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Windfall Analysis: A New Look at Uncharged Conduct Evidence

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I. INTRODUCTION

In criminal cases, the prosecution frequently offers evidence of uncharged conduct[1] (usually prior criminal activity), claiming that it will tend to prove the mens rea element of the charged offense.[2] When such an offer is made, Rule 404(b) of the Federal Rules of Evidence ("FRE")[3] creates a dilemma for the trial court. On the one hand, the rule forbids the introduction of uncharged conduct evidence ("UCE") for one purpose: proof of a person's character in order to show that the person acted in conformity with that character trait on a particular occasion. On the other hand, it permits the introduction of the evidence for any other purpose—including proof of intent or of other mens rea elements of the offense.

To consider a paradigmatic example, suppose a defendant is charged with possession of marijuana with intent to distribute. The prosecution may not use a prior sale of marijuana (which necessarily implies a prior possession) to show the

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1. This Article will use the phrase "uncharged conduct evidence" or "UCE" to refer to the type of evidence with which Federal Rule of Evidence (FRE) 404(b) deals. The phrase is imperfect since UCE can be evidence of conduct for which one has *previously* been charged or even convicted. Unfortunately, the alternative phrases have similar problems. For example, "prior bad act evidence" is misleading because the evidence can relate to conduct *subsequent* to the charged conduct.

2. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 5.02 (1992) (discussing the pervasiveness of such use); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5242, at 488 (1978) (stating that intent is the most common justification for admitting UCE). For a few modern examples, see, for example, United States v. Yellow, 18 F.3d 1438, 1441 (8th Cir. 1994); United States v. Ponce, 8 F.3d 989, 994 (5th Cir. 1993); United States v. Sneezer, 983 F.2d 920, 924 (9th Cir. 1992); United States v. Johnson, 970 F.2d 907, 913 (D.C. Cir. 1992); United States v. Arias-Montoya, 967 F.2d 708, 709 (1st Cir. 1992); United States v. Mark, 943 F.2d 444, 448 (4th Cir. 1991); United States v. Cardenas, 895 F.2d 1338, 1340 (11th Cir. 1990); United States v. Mazzanti, 888 F.2d 1165, 1171 (7th Cir. 1989); United States v. Franklin, 704 F.2d 1183, 1187-88 (10th Cir. 1983); United States v. Buchanan, 633 F.2d 423, 426 (5th Cir. 1980); United States v. Mohel, 604 F.2d 748, 751 (2d Cir. 1979).

3. FRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

current possession. That is forbidden by FRE 404(b). The prosecution also cannot use the prior sale to show a current sale. No current sale occurred or at least none is charged.[4] But the prosecution may use the prior sale to show what the defendant intended to do with the currently-possessed marijuana—to show that the defendant would have sold it if he had not been arrested.[5]

Put more generally, FRE 404(b) is intended to permit the jury to infer the charged mens rea from uncharged conduct. Conversely, it is intended to forbid the jury from inferring the charged actus reus from a character trait which was itself inferred from uncharged conduct.

The dilemma exists because admission of the uncharged conduct will frequently lead the jury to draw both the permitted and the forbidden inference. In what situations is the risk of improper use sufficiently great to warrant the exclusion of the evidence despite its potential for proper use? In what situations is the evidence's proper use sufficiently important that it should be admitted despite the risk of misuse?[6] FRE 403 mandates admission of the UCE unless "its probative value is substantially outweighed by the danger of unfair prejudice,"[7] but this general mandate has provided little meaningful guidance in resolving the dilemma created when UCE is offered to prove mens rea.

This article uses visual and mathematical models to analyze that dilemma. Part II describes the basic model itself.[8] Using Venn diagrams and related probability concepts, Part II.B. isolates various effects of UCE and identifies their probative or prejudicial nature.[9] Part II.C. introduces a powerful new analytic tool, "windfall analysis," based on the concepts of evidentiary ideals[10] and evidentiary windfalls.[11] Part II.C. then shows how that tool can lead to surprising results when applied to complex evidentiary problems.[12]

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4. In any event, such a use would also be barred by FRE 404(b).

5. Of course, there are other possible permissible uses. For example, the prior sale could be used to show that the defendant was sufficiently familiar with marijuana's appearance to know what it was that he possessed.

6. Of course, these questions are not unique to cases involving FRE 404(b). Similar questions arise whenever the court must decide whether to admit evidence which is admissible for one purpose but not for another. FED. R. EVID. 105, 403.

7. FRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value 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." FED. R. EVID. 403.

8. *See infra* notes 29-70 and accompanying text.

9. *See infra* notes 29-59 and accompanying text.

10. Evidentiary ideals are the probabilities of conviction that would exist if the jury used the evidence only for the purposes permitted by the Rules.

11. *See infra* notes 60-68 and accompanying text. Evidentiary windfalls are variations from the evidentiary ideal that result from admission or exclusion of evidence, or from acceptance of a complex evidentiary alternative to simple admission or exclusion.

12. *See infra* notes 69-70 and accompanying text.

Part III.A. then uses windfall analysis to analyze a problem that has divided the Courts of Appeals: defendants' offers to concede conditionally mens rea in order to avoid admission of the UCE.[13] Part III.B. concludes that the Seventh Circuit is wrong to reject uniformly such conditional concessions as an adequate substitute for the evidence.[14] However, Part III.B. also concludes that, to the extent that the other circuits suggest that conditional concessions should always be accepted, those circuits may also be wrong.[15] Part III.C. then establishes a proposition not yet adopted by any of the circuits: that there are situations in which a trial court should require conditional concessions as a pre-requisite for excluding UCE even though that evidence *fails* the FRE 403 balancing test.[16]

Part IV uses the basic model to analyze another line of FRE 404(b) cases: ones that adopt the "*Ring* rule" and exclude UCE whenever the mens rea would "ordinarily be inferred" from the actus reus.[17] Part IV.A. explains the *Ring* rule and its history.[18] Part IV.B. uses the basic model to demonstrate that the *Ring* rule is correct as far as it goes.[19] However, Part IV.B. also suggests that the rule should be significantly expanded.[20] Part IV.C. challenges an assumption underlying Part IV.B.'s analysis.[21] Part IV concludes by demonstrating that, even without that assumption, Part IV. B.'s conclusions are still correct.[22]

Part V suggests some refinements. Part V.A. identifies two factors that are omitted from the basic model—the "bad man effect"[23] and the effect of limiting instructions[24]—and explains why they do not modify the Article's conclusions. Part V.B. discusses a surprising implication of the basic model: if all other things are equal, "equally persuasive"[25] evidence is more prejudicial than probative.[26]

II. THE MODEL

A. *An Aside on the Limits of Formulas and Venn Diagrams*

13. *See infra* notes 71-84 and accompanying text.
14. *See infra* notes 85-108, 109-40 and accompanying text.
15. *See infra* notes 99-108 and accompanying text.
16. *See infra* notes 141-51 and accompanying text.
17. *See infra* notes 152-92 and accompanying text.
18. *See infra* notes 152-58 and accompanying text.
19. *See infra* notes 159-76 and accompanying text.
20. *See infra* notes 177-78 and accompanying text.
21. *See infra* notes 179-83 and accompanying text.
22. *See infra* notes 184-92 and accompanying text.
23. *See infra* notes 193-200 and accompanying text.
24. *See infra* notes 201-04 and accompanying text.
25. Evidence will be treated as "equally persuasive" if it is as likely to cause the jury to find mens rea as to find actus reus.
26. *See infra* notes 205-11 and accompanying text.

This Article describes a model that analyzes the issue in terms of the mathematical probability of various effects. However, it is not intended to suggest that courts should try to quantify the various probabilities and perform actual calculations. Such quantifications are no more possible here than they are in connection with Learned Hand's *Carroll Towing*[27] formula for negligence or Richard Posner's formula for the granting of preliminary injunctions.[28] Instead, the model is intended to channel the court's thinking—to insure that the court properly considers all the relevant factors. It is also intended to reveal some relationships between those factors that may not be intuitively obvious.

B. The Basic Model

When the government offers uncharged conduct solely to prove mens rea, the FRE 403 balance can be seen as a comparison between two effects. On the one hand, the evidence may have a permissible mens rea effect: it may change the likelihood that the jury will believe that the defendant possessed the necessary mens rea. In the paradigmatic case of a defendant charged with possession of marijuana with intent to distribute, the mens rea effect would be the increased likelihood that the jury would find that the defendant intended to distribute the marijuana. On the other hand, the evidence may have an impermissible actus reus effect: it may change the likelihood that the jury will believe that the defendant performed the charged physical conduct, the actus reus.[29] In the paradigmatic case, the actus reus effect is the increased likelihood that the jury would find that the defendant possessed the marijuana.

In mathematical terms, each effect can be initially described as the difference between two probabilities.[30] The mens rea effect is the difference between the

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27. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

28. American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 (7th Cir. 1986).

29. Throughout this Article, it will be assumed that proper limiting instructions have been given. As a result, the actus reus effect will be the net increase in the probability of an actus reus finding after the jury has received a proper limiting instruction. *See infra* notes 201-04 and accompanying text.

30. This Article will use certain conventions of statistical notation:

$P(X)$	= probability of the occurrence of event X.
$P(X \mid p)$	= probability of X given p.
$P(X \cap Y)$	= probability of the occurrence of both event X and event Y (the intersection of X and Y).
$P(X \cup Y)$	= probability of the occurrence of either event X or event Y (the union of X and Y).
$P(X \mid p \cap q)$	= probability of event X given both p and q.
$P(X \mid p \cap Y \mid q)$	= probability of both event X given p and event Y given q.
$P(\overline{X})$	= probability of the nonoccurence of event X.
$P(X \mid \overline{p})$	= probability of X given the nonoccurence of p.
$P(\overline{X} \mid p)$	= probability of the nonoccurence of X given p.
$>>$	= substantially outweighs (a phrase from Rule 403 that does not have a meaningful mathematical equivalent).
$\not>>$	= does not substantially outweigh.
$\lvert x \rvert$	= the absolute value (i.e., the greater of x and -x).

probability that the jury will find[31] the necessary mens rea element if the evidence is admitted[32] and the probability it would find that element if the evidence were excluded.[33] Thus, the mens rea effect could be designated as follows:

$$P(MR|a) - P(MR|\bar{a})^{34}$$

where "MR" is a finding of mens rea and "a" is admission of the uncharged conduct evidence.

The effect on the actus reus determination could be similarly seen as the difference between the probability that the jury will find the actus reus element, given admission of the evidence,[35] and the probability, given exclusion of that evidence:[36]

$$P(AR|a) - P(AR|\bar{a})$$

where "AR" is a finding of actus reus. The two effects are illustrated in Figure 1 below:

$\approx$ = approximately equals.

$\Delta P(X)$ = the change in the probability of X.

31. In discussing the basic model, a jury's "finding" of an element means that the jury has concluded that the element is true. For example, a jury is treated as "finding" the mens rea element if the jury comes to believe that the defendant possessed the required mens rea.

As discussed in connection with the "bad man effect," a jury's *verdict* may not necessarily reflect a "finding" in this sense. A jury's verdict may be based on a desire to incarcerate the defendant regardless of his guilt of the charged offense. *See infra* notes 193-200 and accompanying text.

32. $P(MR|a)$, where "MR" is a jury finding of mens rea and "a" indicates admission of the UCE.

33. $P(MR|\bar{a})$.

34. If the smaller probability is a subset of the larger, this can also be expressed as:

$$P(MR|a \cap \overline{MR}|\bar{a})$$

i.è., the intersection of the probability of a jury finding mens rea with the evidence admitted and the probability of its *not* finding mens rea *without* the evidence.

35. $P(AR|a)$.

36. $P(AR|\bar{a})$.

