleagues, Judge Wardlaw did not read *Shymanovitz* as imposing a blanket ban on the use of reading material to prove intent.¹³⁸ She supported the admissibility of reading material, provided that the trial judge “carefully weigh[ed]” both the relevance and the prejudicial effects of the evidence.¹³⁹ The four judges who joined Judge Kleinfeld’s concurrence also joined a brief concurrence by Judge McKeown, which asserted that the court reached too far in discussing *Shymanovitz*.¹⁴⁰ According to Judge McKeown, “[t]he bulk of the majority’s discourse [regarding *Shymanovitz* and Rule 404(b)] is dicta”; the court could have and should have disposed of the case purely on the basis of Rule 403.¹⁴¹

In sum, the original *Curtin* opinion interpreted *Shymanovitz* as substantially limiting the admissibility of reading material under Rule 404(b).¹⁴² Re-hearing the case en banc, all fifteen judges agreed to remand the case for a new trial on the basis of the trial court’s harmful Rule 403 error.¹⁴³ Six of the fifteen judges, however, wrote or joined concurrences that sharply criticized the majority’s evaluation of the admissibility of the defendant’s reading material under Rule 404(b).¹⁴⁴ Despite the apprehensions of the concurring judges, the eight-judge majority announced the current rule in the Ninth Circuit: reading material is admissible under Rule 404(b) if it makes a defendant’s

136. *Id.* at 963 (“Using a person’s perverse sexual fantasies to prove action in conformity therewith is exactly what subsection (a) of Rule 404 prohibits. . . . Good prosecution proves that the defendant committed the crime. Bad prosecution proves that the defendant is so repulsive he ought to be convicted whether he committed it or not.”).

137. *Id.* at 966 (Wardlaw, J., concurring).

138. *Id.* at 965–66.

139. *Id.* at 966.

140. *Id.* at 965 (McKeown, J., concurring).

141. *Id.*

142. See *United States v. Curtin*, 443 F.3d 1084, 1091–94 (9th Cir. 2006), *rev’d en banc*, 489 F.3d 935 (9th Cir. 2007).

143. See *Curtin*, 489 F.3d at 959, 964 (Kleinfeld, J., concurring), 965 (McKeown, J., concurring), 966 (Wardlaw, J., concurring).

144. See *id.* at 959–65 (Kleinfeld, J., concurring), 965 (McKeown, J., concurring).

criminal intent “more or less probable than it would be without the evidence.”¹⁴⁵

III. THE NINTH CIRCUIT FAILED TO CONSIDER WHETHER THE EVIDENCE SHOWED THE DEFENDANT’S CHARACTER RATHER THAN HIS INTENT

As numerous courts have held, reading material can be relevant in a criminal trial.¹⁴⁶ The more important question, however, is *for what purpose* is the evidence relevant? In other words, is the evidence truly probative of a defendant’s intent to commit a crime—or is intent merely a pretext for admission of material that only shows a defendant’s propensity to commit a crime? When reading material is introduced as evidence of a defendant’s propensity to commit a crime, there is a danger that the defendant will be convicted for who he is and what he reads rather than for what he has done.¹⁴⁷ This is particularly true if the defendant is interested in literature that may be unpopular, unusual, sexually deviant, or related to criminal activity.¹⁴⁸ Because of this danger, courts should also be concerned that liberal admission of reading material will affect particular groups of people differently. For example, an individual with unusual sexual proclivities or an interest in true crime novels would be more likely to suffer prejudice through introduction of his or her reading material than would someone whose bookshelf contains nothing but Jane Austen novels.¹⁴⁹

The en banc *Curtin* opinion reveals a problem that plagues the use of reading material as evidence of a defendant’s intent to commit the charged crime. In addition to applying Rule 404(b) in an ad hoc manner,¹⁵⁰ *Curtin* failed to address whether the admitted stories were

145. *See id.* at 948, 959.

146. *See supra* Part I.

147. *See* United States v. Vizcarra-Martinez, 66 F.3d 1006, 1013–14 (9th Cir. 1995).

148. *See* Guam v. Shymanovitz, 157 F.3d 1154, 1160 (9th Cir. 2007) (observing that reading material that implies that the defendant is gay, or that he has unusual sexual proclivities, would be highly prejudicial where the defendant is accused of sexual misconduct); *see also* RICHARD A. POSNER, SEX AND REASON, 201 (1992) (observing that “so many people in our society” are repulsed by promiscuity and sexual deviance, and that incest has “a rare power to disgust”).