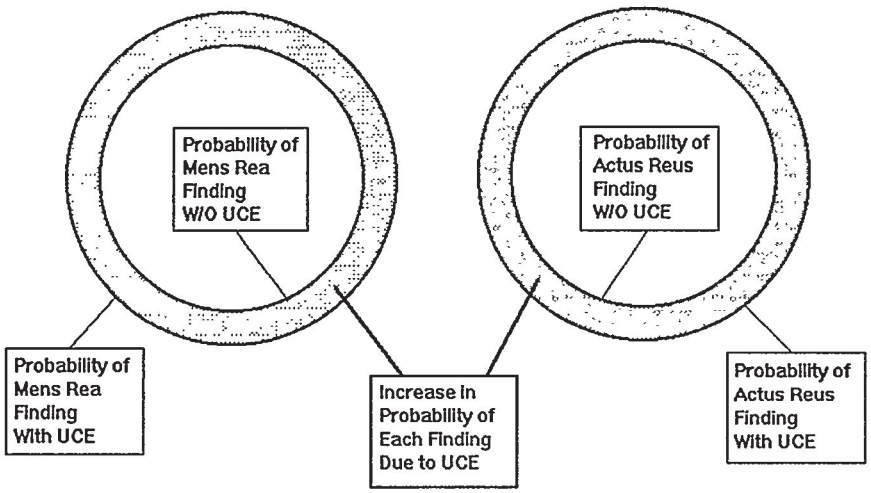

Figure 1

In each case, the smaller circle represents the probability of the finding with the evidence excluded, the larger circle represents the probability with the evidence admitted, and the gray "doughnut" represents the difference between the two probabilities.

Each of these effects is *mathematically* positive:[37] it increases the likelihood that the jury will find mens rea or actus reus. However, in *evidentiary* terms, the effect on the mens rea finding is a desirable effect while the effect on the actus reus finding is an undesirable one. Convincing the jury that the defendant possessed the required mental state is a permissible use under the rules.[38] However,

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37. There may be odd cases in which one effect is mathematically positive and the other negative, i.e., in which the evidence would make it more likely that the jury would find mens rea but less likely that it would find actus reus or vice versa. Such cases would not present an evidentiary dilemma. If the prosecution offered evidence that increased the probability of a mens rea finding but decreased the probability of an actus reus finding, the defense would have no legitimate objection. To the extent that the evidence affects mens rea, that effect is authorized by the rules. To the extent that it affects actus reus, that effect helps the defendant since it reduces the likelihood of an actus reus finding and, therefore, the probability of conviction.

38. *But see infra* notes 193-200 and accompanying text (discussing the "bad man effect's" improper overlay on the mens rea effect).

to the extent that evidence persuades the jury to find that the defendant committed the charged physical conduct, it is having the exact effect forbidden by FRE 404(b).

As a result, it might seem that the FRE 403 balance could be recast as a simple comparison between the mens rea effect and the actus reus effect. Under this recasting, the UCE should be excluded if:

$$P(AR|a) - P(AR|\bar{a}) >> P(MR|a) - P(MR|\bar{a}).$$

In graphic terms, this recasting would exclude the UCE whenever the actus reus effect's "doughnut" is substantially larger than the mens rea effect's "doughnut."

However, this recasting overstates the importance of the UCE and over-simplifies the analysis. For the defendant to be harmed or the prosecution helped by the evidence, the evidence has to have an effect on the ultimate outcome: on the finding of guilt or innocence. A guilty verdict[39] requires the jury to find *both* actus reus and mens rea. The probability of such a verdict is the probability that the jury will find both elements. Mathematically, this can be expressed as the intersection of, or the overlap between, the likelihood of an actus reus finding[40] and the likelihood of a mens rea finding:[41]

$$P(AR \cap MR).$$

39. In the discussion of the basic model, a "verdict" will be assumed to be an "honest verdict," i.e., one based on the jury's belief that the elements of the offense have been proved. As discussed in Part V. A., a guilty verdict may also result from the "bad man effect," i.e., the jury's desire to incarcerate the defendant, regardless of his guilt or innocence of the charges, because the jury thinks that the defendant is evil or dangerous. *See infra* notes 193-200 and accompanying text.

40. P(AR).

41. P(MR).

Graphically, the intersection is the light gray, lens-shaped area in Figure 2 below:

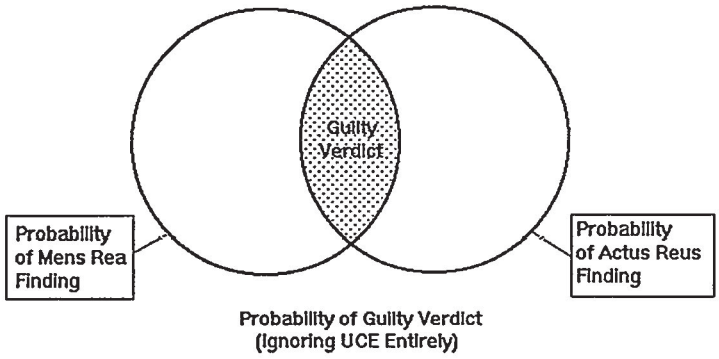

Figure 2

The "guilt effect" of UCE, i.e., its effect on the jury's verdict, can be expressed mathematically as the difference between the probability of concurrent findings of mens rea and actus reus with the evidence,[42] and the probability of such concurrent findings without the evidence:[43]

$$P(AR|a \cap MR|a) - P(AR|\bar{a} \cap MR|\bar{a}).^{44}$$

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42. $P(AR|a \cap MR|a)$.
43. $P(AR|\bar{a} \cap MR|\bar{a})$.
44. If the latter is a subset of the former, this can also be expressed as:

$$P(AR|a \cap MR|a) \cap P(\overline{AR}|\bar{a} \cap \overline{MR}|\bar{a}).$$

The guilt effect is illustrated by Figure 3 below, in which the inner, light gray, lens-shaped area represents the probability of a guilty verdict without the evidence, and the outer, dark gray area represents the increase in that probability due to the evidence:

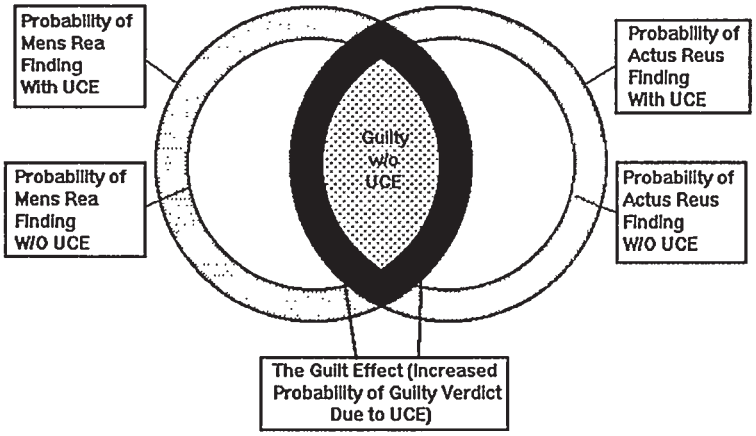

Figure 3

To perform the FRE 403 balance, the guilt effect must be divided into component effects that FRE 404(b) permits and those that the rule prohibits. As a first step in that division, it is useful to divide the guilt effect into three components: a mens rea guilt effect (the probability that the UCE will change only the mens rea finding),[45] an actus reus guilt effect (the probability that the evidence will change only the actus reus finding),[46] and a dual element guilt effect (the probability that it will change both findings).[47]

The mens rea guilt effect is purely probative. It represents the probability that the evidence will have the permissible effect of causing the jury to find the mens rea (e.g., that defendant intended to sell the marijuana) when it was already going to find actus reus (e.g., that defendant possessed the marijuana). The mens rea

45. *See infra* notes 48-49 and accompanying text.
46. *See infra* notes 50-51 and accompanying text.
47. *See infra* notes 52-59 and accompanying text.

guilt effect can be expressed mathematically as the intersection between the entire mens rea effect[48] and the probability of an actus reus finding without the UCE.[49]

$$P(MR\,|a \cap \overline{MR}\,|\bar{a}) \cap P(AR\,|\bar{a}).$$

That probability is illustrated in Figure 4 below:

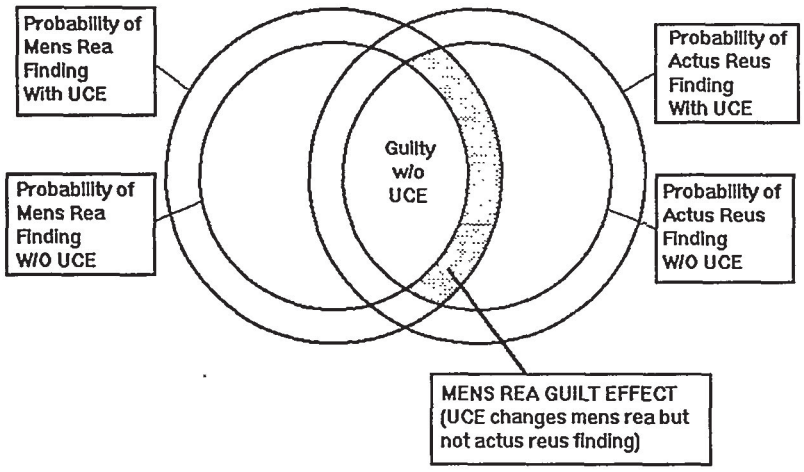

Figure 4

The actus reus guilt effect, on the other hand, is entirely prejudicial. It represents the probability that the evidence will have an effect forbidden by FRE 404(b): that it will cause the jury to find actus reus when it was already prepared to find the mens rea. The actus reus guilt effect can be expressed mathematically as the intersection between the entire actus reus effect[50] and the probability of a mens rea finding without the UCE:[51]

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48. $P(MR\,|a) - P(MR\,|\bar{a})$ or $P(MR\,|a \cap \overline{MR}\,|\bar{a})$.
49. $P(AR|\bar{a})$.
50. $P(AR|a) - P(AR|\bar{a})$ or $P(AR\,|a \cap \overline{AR}\,|\bar{a})$.
51. $P(MR|\bar{a})$.

$$P(AR \mid a \cap \overline{AR} \mid \bar{a}) \cap P(MR \mid \bar{a}).$$

The actus reus guilt effect is illustrated in Figure 5 below:

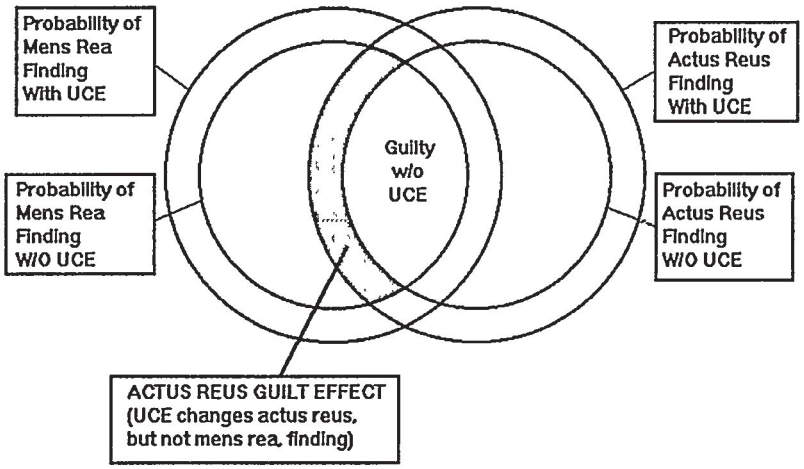

Figure 5

The analysis to this point has omitted the dual element guilt effect, i.e., the probability that the UCE would cause the jury to find both the mens rea and the actus reus. (In the case of the defendant charged with possessing marijuana with intent to distribute it, the dual element guilt effect is the probability that the evidence will cause a jury to find both possession and intent to sell when it otherwise would have found neither element.) This situation can be expressed mathematically as the intersection between the entire mens rea effect[52] and the entire actus reus effect:[53]