149. *See Shymanovitz*, 157 F.3d at 1159 (“Under the government’s theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov’s *Lolita*, and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories.”).

150. *See infra* notes 153–157 and accompanying text.

evidence of the defendant's propensity to commit the charged crime disguised as evidence of the defendant's intent to commit the crime.¹⁵¹ As a consequence of this failure, the court subverted the purpose of Rule 404, which excludes propensity evidence on the basis of policy, not strict relevance.¹⁵²

Before applying Rule 404(b) to the contested evidence, the *Curtin* court should first have considered whether the rule even applied to the evidence.¹⁵³ If the stories were intrinsic to or “inextricably intertwined” with the charged crime, then Rule 404(b) did not apply.¹⁵⁴ If the evidence was relevant under Rule 401 and survived Rule 403's balancing test, the evidence would be otherwise admissible.¹⁵⁵ Instead, the *Curtin* majority analyzed the evidence backward, first concluding that the evidence was relevant to show intent.¹⁵⁶ The court then held that it was “unnecessary to consider” whether the evidence was intrinsic or extrinsic to the charged crime.¹⁵⁷

After *Curtin* rejected the view that Rule 404(b) permitted the introduction of only “bad” acts, the court considered only whether the material had any tendency to make it more or less probable that the defendant intended to have sexual relations with a minor.¹⁵⁸ In conducting this straight-forward relevancy analysis of the sexually explicit stories, the *Curtin* court failed to appreciate Rule 404's objectives. According to the Supreme Court in *United States v. Michelson*,¹⁵⁹ “[propensity evidence] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”¹⁶⁰ Therefore, even if the evidence of the defendant's reading material met the low Rule 401 relevancy standard and, through “common sense,”

151. See *United States v. Curtin*, 489 F.3d 935, 948–56 (9th Cir. 2007) (en banc); see also *Ordover*, *supra* note 71, at 148, 158.

152. See *supra* notes 55–62 and accompanying text.

153. See *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996); *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987).

154. See *Coleman*, 78 F.3d at 156; *Soliman*, 813 F.2d at 279.

155. See *Coleman*, 78 F.3d at 156; *Soliman*, 813 F.2d at 279.

156. See *Curtin*, 489 F.3d at 942 n.2.

157. *Id.*

158. *Id.* at 948, 951.

159. 335 U.S. 469 (1948).

160. *Id.* at 475–76.

made it “more or less probable” that he intended to have sexual relations with a minor, the evidence should still be rejected if it is being presented merely to show the defendant’s propensity to commit the crime.¹⁶¹

Notably, after the *Curtin* court discussed Rule 404’s objectives at length, it failed to analyze whether the conclusion about the defendant’s intent first required an inference regarding his propensity to engage in this kind of conduct.¹⁶² “Common sense” and statistical evidence suggest that a person who commits a crime is more likely to commit a second crime.¹⁶³ If the relevancy of the evidence depends on the conclusion that the defendant is a criminal who is prone to commit crimes, the evidence is still rejected on policy grounds—even if the inference itself is logical and accurate.¹⁶⁴ Yet the *Curtin* court never considered whether its “common sense” inference about the defendant’s *intent* to have sexual relations with minors was actually a disguised inference about his *propensity* to have sexual relations with minors.¹⁶⁵ As *Curtin*’s pseudo-dissenters observed, “[p]erverse sexual desire is a trait of character. Using a person’s perverse sexual fantasies to prove action in conformity therewith is exactly what subsection (a) of Rule 404 prohibits. The exceptions in subsection (b) . . . are not a meaningless litany that deletes subsection (a).”¹⁶⁶

To support the admissibility of reading material, the Ninth Circuit relied on dicta from the Supreme Court’s decision in *Huddleston v. United States*. The *Curtin* majority quoted the following line from *Huddleston* no less than three times in its opinion: “[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.”¹⁶⁷ But *Huddleston* was not a case about the relationship of propensity to intent.¹⁶⁸ Instead, *Huddleston* considered what burden

161. See *supra* notes 55–73 and accompanying text.

162. See *Curtin*, 489 F.3d at 948–54.

163. See *supra* notes 55–62 and accompanying text.

164. See *supra* notes 55–62 and accompanying text.

165. See *Curtin*, 489 F.3d at 948.

166. *Id.* at 963 (Kleinfeld, J., concurring).