52. $P(MR|a) - P(MR|\bar{a})$ or $P(MR \mid a \cap \overline{MR} \mid \bar{a})$.
53. $P(AR|a) - P(AR|\bar{a})$ or $P(AR \mid a \cap \overline{AR} \mid \bar{a})$.

$$P(MR \mid a \cap \overline{MR} \mid \bar{a}) \cap P(AR \mid a \cap \overline{AR} \mid \bar{a}).$$

Graphically, this intersection is illustrated in Figure 6:

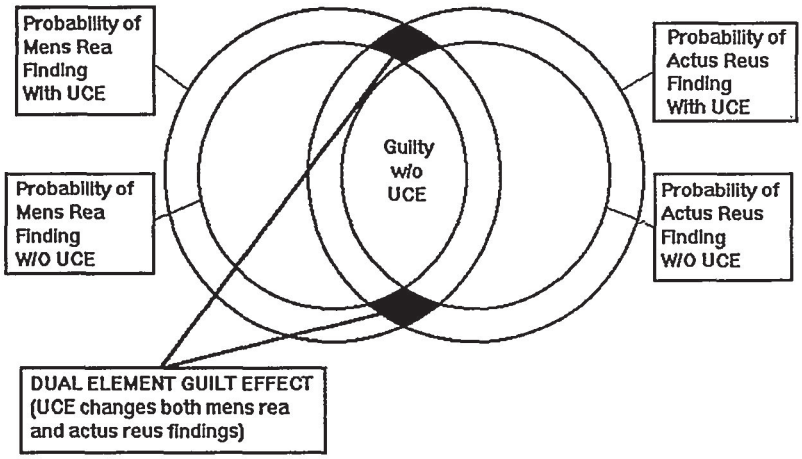

Figure 6

While it may not be immediately obvious, the dual element guilt effect is prejudicial rather than probative. By definition, it represents a situation in which, without the UCE, the jury would have found neither element of the prosecution's case. Under FRE 404(b), the jury properly let the UCE change its mens rea finding but should not have let the UCE change its actus reus finding.[54] If the jury had complied with FRE 404(b), the defendant would have been acquitted even

54. On request, the defendant is entitled to an instruction telling the jury that it should not consider the UCE unless it has already found that the defendant performed the actus reus. Huddleston v. United States, 485 U.S. 681, 691-92 (1988); United States v. Davis, 546 F.2d 617, 619 (5th Cir. 1977). For an example of such an instruction, see MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 32 (1994).

with the UCE. A guilty verdict requires a finding of both elements and the jury could not have changed its actus reus without violating FRE 404(b). Thus, exclusion of the UCE would be harmless since it would lead to the same verdict as permissible use of that evidence. Admission, on the other hand, would be prejudicial since it would lead to a verdict that the jury can only reach by making impermissible use of the UCE.

An example illustrates the point. Suppose the paradigmatic defendant, charged with possession of marijuana with intent to distribute, denies both elements of the charge. After all the evidence except the UCE is admitted, the jurors remain unconvinced that the defendant possessed the marijuana and equally unconvinced that whoever possessed it intended to distribute it. If deliberations took place at that point, the defendant would be acquitted. Now assume that evidence of a prior sale of hashish is admitted. This evidence convinces the jurors that the defendant possessed the marijuana (the forbidden propensity inference) and that he intended to sell it (the permitted inference of intent). However, under FRE 404(b) the jury is not permitted to even consider the prior hashish sale unless it first finds—without considering the hashish sale evidence—that the defendant possessed the marijuana.[55] Admission of the uncharged hashish sale leads to a verdict which the jury could only reach by drawing the exact inference the rule forbids. It had a prejudicial rather than probative effect.[56]

The prejudicial nature of the dual element guilt effect has a significant and surprising implication: if all other factors are equal, evidence that is equally persuasive on both issues is more prejudicial than probative. This implication is explained and discussed in Part V.[57]

Since the dual element guilt effect is prejudicial, the full prejudicial effect of admitting uncharged conduct is the sum of that effect and the actus reus guilt effect. Mathematically, this can be expressed as the intersection between the entire actus reus effect[58] and the likelihood of a mens rea finding *with* the UCE:[59]

$$P(AR \mid a \cap \overline{AR} \mid \bar{a}) \cap P(MR \mid a).$$

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55. *Huddleston*, 485 U.S. at 690-92.

56. Like much of this model, the prejudicial nature of the dual element guilt effect depends on the fact that mens rea and actus reus are conjunctive elements, i.e., elements both of which must be proved for the proponent of the evidence to prevail.

If they were disjunctive elements (i.e., alternative elements each of which would be enough to sustain a verdict), the dual element guilt effect would be probative rather than prejudicial. For disjunctive elements, the improper use would be harmless since the proper use would lead to a guilty verdict regardless of the improper use.

57. *See infra* notes 205-11 and accompanying text.

58. $P(AR|a) - P(AR|\bar{a})$ or $P(AR \mid a \cap \overline{AR} \mid \bar{a})$.

59. $P(MR|a)$.

The full prejudicial effect of UCE is illustrated in Figure 7 below:

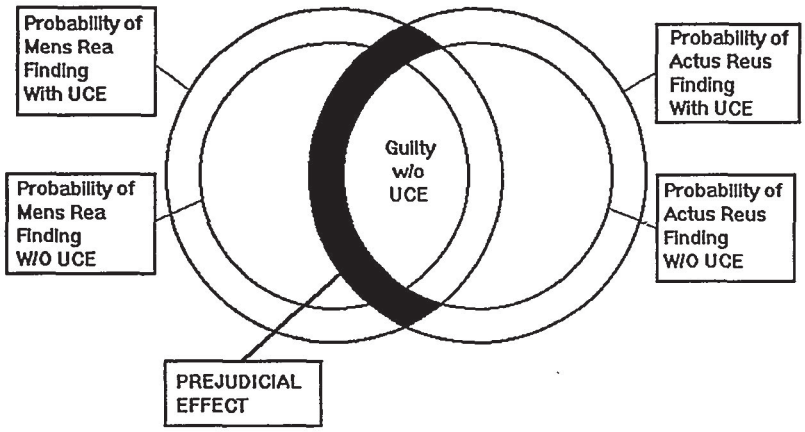

Figure 7

With the basic model now complete, the effects can be summarized as follows: probative value is equal to the mens rea guilt effect and prejudicial effect is equal to the sum of the actus reus guilt effect and the dual element guilt effect. In graphic terms, probative value is the intersection between the mens rea effect and the probability of an actus reus finding without the UCE. Prejudicial effect is the intersection of the actus reus effect with the probability of a mens rea finding with the evidence. As a result, if UCE is offered to prove mens rea, the FRE 403 balance requires exclusion if:

$$P(AR\,|\,a \cap \overline{AR}\,|\,\bar{a}) \cap P(MR\,|\,a) \gg P(MR\,|\,a \cap \overline{MR}\,|\,\bar{a}) \cap P(AR\,|\,\bar{a}).$$

The balance between probative value and prejudicial effect is illustrated by Figure 8 below:

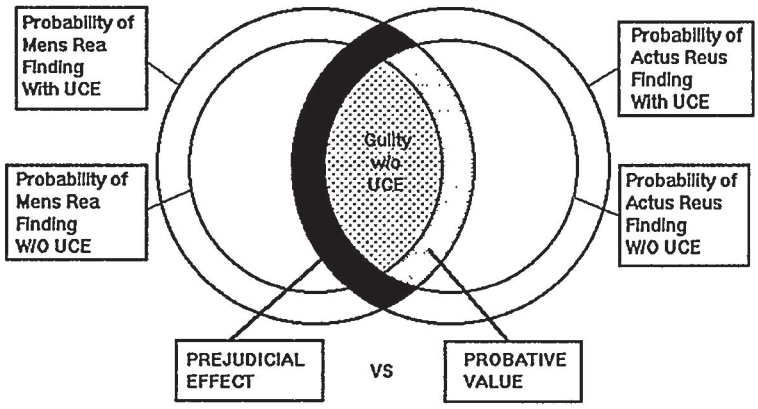

Figure 8

C. *The 404(b) Ideal and Evidentiary Windfalls*

The FRE 403 balance can also be seen as a choice between two alternative variations from an ideal probability of conviction. Under FRE 404(b), an ideal trial would be one in which the jury considered the UCE for permissible purposes but not for impermissible ones.[60] The prosecution is entitled to the probability of conviction (and the defense is entitled to the probability of acquittal) that would exist in such a trial—no more and no less.[61] The FRE 404(b) ideal is the intersection of the probability of a mens rea finding given admission of the UCE and the probability of an actus reus finding given exclusion of the evidence.[62] The FRE 404(b) ideal is illustrated in Figure 9 below:

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60. *See infra* notes 66-68 and accompanying text.

61. This definition of the ideal is compelled by FRE 105 and by the Supreme Court's direction to minimize the impermissible effect of UCE through the use of limiting instructions. *Huddleston*, 485 U.S. at 691-92.

62. $I = P(MR|a \cap AR|\bar{a}) = 404(b)$ ideal.

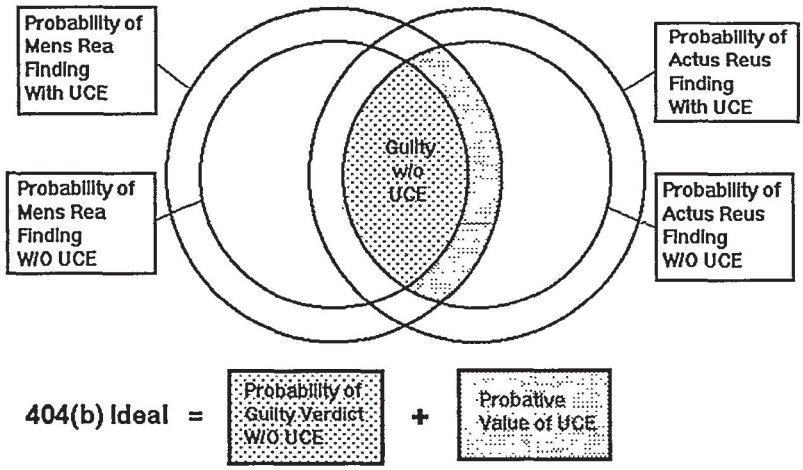

Figure 9

The concept of evidentiary ideals is extremely valuable. Evidentiary alternatives[63] can be evaluated by comparing the extent to which they produce probabilities of conviction and acquittal that approximate that ideal.[64] Evidentiary effects that bring the probability of conviction closer to the ideal are probative effects. Ones that take that probability farther from the ideal are prejudicial. The net result of the two types of effects determines the FRE 403 balance. For example, if the net result of admission is to create a probability of conviction substantially farther from the ideal than the net result of exclusion, the evidence

63. In the simplest case, an evidentiary alternative represents the decision to admit or exclude evidence. However, as discussed in Part III, there are more complex alternatives, e.g., the choice between admission of the evidence or exclusion of the evidence in return for a conditional concession of mens rea. *See infra* notes 71-88 and accompanying text.

64. FRE 403 creates a preference for admission of evidence. FED. R. EVID. 403. Therefore, if admission and exclusion would lead to equivalent variations from the ideal, the evidence should be admitted. Exclusion is mandated only if admission would lead to a substantially greater variance from the ideal.

should be excluded. More complex evidentiary alternatives can be similarly analyzed.[65]

The analysis of variations from the evidentiary ideal necessarily leads to recognition of an equally powerful analytical tool—the concept of evidentiary windfalls.[66] The all or nothing nature of admissibility decisions leads to windfall advantages for one of the two parties. If the UCE is admitted, the prosecution properly benefits from its probative value—but also unfairly benefits from its prejudicial effect. If the evidence is excluded, the defense properly avoids being harmed by its prejudicial effect—but also unfairly avoids being harmed by its probative value to the prosecution.