167. *Curtin*, 489 F.3d at 945, 948, 951 (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)).

168. The petitioner in *Huddleston* asserted that, because prior acts have “a grave potential for causing improper prejudice,” the Court should require trial courts to determine that the defendant committed the prior act by a preponderance of the evidence. *Huddleston*, 485 U.S. at 686–87.

the prosecution must meet to show that the defendant *committed* the prior act.¹⁶⁹ Although *Huddleston* acknowledged that extrinsic acts may be critical to the prosecution's case, the Supreme Court did not hold that impermissible character inferences become permissible purely because the prosecution has no other means of proving that element of the crime.¹⁷⁰ In fact, citing *United States v. Michelson*, the Court stated that admission "for a proper purpose" other than to show propensity is one of several safeguards to prevent the wrongful admission of character evidence.¹⁷¹

Similarly, in *United States v. Stotts*, the Sixth Circuit failed to evaluate whether the admitted reading material proved only that the defendant had a propensity to make explosive devices.¹⁷² In *Stotts*, the court summarily upheld the admission of the defendant's bomb-making books without specifically finding that the book contained instructions for the explosive components found in the defendant's home.¹⁷³ The danger that a jury will have to draw conclusions about the defendant's character in order to discern his intent increases in the absence of a connection between the explosive components found in the defendant's home and his reading material.¹⁷⁴ In other words, when the reading material provides blueprints for the discovered bomb-making components, a jury can conclude that the defendant intended to build a bomb without first drawing impermissible conclusions about his character.¹⁷⁵ When the books are not directly linked to the bomb-making components found in the defendant's residence, however, there is a greater danger that the jury will merely conclude that the defendant is a

169. *Id.* at 685 ("We granted certiorari to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before "similar act" and other Rule 404(b) evidence is submitted to the jury. We conclude that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant *committed* the similar act."). (internal citations omitted) (emphasis added). Notably, there was no dispute in *Curtin* as to whether the defendant had actually possessed the admitted reading material. See *Curtin*, 489 F.3d at 939–40.

170. See *Huddleston*, 485 U.S. at 685–91.

171. See *id.* at 691 (citing *Michelson v. United States*, 335 U.S. 469 (1948)).

172. See *United States v. Stotts*, 176 F.3d 880, 890–91 (6th Cir. 1999).

173. *Id.* at 890.

174. *Thompson v. United States*, 546 A.2d 414, 421 (D.C. 1988) ("Where evidence of prior crimes can become probative with respect to intent only after an inference of predisposition has been drawn, the argument for admission is at its weakest, for the distinction between intent and predisposition then becomes ephemeral.").

175. See *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998) (upholding admission of a bomb-making book that provided an exact blueprint for the bomb that the defendants were charged with detonating).

“bomb-maker” or a “criminal” and therefore had the intent to build a bomb.¹⁷⁶ Rule 404(b) prohibits this kind of conclusion.¹⁷⁷ Like the *Curtin* court, the Sixth Circuit failed to consider the relationship of propensity to intent, and thereby failed to guard against the possible introduction of character evidence disguised as evidence of intent.¹⁷⁸

In contrast to the Ninth and Sixth Circuits, the Eighth Circuit, in *United States v. Johnson*, refused to accept at face value the prosecution’s characterization of the defendant’s reading material.¹⁷⁹ When the prosecution offered the defendant’s reading material to prove that the defendant knowingly downloaded child pornography, the court evaluated whether the evidence was truly probative of the defendant’s intent to commit the crime, or whether it instead required an inferential step about the defendant’s character and/or his propensity to commit crimes.¹⁸⁰ The court eventually concluded that the reading material did make it more probable that the defendant knowingly and intentionally downloaded pornography, but only if a jury first concluded that the defendant was the type of person who would download pornography.¹⁸¹ The court then excluded the evidence, not because it was irrelevant, but because it violated the propensity rule and did not properly meet any of the 404(b) exceptions.