When UCE is offered to prove mens rea, the prosecution's admission windfall[67] and the defendant's exclusion windfall[68] can be illustrated in Figure 10 below:

65. *See infra* notes 70-204 and accompanying text.

66. This is not to suggest that trial judges should attempt to calculate numerical values for evidentiary windfalls. *See supra* notes 27-28 and accompanying text. Instead, windfall analysis should channel judges' thinking and suggest relationships that are not otherwise obvious. *See, e.g., infra* notes 71-84 and accompanying text.

67. $AWF=P(AR|a \cap \overline{AR}|\bar{a}) \cap P(MR|a)$= Admission Windfall. The admission windfall also equals the prejudicial effect resulting from admission of the evidence.

68. $EWF=P(MR|a \cap \overline{MR}|\bar{a}) \cap P(AR|\bar{a})$= Exclusion Windfall. The exclusion windfall is also equal to the probative effect of the evidence if it is admitted.

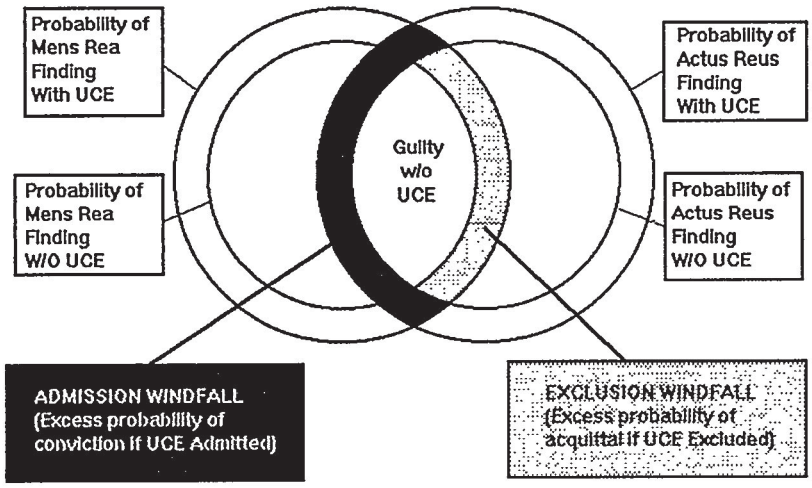

Figure 10

In a sense, these windfalls are the converses of the FRE 403 factors: the prosecution's windfall from admission is the prejudicial effect of the evidence, and the defendant's windfall from exclusion is the probative value of the excluded evidence. However, focusing on the windfall effect of evidentiary decisions emphasizes a fact that the FRE 403 balance frequently obscures. Even if the difference between prejudicial effect and probative value is quite small, the unfair advantage to one of the parties from exclusion or admission can be quite large. The magnitude of the admission windfall is the full prejudicial effect of admission of the evidence. The magnitude of the exclusion windfall is the full probative value of the evidence.

This has intriguing implications for complex evidentiary decisions. For example, it suggests that, in deciding the admissibility of evidence under FRE 403, the trial court should consider any windfall created by previous evidentiary rulings. Thus, suppose a court has already admitted highly prejudicial prosecution evidence because its probative value slightly outweighs its substantial prejudicial effect. While that is, under FRE 403, the correct result, it has created a substantial

admission windfall for the prosecution; i.e., it has increased the probability of conviction considerably beyond the ideal.[69]

Suppose, the prosecution later offers evidence that is slightly probative and equally slightly prejudicial. Viewed in isolation, the later evidence should also be admitted since its prejudicial effect does not substantially outweigh its probative value. However, in light of the admission of the earlier evidence, exclusion will reduce the previously created admission windfall, creating a probability of conviction that more closely approximates the ideal probability defined by the relevant evidentiary rules. Admission of the later evidence would increase the pre-existing windfall, thus creating an even less ideal probability of conviction.[70] Full exploration of the significance of evidentiary windfalls for successive FRE 403 rulings is beyond the scope of this Article. However, the concept of windfall advantages can be used to analyze complex evidentiary alternatives under FRE 404(b). Part III turns to such a problem.

III. CONDITIONAL CONCESSIONS

In the give and take of litigation, a court is not always faced with a simple choice between admission and exclusion of UCE. Frequently a defendant will offer to "conditionally concede" mens rea—to concede that, if he committed the actus reus, he also possessed the mens rea.[71] For example, a defendant charged with possessing drugs with intent to distribute them might concede that, if the jury finds that he possessed the drugs, it should also find that he intended to distribute them.[72] A defendant charged with receiving stolen goods might concede that, if the jury finds that he received the goods, it should also find that he knew they were stolen. A defendant charged with murdering someone with a mail bomb

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69. The alternative—exclusion—would have left the probability of conviction below the ideal by an even greater amount.

70. This is not simply a matter of the law of diminishing returns. The law of diminishing returns simply requires that the probative value (exclusion windfall) and prejudicial effect (admission windfall) be evaluated in light of the earlier evidence. The text's analysis begins after that evaluation.

The conclusion expressed in the text is equally true in situations in which the law of diminishing returns does not apply, for example, cases in which the later evidence deals with an issue entirely unrelated to the earlier evidence.

71. The cases sometimes call conditional concessions "stipulations." *See, e.g.*, United States v. Scott, 48 F.3d 1389, 1396 (5th Cir. 1995); United States v. Ponce, 8 F.3d 989, 993 (5th Cir. 1993); United States v. Willis, 6 F.3d 257, 259 (5th Cir. 1993); *see also* United States v. Brown, 34 F.3d 569, 573 (7th Cir. 1994) (using "concession" and "stipulation" interchangeably); United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994) (discussing "concession" and "stipulation" as though they were interchangeable). This terminology is somewhat misleading. A stipulation, in the ordinary sense, requires the consent of both parties; but a defendant can concede or concede conditionally a fact without the prosecution's consent. (It is, of course, for the court to decide the effect of such a concession.)

72. *See, e.g.*, United States v. Mohel, 604 F.2d 748 (2d Cir. 1979); United States v. Ponce, 8 F.3d 989 (5th Cir. 1993); United States v. Yeagin, 927 F.2d 798 (5th Cir. 1991); United States v. Manner, 887 F.2d 317 (D.C. Cir. 1989).

might concede that, if the jury found that he mailed the bomb, it should also find that the killing was premeditated and that he acted with malice aforethought.[73]

Subpart A uses the basic model to analyze the effects of such a conditional concession.[74] Subpart B uses windfall analysis to reject the Seventh Circuit's *Chaimson*[75] rule by demonstrating that a conditional concession of mens rea should lead to exclusion of the UCE.[76] Subpart C uses windfall analysis to demonstrate a proposition not yet adopted by any circuit: that there exists a class of cases in which a conditional concession of mens rea should be required as a prerequisite to exclusion of the evidence.[77]

A. *Conditional Concession Analysis Using the Basic Model*

Logically, a case in which the defendant conditionally concedes mens rea is the equivalent of a strict liability offense, i.e., an offense with *no* mens rea element. In both situations, the prosecution wins if it proves actus reus and nothing else. Mathematically, the result of a conditional concession of mens rea is simple: the probability of a guilty verdict with such a concession becomes equal to the probability of a finding of actus reus without the UCE:

$$P(G|c) = P(AR|\bar{a})$$

where "G" represents a guilty verdict and "c" represents a conditional concession of mens rea.

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73. Such conditional concessions of mens rea often pose practical problems of phrasing, completeness, or clarity. The conceding defendant must be careful to avoid inadvertently convincing the jury that the defendant is conceding the actus reus—the defendant must be sure the that jury hears the "if." United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980). On the other hand, the government must be certain that the conditional concession clearly and unequivocally covers every mens rea element the prior bad act would otherwise be properly admissible to prove. As one frequently quoted decision has stated:

> [The defendant must] express a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed.

Id. These phrasing issues are often dispositive in practice. However, unless otherwise indicated, this Article will assume that the conditional concession is sufficiently clear to remove the relevant mens rea issues.

74. *See infra* notes 78-84 and accompanying text.

75. United States v. Chaimson, 760 F.2d 798 (7th Cir. 1994).

76. *See infra* notes 85-140 and accompanying text.

77. *See infra* notes 141-51 and accompanying text.

This effect is illustrated in Figure 11 below:

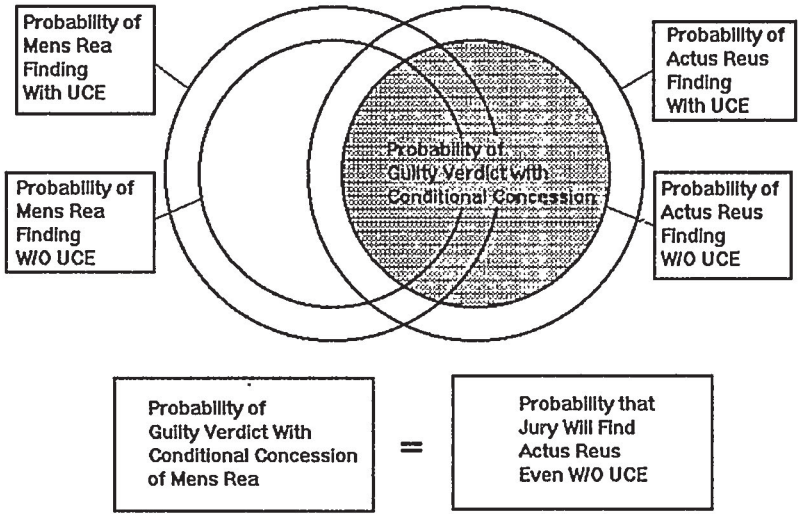

Figure 11

Since mens rea has been conceded, the mens rea circles have become irrelevant. The probability of guilt has become the entire inner actus reus circle.

When the defendant conditionally concedes mens rea, the probability of a guilty verdict is the sum of three component probabilities. Two of these components have already been described and were previously illustrated in Figure 9:[78] the probability of a guilty verdict without the UCE[79] and the additional probability resulting from the probative value of the evidence, i.e., its mens rea guilt effect.[80] Together, these two components provide the prosecution the full probability of conviction to which it is legitimately entitled. By themselves, they represent the probability of conviction in the ideal FRE 404(b) trial:[81] a trial in which the jury considers the UCE for permissible purposes but not for impermissible ones.

78. *See supra* Figure 9 at p. 1093.
79. $P(G|\bar{a}) = P(MR|\bar{a} \cap AR|\bar{a})$.
80. $P(AR|\bar{a} \cap MR|a \cap \overline{MR}|\bar{a})$.
81. $I = P(MR|a \cap AR|\bar{a})$.

But there is a third component: the conditional concession windfall. The conditional concession windfall benefits the prosecution and results from the fact that the conditional concession will cause the jury to find mens rea even if the UCE would not have caused such a finding. The conditional concession windfall represents the risk that the jury will find the actus reus without the UCE and will find mens rea solely because of the concession.[82] It is illustrated in Figure 12 below:

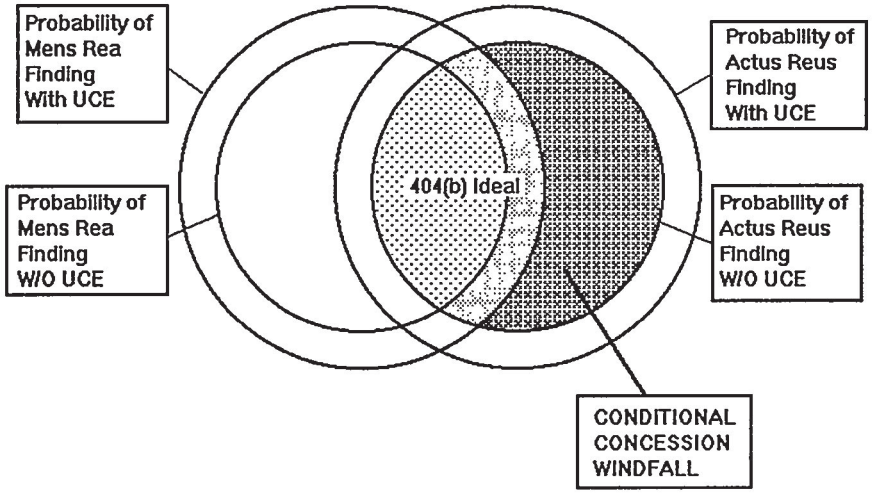

Figure 12

82. CCWF=P(AR $|\bar{a} \cap \overline{MR}|a$)=Conditional ConcessionWindfall.

This additional probability of conviction is a windfall for the prosecution since it exceeds the FRE 404(b) ideal. The defendant is willing to confer that windfall because he believes that it is the lesser of two evils. As discussed in Part II, admission of the evidence would confer a different windfall on the prosecution—an admission windfall that is equal to the prejudicial effect of the evidence.[83] The defendant will be willing to conditionally concede mens rea if he concludes that the admission windfall would be more damaging than the conditional concession windfall.[84] This comparison is illustrated in Figure 13 below:

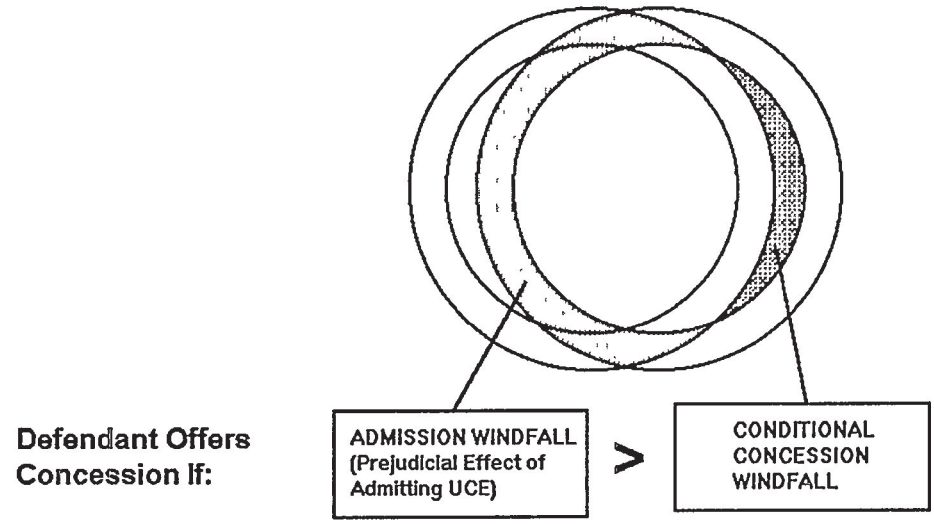

Figure 13

83. AWF=P(AR |a ∩ $\overline{AR}$ |$\bar{a}$) ∩ P(MR |a). *See supra* notes 66-70 and accompanying text.
84. CCWF < AWF or P(AR |$\bar{a}$ ∩ $\overline{MR}$ |a)<P(AR |a ∩ $\overline{AR}$ |$\bar{a}$) ∩ P(MR |a).

B. The Chaimson *Rule and Conditional Concessions*

The Courts of Appeals are split on the effect of conditional concessions on the admissibility of UCE. The Seventh Circuit has adopted the *Chaimson* rule that uniformly refuses to exclude UCE to prove mens rea even though the defendant has offered to conditionally concede mens rea.[85] At least nine other circuits take the opposite position, holding that a defendant's offer to conditionally concede mens rea should always lead to exclusion of the UCE.[86]

Section 1 will illustrate that the *Chaimson* rule is wrong—although not quite as wrong as it might seem at first glance. An offer to conditionally concede mens rea should uniformly lead to exclusion of UCE.[87] Section 2 will discuss an important argument for the Seventh Circuit's position—the rule against "pleading out" elements of a criminal charge—and will explain why that argument does not support the circuit's position.[88]

1. The Seventh Circuit Rule: The Fundamental Flaw and the Kernel of Truth

The Court of Appeals for the Seventh Circuit takes the surprising position that a defendant's offer to conditionally concede mens rea should have no effect on the admissibility of uncharged conduct. The court acknowledges that other circuits exclude prior bad act evidence whenever the defendant conditionally concedes the element that the evidence is offered to prove.[89] However, the court specifically rejects that position stating that, "even if a stipulation is offered the prosecution has to be allowed to prove its entire case if it so chooses."[90] Under this *Chaimson* rule, "the government is entitled to present 'other acts' evidence to assist in proving such a material element of an offense such as defendant's state

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85. *See infra* notes 90-92 and accompanying text. The Ninth Circuit may share this position. *See infra* note 92 and accompanying text (listing cases adopting the *Chaimson* rule).

86. *See infra* notes 93-98 and accompanying text.

87. *See infra* notes 89-108 and accompanying text.

88. *See infra* notes 109-27 and accompanying text.

89. United States v. Brown, 34 F.3d 569, 572 (7th Cir. 1994); *see id.* (citing cases from the Second, Third, Fifth and Eleventh Circuits so holding).

90. *Id.; cf.* United States v. Chaimson, 760 F.2d 798 (7th Cir. 1985). *Brown* enigmatically suggests that the prosecution's effort to present prior bad acts might still be limited under FRE 403 and that an offer to stipulate should be considered in the FRE 403 weighing. Unless that suggestion is a hint that the trial court should engage in the sort of analysis described in the text accompanying notes 86-88, it is inconsistent with the Circuit's position. If the defendant's stipulation is taken into account, the prior bad act evidence would have no marginal probative value and the FRE 403 weighing would necessarily lead to exclusion. *See, e.g.*, United States v. Russo, 717 F.2d 545, 552 (11th Cir. 1983); United States v. Beechum, 582 F.2d 898, 914 & n.19 (5th Cir. 1978) (en banc).

of mind *even if it is not in dispute.*"[91] The Ninth Circuit may have adopted a similar position.[92]

The *Chaimson* rule has been rejected by at least nine other circuits.[93] At first glance, the rule appears to make no sense. As discussed in Part A, a conditional concession of mens rea provides the prosecution the full probability of conviction to which it is entitled.[94] The prosecution receives the entire benefit of the probative value of the pre-existing evidence[95] and the UCE.[96] All the prosecution loses by exclusion of the UCE is the prejudicial effect of the evidence—something to which the prosecution is not entitled.[97] In effect, what the prosecution loses is the possibility that the jury will do exactly what FRE 404(b) forbids it to do—use the UCE to find that the defendant performed the actus reus. Even for that "loss," the prosecution is partially compensated. The prosecution receives the conditional concession windfall.[98]

However, the existence of the conditional concession windfall also explains why the Seventh Circuit is not as wrong as it might appear at first glance. FRE 403 mandates admission unless the excess of prejudicial effect over probative value is *substantial.*[99] A conditional concession eliminates the marginal probative value of the UCE, i.e., its probative value given the concession.[100] Ignoring the conditional concession windfall, one would compare the marginal probative value of the evidence (zero) with its prejudicial effect.[101] Therefore, FRE 403 mandates acceptance of the concession (and exclusion of the evidence) in all cases except the rare ones in which the prejudicial effect is de minimis.[102]

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91. United States v. Acevedo, 28 F.3d 686, 688 (7th Cir. 1994) (emphasis added); *see id.* (stating in dictum that the rule is current circuit law).

92. *See, e.g.*, United States v. Old Chief, No. 94-30277, 1995 WL 325745, *1 (9th Cir., May 31, 1995) (declaring that a stipulation should not enter into the weighing analysis for determining the admissibility of evidence), *cert. granted*, 116 S. Ct. 907 (1996); United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993) (stating that a stipulation should not even be *considered* in the FRE 403 balance); United States v. Hadley, 918 F.2d 848, 851-52 (9th Cir. 1990) (holding that uncharged conduct is admissible to prove intent even though defendant agreed not to argue lack of intent), *cert. dismissed as improvidently granted*, 506 U.S. 19 (1991).

93. *See, e.g.*, United States v. Thomas 58 F.3d 1318, 1323 (8th Cir. 1995); United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994); United States v. Taylor, 17 F.3d 333, 338-39 (11th Cir. 1994); United States v. Ferrer-Cruz, 899 F.2d 135, 138-39 (1st Cir. 1990); United States v. Manner, 887 F.2d 317, 322 & n.2 (D.C. Cir. 1989); United States v. Colon, 880 F.2d 650, 658-60 (2d Cir. 1989); United States v. Soundingsides, 825 F.2d 1468, 1469 (10th Cir. 1987) (opinion on rehearing); United States v. Schaffner, 771 F.2d 149, 153 (6th Cir. 1985); *Beechum*, 582 F.2d at 914 & n.19; *cf.* United States v. Fleming, 983 F.2d 1058, 1061 (4th Cir. 1993) (holding that a stipulation decreases the need for evidence).

94. *See supra* notes 78-83 and accompanying text.

95. $P(AR|\bar{a} \cap MR|\bar{a})$. *See supra* notes 78-83 and accompanying text.

96. $P(MR|a \cap \overline{MR}|\bar{a}) \cap P(AR|\bar{a})$. *See supra* notes 83-94 and accompanying text.

97. $AWF=P(AR|a \cap \overline{AR}|\bar{a}) \cap P(MR|a)$. *See supra* note 69 and accompanying text.

98. $CCWF=P(AR|\bar{a} \cap \overline{MR}|a)$. *See supra* note 82 and accompanying text.

99. FED. R. EVID. 403.

100. $P(MR|c \cap a) = P(MR|c) = 100\%$. Therefore, $P(MR|c \cap a) - P(MR|c) = 0$.

101. United States v. Jones, 28 F.3d 1574, 1581 (11th Cir. 1994); *Beechum*, 582 F.2d at 914 & n.19.

102. *Russo*, 717 F.2d at 552; *Beechum*, 582 F.2d at 914 & n.19.

The existence of the conditional concession windfall complicates the analysis. Just as a court must consider only the marginal probative value of the evidence, it must also consider only its marginal prejudicial effect, i.e., the increased prejudice due to the decision to admit the evidence rather than to accept the concession.[103] Even if the prejudicial effect of the evidence (i.e., the prosecution's admission windfall) is itself substantial, the *difference* between that effect and the conditional concession windfall[104] may be de minimis.[105] In such a situation, the marginal prejudicial effect might outweigh—but not *substantially* outweigh[106]—the probative value. As a result, FRE 403 would require the court to reject the offered conditional concession and admit the evidence.[107] Figure 14 below illustrates the analysis:

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103. The prosecution receives an improper advantage under either alternative. If the evidence is admitted, it receives the admission windfall. If a concession is accepted (and the evidence excluded), the prosecution receives the conditional concession windfall. The prejudicial effect of choosing the former over the latter is the difference between the two improper advantages.

104. AWF - CCWF or $P(AR|a \cap \overline{AR}|\bar{a}) \cap P(MR|a) - P(AR|\bar{a} \cap \overline{MR}|a)$.

105. The parties must believe that the prejudicial effect of the evidence (i.e., the admission windfall) is at least somewhat greater than the conditional concession windfall or else the defendant would not offer the concession and the prosecution would not oppose it. *See infra* note 108 and accompanying text.

106. *See supra* note 99 and accompanying text.