The failure of *Curtin* and *Stotts* to adequately safeguard against the improper introduction of propensity evidence can have significant ramifications on the presumption of innocence in criminal cases. When courts accept “magic words” such as “intent” or “motive” without questioning whether the evidence admitted truly demonstrates the defendant’s intent or motive to commit the charged crime, the 404(b) exception can swallow the general rule against the introduction of propensity evidence.¹⁸² Instead, “[c]ourts must view with a jaundiced

176. See *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985) (“The Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts.”).

177. See *supra* Part I.C.

178. See *Stotts*, 176 F.3d at 890–91.

179. *United States v. Johnson*, 439 F.3d 884, 888 (8th Cir. 2006).

180. *Id.*

181. *Id.* at 889.

182. Anderson, *supra* note 10, at 937; see also *Kendall*, 766 F.2d at 1436; *Thompson v. United States*, 546 A.2d 414, 420–21 (D.C. 1988) (“[C]ourts must be vigilant to ensure that poisonous predisposition evidence is not brought before the jury in more attractive wrapping and under a more enticing sobriquet.”).

eye evidence purportedly offered as relevant to some other issue but in reality bearing wholly or primarily on the defendant's predisposition to commit another similar crime."¹⁸³ Ultimately, such casual evaluation destroys the presumption of innocence by allowing a jury to convict based on a defendant's bad character.¹⁸⁴ This is precisely the result that Rule 404 seeks to avoid.¹⁸⁵ Rather, courts should follow the Eighth Circuit's lead and specifically analyze whether an item of reading material reveals a defendant's character rather than his or her intent to commit the charged crime.¹⁸⁶

IV. COURTS SHOULD EXPLICITLY EVALUATE WHETHER A DEFENDANT'S READING MATERIAL REQUIRES AN INFERENCE ABOUT HIS OR HER PROPENSITY TO COMMIT A CRIME

Possession of lawful reading material, even fantasy material, can be relevant to show a defendant's intent to commit a crime. Unfortunately, the line dividing a defendant's propensity to commit a crime from his or her intent to commit the crime is difficult to discern, particularly where reading material is concerned. Therefore, courts should adopt a new analytical framework that will provide more consistency while offering greater deference to an individual's First Amendment rights and the propensity rule.

First, a court should evaluate the materiality of the reading material under Rules 401 and 402.¹⁸⁷ If the elements of the charged crime do not require the prosecution to prove a mental state, such as knowledge or intent, then the reading material should be excluded as immaterial and therefore irrelevant under Rule 401.¹⁸⁸ Second, a court should perform a basic probative worth analysis, evaluating whether the book has "any tendency" to show the defendant's intent or knowledge of a charged

183. *Thompson* 546 A.2d at 420.

184. *Ordover*, *supra* note 71, at 144; *see also* *United States v. Curtin*, 489 F.3d 935, 963 (9th Cir. 2007) (Klenfeld, J., concurring) ("Good prosecution proves the defendant committed the crime. Bad prosecution proves the defendant is so repulsive he ought to be convicted whether he committed it or not.").

185. *Ordover*, *supra* note 71, at 158.

186. *See* *United States v. Johnson*, 439 F.3d 884, 888–89 (8th Cir. 2006).

187. *See* *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995) (observing that the first step of the analysis is asking whether the evidence "tends to prove a material point").

188. *Id.*; *see also* *supra* Part I.A (discussing the application of Rules 401 and 402 in the context of reading material).

crime.¹⁸⁹ If the reading material fails at this checkpoint, it should also be excluded as irrelevant.¹⁹⁰

Third, a court should analyze the reading material under Rule 404(b). As a threshold issue, before applying Rule 404(b), a court should consider whether the evidence is intrinsic or extrinsic to the charged crime.¹⁹¹ If the evidence is intrinsic to the charged crime, then Rule 404(b) does not apply.¹⁹² If a court categorizes the evidence as extrinsic, it should specifically evaluate whether the prosecution has truly offered the evidence for a proper purpose under Rule 404(b), such as to prove intent.¹⁹³ If the trier of fact would first have to draw conclusions about an individual's propensity to commit a crime in order to conclude that the defendant formed the intent to commit the crime, the evidence violates the propensity rule and should be excluded.¹⁹⁴ Finally, if the evidence passes the Rule 404(b) evaluation, a court should conduct a Rule 403 balancing test, considering whether the evidence's prejudicial effect substantially outweighs its probative value.¹⁹⁵