107. AWF - CCWF $\not\approx 0$, or $P(AR|a \cap \overline{AR}|\bar{a}) \cap P(MR|a) - P(AR|\bar{a} \cap \overline{MR}|a) \not\approx 0$.

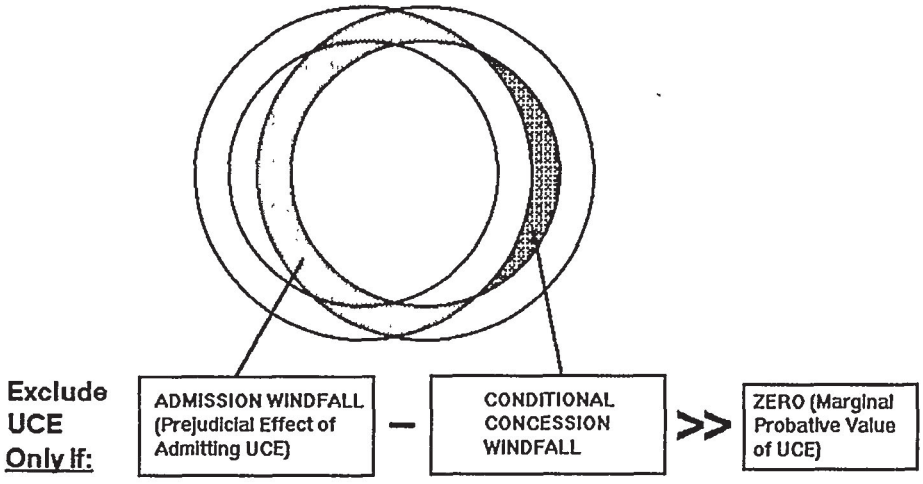

Figure 14

While this analysis does not support the *Chaimson* rule's uniform rejection of conditional concessions, it does show that there may exist a small class of cases in which such concessions should be rejected. Thus, the Seventh Circuit could justify a case by case analysis that occasionally leads to rejecting concessions.

Nonetheless, the remaining circuits are almost surely wise to adopt a per se rule requiring the trial court to exclude UCE whenever a defendant offers to conditionally concede mens rea. The fact that the defense makes the offer and that the prosecution rejects it demonstrates that the parties believe that conviction is less likely with the concession than with the UCE, i.e, that the conditional concession windfall is smaller than the admission windfall.[108] It strongly suggests that they consider the difference to be sufficiently significant to argue about the issue. The possibility that both parties have concurrently misjudged the effect of the evidence seems unlikely to justify the additional cost of case by case analysis.

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108. *See supra* note 105 and accompanying text.

2. *The* Chaimson *Rule and Jury Nullification: The False Analogy to the Rule Against "Pleading Out"*

Support for the *Chaimson* rule might be sought in the "longstanding rule that 'the criminal accused cannot "plead out" an element of the charged offense by offering to stipulate to that element.'"[109] That rule can be illustrated by the situation of a defendant charged with being a felon in possession of a firearm.[110] Such a defendant may fear that jurors will infer from his prior felony that he committed the charged offense, i.e., possessed the firearm in question. (This is, of course, precisely the type of inference that FRE 404(b) forbids.) To avoid this risk, the defendant may attempt to concede his previous felony conviction and thus prevent the prosecution from introducing evidence of the previous conviction.[111]

The rule against pleading out elements can best be justified as an effort to avoid increasing the risk of jury nullification.[112] In a felon-in-possession case, the defendant's status as a convicted felon is a crucial part of the criminality of the defendant's current conduct.[113] Without the prior conviction, the defendant's current conduct would be entirely lawful.[114] Eliminating that issue from the case gives the jury the impression that the defendant is charged with a single element,

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109. Edward J. Imwinkelried, *The Right to 'Plead Out' Issues and Block the Admission of Prejudicial Evidence*, 40 EMORY L.J. 341, 357-58 (1991); *cf.* United States v. Breitkreutz, 8 F.3d 688, 691 (9th Cir. 1993); United States v. Ponce, 8 F.3d 989, 993 (5th Cir. 1993); United States v. Brickey, 426 F.2d 680, 685-86 (8th Cir. 1970), *cert. denied*, 400 U.S. 828. The government has hinted at a similar argument. Brief for the United States at 34, Hadley v. United States, 506 U.S. 19 (U.S. 1993) (denying certiorari as improvidently granted) (quoting United States v. Allen, 798 F.2d 985, 1001 (7th Cir. 1986)). *Chaimson* itself did not discuss the rule against pleading out elements.

Professor Imwinkelried's article provides a clear historical analysis of the development of the rule against pleading out issues in criminal cases, Imwinkelried, *supra,* at 347-58, and a fascinating constitutional argument against its modern use, *id.* at 359-88.

110. *See* 18 U.S.C.A. § 922(g) (West Supp. 1996) (defining the crime as being a felon in possession of a firearm). The Supreme Court has recently granted certiorari to review the Ninth Circuit's practice of uniformly permitting the government to reject such stipulations. Old Chief v. United States, 56 F.3d 75 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 907 (1996).

For a less common application of the rule against pleading out elements of a criminal charge, see Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958), *cert. denied*, 358 U.S. 824 (1958), in which the court refused to accept the defendant's offered concession that a film was obscene.

111. *Breitkreutz*, 8 F.3d at 690-92. *But see, e.g.*, United States v. Tavares, 21 F.3d 1, 6 (1st Cir. 1994) (permitting proof of felony conviction but refusing to permit proof of the nature of the felony).

112. United States v. Barker, 1 F.3d 957, 960 (9th Cir. 1993) (bifurcated trials); United States v. Gilliam, 994 F.2d 97, 99-101 (2d Cir. 1993); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989) (bifurcated trials).

For alternative explanations—but not justifications—see Imwinkelried, *supra* note 109.

113. *Gilliam*, 994 F.2d at 100; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 194 (1994).

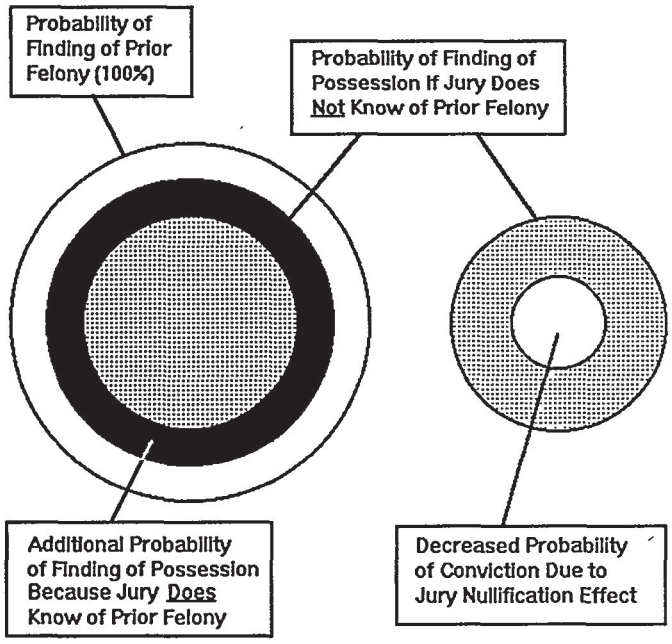
114. *Barker*, 1 F.3d at 960; *Gilliam*, 994 F.2d at 97, 100-01; *Collamore*, 868 F.2d at 28; *cf.* United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977) (noting that transporting explosives is innocent conduct unless defendant is a convicted felon), *cert. denied*, 434 U.S. 1047 (1978).

"*person*-in-possession" crime.[115] Misled as to the true nature of the charge, jurors (many of whom quite lawfully own firearms) may be unwilling to convict someone of a truncated "crime" that their own experience tells them simply is not illegal or immoral.[116]

115. *Barker*, 1 F.3d at 960; *Gilliam*, 994 F.2d at 101; *Collamore*, 868 F.2d at 28. Similarly, unless the jury in *Parr* was told that the film in question was obscene, it would be led to believe that the defendant was charged with possession of a film simpliciter. *Parr*, 255 F.2d at 88 (5th Cir. 1958).

116. *See Barker*, 1 F.3d at 960 (discussing the questions which enter the minds of jurists when the defendant is being tried for possession of a gun); *Gilliam*, 994 F.2d at 99 (noting that the jury may think "so what, a lot of people have guns, what's the big deal[?]"); United States v. Birdsong, 982 F.2d 481, 482 (11th Cir. 1993), (same), *cert. denied*, 508 U.S. 980; *Collamore*, 868 F.2d at 28 (explaining that a juror whose friends and relatives own firearms "may wonder why [defendant's] possession was illegal").

The effect of pleading out the "felon element" is illustrated a comparison of the two diagrams in Figure 15 below:



WITHOUT PLEADING OUT
Figure 15-A

WITH PLEADING OUT
Figure 15-B

Figure 15

Figure 15-A represents the probabilities if the prior felony is introduced into evidence, while Figure 15-B represents the probabilities if the element is pleaded out. In Figure 15-A, the outer circle is the probability that the jury will find that defendant has a prior felony conviction.[117] The light gray inner circle is the probability that the jury would, without knowing of the prior felony, find that the defendant possessed the firearm. The darker doughnut in Figure 15-A represents the increased probability of such a finding if the jury *does* know of the prior felony. This doughnut is a form of prejudice to the defendant and is quite similar to the actus reus guilt effect.[118] The probability of conviction is the sum of these two probabilities, i.e., the probative value of the evidence of possession and the prejudicial effect of the prior felony.

But there is also prejudice if the element is pleaded out, albeit prejudice of a different sort and to a different party. In Figure 15-B, the light gray circle again represents the probability that the jury, ignorant of the defendant's prior felony, would find that the defendant possessed the firearm.[119] But that probability has been reduced by the solid white area representing the risk that the jury will refuse to convict because of the jury nullification effect, i.e., because it believes that the defendant is being charged with simply possessing a weapon. This circle is a form of prejudice to the prosecution. If the prior felony element is pleaded out, the ideal probability of conviction is reduced by the prejudicial effect (to the prosecution) created by the jury nullification effect.

Assuming that the goal is to minimize undue prejudice, the two diagrams suggest the proper approach to the pleading out problem. The prejudicial effect of the prior felony (i.e., the dark ring in Figure 15-A) should be compared with the jury nullification effect of pleading out (i.e., the white circle in Figure 15-B). Given the preference for admission embodied in FRE 403, the defendant should be permitted to plead out the element only if the prejudicial effect is substantially greater than the jury nullification effect.[120] While this analysis does not support

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117. Since this will ordinarily be proved by a certified judgment of conviction, it is assigned a probability sufficiently close to certainty to completely encompass the remaining circles.

118. Like the actus reus guilt effect, the darker doughnut represents the risk that the jury will find actus reus due to impermissible propensity reasoning.

119. There is no need for an outer circle representing the probability of finding the prior felony since that element has been eliminated as a requirement for conviction.

120. None of the circuits has adopted the approach endorsed in the text. The Ninth Circuit seems farthest from that approach. It uniformly permits the prosecution to introduce both the fact of a felony conviction and the nature of that conviction. *Breitkreutz*, 8 F.3d at 691. While the Ninth Circuit may prevent the prosecution from introducing multiple convictions, it apparently permits the prosecution to choose the most prejudicial. *Id.* at 692. This rule seems designed to maximize the potential for prejudice. *But see* United States v. Roberson, No. 94-30216, 1995 WL 411872, at *2 (9th Cir. July 11, 1995) (refusing to permit testimony "describing the details of [a defendant's] prior conviction").

The First Circuit takes an approach that more closely approximates the one advocated in the text. It permits the proof of the unadorned fact that the defendant has been convicted of an unspecified felony. *Tavares*, 21 F.3d at 4-5. This avoids the jury nullification risk while minimizing the prejudicial effect of the prior felony. Given FRE 403's preference for admission, this may be a rough proxy for the text's approach.

a per se rule against pleading out elements, it does suggest that there exists a set of cases in which pleading out should not be permitted.

Does a similar set of cases exist if the defendant, instead of seeking to plead out an element, seeks to conditionally concede mens rea? In certain respects, the situations seem quite similar. In each situation, the defendant seeks to prevent the jury from using evidence of uncharged conduct to infer the actus reus of the crime. In each, the defendant seeks to avoid an impermissible actus reus effect. It might seem that a similar jury nullification effect would exist and a similar analysis would be appropriate in both situations.

However, the two situations are different in a crucial respect. By "pleading out," a defendant does not seek to substitute a concession of an element for evidence on that element.[121] Instead, the defendant seeks to prevent the jury from hearing either the concession or the evidence.[122] Pleading out causes the jury to decide the case as if that element were not a requirement for conviction.[123] In sharp contrast, a conditional concession of mens rea need not mislead the jury about the elements of the offense. The jury can be made fully aware that the crime has a mens rea element. The conditional concession simply tells the jury that the defendant concedes that it should find that the defendant did possess that mens rea if it finds that he committed the actus reus. The jury is not asked to convict the defendant of a truncated crime that does not sound like a real crime.[124] It is simply told that the defendant conditionally agrees that one of the elements of the crime has been proved. The jury is not being asked, for example, to convict someone for possession of a firearm without being told that the possession is a crime for this defendant because he is a convicted felon. Instead, it is being asked to convict someone of possession with intent to distribute and being told that the parties agree that whoever possessed the drugs also intended to distribute them. Thus, the first and fundamental problem with the analogy between the two situations is that

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However, without empirical research on the relative magnitudes of the jury nullification effect and the prejudicial effect of the prior felony conviction—empirical research that is outside the scope of this article—no definitive evaluation is possible.

121. *See, e.g., Gilliam*, 994 F.2d at 102-03 (permitting the defendant to inform the jury of a prior felony by stipulation but refusing to permit the defendant to conceal the element from jury by pleading out the element).

122. There are, of course, defendants who do seek to substitute a bland concession of convicted felon status for the often lurid details of the conviction itself. *See, e.g., id.* This type of concession should be permitted for exactly the same reason that conditional concessions should be permitted. In both cases, the prosecution receives all that it is entitled to—certainty that the jury will find the conceded element—and is deprived only of something to which it is not entitled—increased probability that the jury will find possession resulting from the impermissible propensity inference or from the "bad man effect." *See Tavares*, 21 F.3d at 6.

123. *See supra* note 115 and accompanying text.

124. *See supra* note 116 and accompanying text.

conditional concessions simply do not seem to create a jury nullification effect.[125] Of course, there is always some risk of jury nullification in any case.[126] For example, a rogue jury, believing that drugs should be legalized, could disregard its instructions. However, there is no *increase* in that risk from accepting the conditional concession in lieu of the evidence of mens rea.[127]

3. *The* Chaimson *Rule and Jury Nullification: The Ambiguous Results of a Hypothetical Effect*

Since conditional concessions create no marginal jury nullification effect, the analogy with pleading out fails at the outset.[128] But even if conditional concessions did create such an effect, the analogy would be seriously flawed. The following analysis assumes that accepting a conditional concession in lieu of UCE of mens rea creates some form of increased risk of jury nullification. The analysis will demonstrate that the significance of such a risk is far more ambiguous than the effect of the jury nullification risk created by pleading out.[129] If a conditional concession jury nullification effect existed, it would create a "nullification windfall" for the defense that could be illustrated by the white circle of acquittals shown in Figure 16.

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125. It is difficult to prove a negative. It is conceivable that there is a situation in which accepting a conditional concession of mens rea in lieu of evidence would increase the risk of jury nullification. However, the author has read several hundred cases dealing with FRE 404(b) without being able to identify such a situation.

126. For a discussion of the history of jury nullification, see Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures,* 65 N.Y.U. L. REV. 825, 828-34 (1990).

127. Excluding uncharged conduct does create what might be called the "false second chance effect." Exclusion may cause the jury to falsely believe that the defendant has never done anything bad in the past. As a result of that false belief, the jury may decide to acquit the defendant (despite believing him guilty) in order to give him a "second chance." The risk of such an acquittal is a form of jury nullification. But it is a risk that the adoption of FRE 404(b) requires courts to accept. Whenever UCE is excluded, the false second chance effect is created. If the existence of that risk justified an exception to FRE 404(b), the exception would apply to all cases and the rule would apply to none.

128. *See supra* notes 109-27 and accompanying text.

129. *See infra* notes 130-40 and accompanying text.

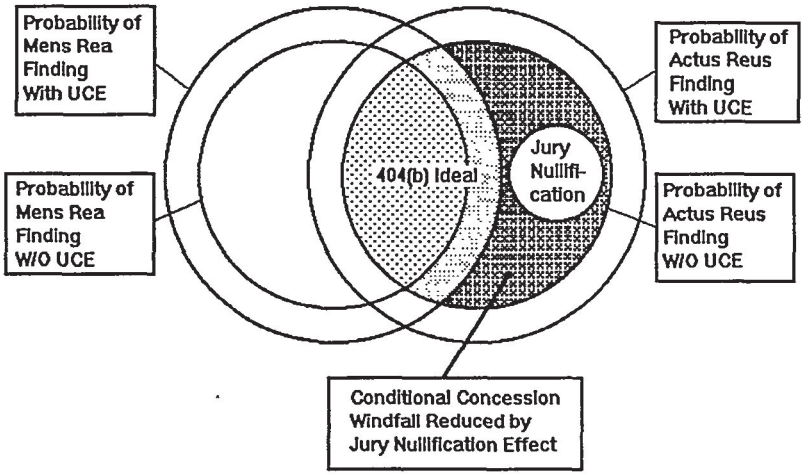

Figure 16

Visual analysis of this diagram demonstrates a surprising fact about the effect of jury nullification when it is combined with a conditional concession: it may move the probability of conviction closer to—rather than farther from—the FRE 404(b) ideal.[130] Without the jury nullification effect, a conditional concession places the defendant at a disadvantage that is equal to the conditional concession windfall.[131] As Figure 16 suggests, if the jury nullification effect of the concession (the nullification windfall) is smaller than that disadvantage,[132] the nullification simply reduces the prosecution's windfall.[133]

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130. The conclusion can be stated mathematically as follows:

$$I + |CCWF - NWF| < I + |CCWF|$$

where "I" represents the FRE 404(b) ideal, "CCWF" represents the conditional concession windfall, and "NWF" represents the nullification windfall.

131. $CCWF=P(AR\,|\,\bar{a} \cap \overline{MR}\,|\,a)$. *See supra* notes 71-84 and accompanying text.

132. $NWF < CCWF$.

133. If: $0 < NWF < CCWF$,
then: $|CCWF - NWF| < |CCWF|$.

The placement of the white disk representing nullification acquittals makes no difference in the analysis. As

By doing so, the nullification effect makes acceptance of the conditional concession a more desirable choice for the court than it would be without that effect.[134] As discussed above, FRE 403 mandated acceptance of the conditional concession (ignoring any nullification effect) because the conditional concession windfall was substantially smaller than the admission windfall.[135] So long as the nullification effect is no larger than the conditional concession windfall, nullification will increase the difference between the effects and will make acceptance of the concession even more desirable.[136] Since the effect reduces the variance from the FRE 404(b) ideal, it makes accepting the concession a better alternative than it would be without the effect. As a result, the conditional concession should still be accepted and the UCE should be excluded.

If the (hypothetical) jury nullification effect were larger than the conditional concession windfall, it would change the direction of the variation from the FRE 404(b) ideal.[137] However, that would not necessarily mean that the concession

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drawn, the diagram shows the disk entirely within the area illustrating the conditional concession windfall. However, the analysis would be the same if the disk were drawn completely inside the area illustrating the FRE 404(b) ideal or if it overlapped both areas. If a thief's purse holds $50 of his own money and $30 of his victims, justice requires that $30 be returned. It makes no difference if the $30 is taken from the funds that originally belonged to the thief or the funds that originally belonged to the victim.

134. If: |CCWF - NWF| < |CCWF|,
then: I + |CCWF - NWF| < I + |CCWF|.

135. CCWF << AWF. *See supra* notes 104-08 and accompanying text.

136. If: 0 < NWF< CCWF << AWF,
then: |CCWF - NWF| < |CCWF|,
therefore: |CCWF - NWF| << AWF.

The discussion in the text assumes that, even without the nullification effect, the concession was a desirable one for the court (i.e., one in which the admission windfall was greater than the conditional concession windfall). If this were not the case, the analysis would not change. The nullification effect would still be advantageous to the defendant and would create one of three situations. First, the concession might still be undesirable even with nullification. In that situation, concession would be disadvantageous to the defendant and he would not offer it. Second, the nullification effect might make the concession significantly desirable. In that situation, the defendant will offer it and the court should accept it since the marginal prejudicial effect of the UCE would be substantially greater than its marginal probative value. Third, the nullification effect might make the concession desirable, but only to a de minimis extent. In that situation, the defendant gains a slight advantage by offering the concession and may do so. If the defendant does, the court is faced with the same problem discussed in the text.

137. If: 0 < CCWF < NWF,
then: CCWF - NWF < 0.

As discussed in Part III.C., the fact that this changes the party benefiting from the windfall is no different than the effect of many FRE 403 decisions. *See infra* notes 141-51.

Changing the party benefited from the variation does have an important practical effect. So long as the nullification effect is smaller than the conditional concession windfall, the parties and the court are trying to answer essentially the same question: whether the admission windfall to the prosecution would be greater (for the court, substantially greater) than the conditional concession windfall minus any nullification effect. The fact that the defendant offers and the defendant opposes a conditional concession tells the court that the parties have answered that question in the affirmative.

But if the nullification effect is greater than the conditional concession windfall, the court can no longer expect guidance from the parties' positions. Since the effect of the concession (including the jury nullification effect) is a probability of conviction that is less than the FRE 404(b) ideal, while the probability from

should be rejected. Unless the jury nullification effect were greater than *twice* the conditional concession windfall, it would still reduce the magnitude of the variation from the FRE 404(b) ideal.[138] Moreover, unless the jury nullification effect equaled or exceeded the sum of the admission windfall and the conditional concession windfall, the variation would still be smaller than the variation that would result from admitting the UCE.[139]

Thus, even if one were to assume that there existed a conditional concession nullification effect, that effect would justify rejecting conditional concessions only if it were larger than the sum of the conditional concession windfall and the admission windfall.[140] It would justify a *per se* rule rejecting *all* conditional concessions only if the effect was almost always greater than that sum. This is a lot to ask of an as yet unidentifiable effect.

C. *Conditional Concession of Mens Rea as a Prerequisite to Excluding Evidence*

Part III.B. demonstrated that the trial court should *permit* the defendant to conditionally concede mens rea in order to prevent the admission of otherwise *admissible* UCE. Part III.C. will suggest that there are situations in which the trial court should *require* the defendant to conditionally concede mens rea in order to prevent admission of otherwise *inadmissible* UCE.[141] It will suggest that, even if

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admission of the UCE is greater than that ideal, the parties no longer care about the relative *magnitudes* of the effects. The defendant will always offer and the prosecution will always refuse the conditional concession. But for the court, it is the relative magnitudes that are crucial.

138. If: $0 < CCWF < NWF < 2 \times CCWF$,
then: $|CCWF - NWF| < |CCWF|$.

Thus, suppose the concession windfall increased the probability of conviction from a FRE 404(b) ideal of 80% to 90% (CCWF = 10) and the nullification effect reduced it from 90% to 75% (NWF = 15). If there were no nullification, the net windfall (favoring the prosecution) would be 10%. Instead, the net windfall (favoring the defense) is only 5%.