If the *Curtin* court had used this test, it would have analyzed the defendant's reading material as follows. First, it would consider whether the evidence was material under Rule 401. Because intent was an element of the charged crime, and because the defendant had specifically placed his intent at issue by asserting that he had intended to have sexual relations with an adult pretending to be a child, the evidence was material.¹⁹⁶ Second, the court would consider whether the evidence was probative under Rule 401. In *Curtin*, the defendant's stories strongly suggested that he had an interest in sexual relations between adults and children, and that he was the type of person one would expect to cross

189. See FED. R. EVID. 401.

190. See *supra* Part I.A.

191. See *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996); *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987).

192. See *Coleman*, 78 F.3d at 156; *Soliman*, 813 F.2d at 279. If the court determines that the evidence is both relevant and intrinsic to the charged crime, it should proceed directly to weighing the evidence's probative value against its prejudicial effect pursuant to Rule 403.

193. See *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

194. See *Ordovery*, *supra* note 71, at 148; see also *supra* notes 69–80 and accompanying text (discussing how Rule 404(b) excludes evidence offered to show criminal intent if conclusions about a defendant's intent are based upon conclusions about his propensity to commit a crime).

195. *United States v. Beechum*, 582 F.2d 898, 916 (5th Cir. 1978); see also *Huddleston*, 485 U.S. at 691 (identifying Rule 403 as a barrier against the wrongful admission of propensity evidence).

196. See *United States v. Curtin*, 489 F.3d 935, 948 (9th Cir. 2007) (en banc).

state lines with the intent to have sexual relations with a minor.¹⁹⁷ Therefore, the stories were probative, as they tended to make his criminal intent more likely.¹⁹⁸ The *Curtin* court ended its analysis at this point, but it should have taken additional steps. After determining that the evidence was relevant, the court should have considered whether the evidence was intrinsic or extrinsic to the charged crime. Assuming that the defendant's possession of the reading material was extrinsic to the crime, the court should have then conducted the analysis required by Rule 404(b), evaluating whether the evidence was relevant to show the defendant's intent *because* it showed that he was the type of person who would cross state lines intending to have sexual relations with a minor.¹⁹⁹ At this point the stories should have been excluded because the stories predominately suggested that the defendant had deviant sexual proclivities, rather than that he had a specific intent to commit a crime.²⁰⁰

An analysis of the first-aid book and the true crime novel described in the Introduction would proceed in the same way. The defendant's intent to commit murder is at issue, and therefore both books are material. Because his possession of both books makes it slightly more likely that the defendant planned to murder his wife and to disguise his criminal intent by shooting himself, the books are probative. Therefore, the books would pass the Rule 401 and 402 relevancy checkpoints. Moving to a Rule 404(b) analysis, the next question would be whether his possession of the books was extrinsic to the charged crime. If the defendant used instructions from the first-aid book to keep himself alive after shooting himself, then arguably that book is intrinsic to the crime itself and would be admitted if it survived the Rule 403 balancing test. Possession of the true crime novel, which provided no direct instruction or aid to the defendant as he committed the crime, would probably be considered extrinsic and should therefore be analyzed under the Rule 404(b) framework. At this stage, a court would evaluate whether the conclusion that the defendant intended to commit murder would require the jury to first conclude that the defendant is more likely to commit murder because he reads books about men who kill their wives. Because possessing such a book shows criminal intent only if the jury first

197. *Id.* at 950–51.

198. *Id.*

199. *Id.* at 963 (Kleinfeld, J., concurring).

200. *Id.*

concludes that possession of the book shows the defendant's propensity to commit the crime, the book should be excluded.

CONCLUSION

Reading material can be highly relevant in a criminal prosecution. This Note does not suggest that reading material should be entirely excluded from criminal prosecutions, but rather that courts should admit the evidence with greater consideration of the rights at stake. Reading material is a particularly dangerous form of evidence because it is constitutionally protected and because it is more likely to show an individual's interests and character than his or her intent. Neither the First Amendment freedom of speech nor the propensity rule can provide any protection for a defendant if reading material is casually admitted in evidence under a wide variety of evidentiary rules. Instead, courts should adopt a clear, predictable standard that appreciates the constitutional significance of an individual's chosen reading material.