139. Thus, suppose (as in the previous note) that the concession would increase the probability of conviction from a FRE 404(b) ideal of 80% to 90% (CCWF = 10) and that nullification then reduced the probability from 90% to 75% (NWF = 15). Suppose also that admission of the evidence would increase the probability of conviction from the FRE 404(b) ideal of 80% to 88% (AWF = 8). If the evidence is admitted, the net windfall (favoring the prosecution) will be 8%. If, instead, the concession is accepted, the net windfall (favoring the defense) will be only 5%.

140. To be more precise, it would justify rejection if it were sufficiently close to that sum that the difference was not substantial.

141. The author has been unable to discover any judicial decision in which a court has recognized this possibility. The language of the decisions on conditional concessions seems to assume that concessions should not be required unless the UCE would otherwise be admissible. *See, e.g.*, United States v. Colon, 880 F.2d 650, 656-57 (2d Cir. 1989) (explaining that it is appropriate to permit a concession that is necessary to exclude evidence unless its prejudicial effect substantially outweighs its probative value); United States v. Franklin, 704 F.2d 1183, 1188 (10th Cir. 1983) (opining that concession necessary to exclude evidence that would be admissible if intent was actively contested); United States v. Webb, 625 F.2d 709, 710 (5th Cir. 1980) (same).

On the other hand, the practical effect of those decisions may be to force such concessions regardless of whether the evidence would otherwise be admissible. Failure to make such a concession seems almost

the prejudicial effect of the evidence substantially outweighs its probative value, it may still be proper for the court to require a conditional concession as a precondition for exclusion.

At first glance, this suggestion might seem to subvert FRE 403. However, there is a class of cases in which the court would more closely approximate the FRE 404(b) ideal by demanding a conditional concession even though the FRE 403 balance would otherwise mandate exclusion. The court should make such a demand whenever the conditional concession windfall to the prosecution would be less than the exclusion windfall to the defense.[142]

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invariably fatal in light of the extreme deference given to trial court's balancing decisions. *See, e.g., Franklin*, 704 F.2d at 1187 (deferring to the trial court on FRE 403 balancing despite exceptionally strong pre-existing evidence of mens rea); *cf.* United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988) (stating that review of a trial court's FRE 403 balancing decision is the quintessential situation for appellate court restraint).

142. CCWF < EWF or $P(AR \mid \overline{a} \cap \overline{MR} \mid a) < P(MR \mid a \cap \overline{MR} \mid \overline{a})$.

This situation is illustrated in Figure 17 below:

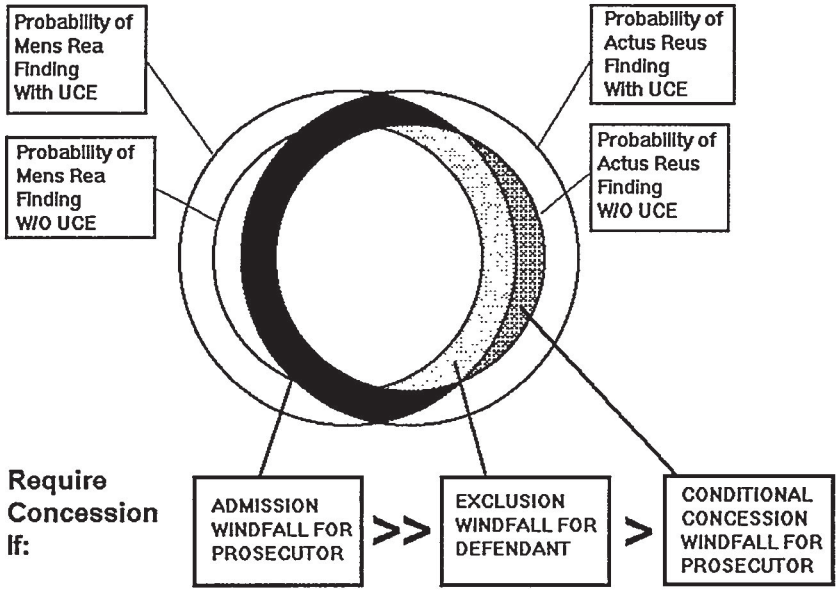

Figure 17

In such a situation, the probability of conviction with the conditional concession[143] would more closely approximate the FRE 404(b) ideal than the probability of conviction with the evidence excluded.[144] Exclusion reduces the probability of conviction below the FRE 404(b) ideal.[145] The concession restores that reduction and then increases the probability above the ideal by a smaller amount.[146] While admission would create more of a windfall than exclusion, exclusion would create more of a windfall than a conditional concession.[147] Of the three alternatives, conditional concession comes closest to the FRE 404(b) ideal.[148]

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143. I + CCWF = P(AR|ā).

144. I - EWF. *See infra* note 148.

145. I - EWF.

146. I + CCWF.

147. AWF >> EWF > CCWF.

148. The variance from the ideal if the evidence is excluded is the exclusion windfall which favors the defense. The variance from the ideal if a conditional concession is accepted is the conditional concession windfall which favors the prosecution. However, this does not affect the *magnitude* of variances which are expressed as the absolute values of the differences rather than the differences themselves. Thus:

It may seem unfair that requiring such a concession reduces the magnitude of the windfall by changing the party that receives it. The court deprives the *defendant* of an advantage and confers a smaller one on the *prosecution*. But this is conceptually no different than any other FRE 403 decision. Whenever the court admits prosecution evidence that is both prejudicial and probative, the court confers an admission windfall on the prosecution and deprives the defendant of an exclusion windfall.[149] Whenever it excludes such evidence, the court confers an exclusion windfall on the defense and deprives the prosecution of an admission windfall.[150] Either decision—like the decision discussed in the text—confers a windfall on one party in order to avoid conferring a larger one on the other.

Of course, demanding a conditional concession as a prerequisite for excluding the otherwise inadmissible evidence is only desirable if the defendant is highly likely to accede to the demand. Unless the defendant does so, the evidence will be admitted and that would create the *greatest* windfall—the situation farthest from the FRE 404(b) ideal. However, it seems unlikely that a rational defendant would refuse the demand. Since the harm to the defendant from admission of the evidence (the admission windfall) is substantially greater than the harm from conditionally conceding mens rea (the conditional concession windfall),[151] the defendant has a strong incentive to accede to the court's demand.

IV. ANALYZING THE *RING* RULE

Part III analyzed the Seventh Circuit's *Chaimson* rule and concluded it should be rejected. Part IV will analyze the longstanding *Ring* rule and will conclude that it is correct—as far as it goes—but that it should be expanded.

A. *The* Ring *Rule*

In many situations, a finding that the defendant committed the actus reus is, by itself, extremely strong evidence that he also possessed the mens rea. The fact that a suspect possessed a thousand grams of cocaine strongly implies that he intended to distribute it.[152] The fact that a defense lawyer advised a potential prosecution witness to hide from the government throughout the client's trial

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If: $0 \leq CCWF < EWF$,
then: $|CCWF| < |-EWF|$,
ergo: $|I - (I + CCWF)| < |I - (I - EWF)|$.

149. $P(G|a) = I + AWF$.

150. $P(G|\bar{a}) = I - EWF$.

151. If $AWF >> EWF > CWF$ then $AWF >> CWF$.

152. United States v. Brown, 3 F.3d 673, 681 n.8 (3d Cir. 1993). *But see* United States v. Mark, 943 F.2d 444, 445 (4th Cir. 1991) (noting that the defendant was charged with conspiracy to possess five kilograms of cocaine).

creates a powerful inference that the lawyer intended to obstruct justice.[153] The fact that a suspect disabled an alarm, broke into a post office late at night, and drilled a hole in its safe strongly implies that the suspect intended to steal something from the Postal Service.[154] In such cases, if the jury finds that the defendant engaged in the physical conduct with which the defendant is charged, it is exceptionally likely—even without any other evidence—that it will also find that the defendant possessed the necessary mens rea.

Many courts have held that UCE should be excluded in such cases unless the defendant actively raises the mens rea issue.[155] In the often cited case of *United States v. Ring*,[156] the Sixth Circuit provided the classic statement of the rule:

> May the "intent" exception be invoked by the prosecution to permit admission of evidence of the accused's prior misconduct where the requisite criminal intent would normally be inferred from the criminal act, if proven, . . . and where, at the same time, the defendant has not asserted the defense of an innocent state of mind? We conclude it may not.[157]

The *Ring* rule has a long pedigree. In a famous 1901 case, a rare poison was carefully mixed with Bromo Seltzer and then mailed to its intended victim on Christmas Eve in a gift-wrapped, silver bottle. Since the nature of such a "foul and cunningly designed act" was inconsistent with innocent intent, the court held that it was neither necessary nor proper to admit evidence of similar prior crimes to prove mens rea.[158]

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153. United States v. Schaffner, 771 F.2d 149, 153 (6th Cir. 1985).

154. *Contra* United States v. Burkett, 821 F.2d 1306, 1308 (8th Cir. 1987) (holding that evidence of a prior break-in was admissible to prove intent in such a situation).

155. At various times, at least three circuits have expressed an even stronger rule, stating that *whenever* the defendant denies the actus reus, UCE will be excluded. United States v. Jenkins, 7 F.3d 803, 806-07 (8th Cir. 1993); United States v. Ortiz, 857 F.2d 900, 904 (2d Cir. 1988); United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978); *cf.* United States v. Silva, 580 F.2d 144, 148 (5th Cir. 1978) (discussing that where defendant denies participation in the act, no discrete issue of intent is raised and intent will usually be inferred). However, each of the three circuits has subsequently either repudiated the strong rule, United States v. Mayan, 17 F.3d 1174, 1182 (9th Cir. 1994); United States v. Hadley, 918 F.2d 848, 851-52 (9th Cir. 1990), *cert. granted*, 503 U.S. 905, *cert. dismissed as improvidently granted*, 506 U.S. 19 (1992), distinguished it out of existence, United States v. Thomas, No. 95-1029, 1995 WL 396521, at *5 (8th Cir. July 5, 1995); United States v. Yellow, 18 F.3d 1438, 1441 & n.3 (8th Cir. 1994), or simply stated the rule without following it.

156. 513 F.2d 1001 (6th Cir. 1975).

157. *Ring*, 513 F.2d at 1007.

158. People v. Molineux, 61 N.E. 286, 296 (N.Y. 1901). Ironically, the poison killed the wrong person.

B. The Ring *Rule Under the Basic Model*

The *Ring* rule deals with a class of cases in which the probability of a finding of mens rea is not independent of the probability of a finding of actus reus. Statistically, the probabilities of two events are independent if the occurrence of one does not change the probability of the other.[159] The probability that a card will be a face card and a heart are independent. If you know you have drawn a face card, the odds are still one in four that it is a heart. If you know you have drawn a heart, the odds are still three in thirteen that it is a face card.

The probabilities of two events are not independent (i.e., there is a correlation between them) if the occurrence of one changes the probability of the other.[160] The probability that a card will be a face card and that it will be a king are dependent. If you know that you have drawn a face card, the odds that your card is a king have increased from one in thirteen to one in three. If you know that you have drawn a king, the odds that your card is a face card have increased from three in thirteen to certainty.[161]

Diagrammatically, the extent of independence or dependence is shown by the amount of the overlap between the circles (i.e., the distance between their centers). Figure 18-A below illustrates the intersection between two independent probabilities while Figure 18-B illustrates the intersection between two probabilities that are not independent. Notice that correlation increases the probability of a finding of both elements and also the probability of finding neither. It decreases the probability of finding one element without the other.

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159. Events E1 and E2 are independent if P(E1|E2) = P(E1) and P(E2|E1) = P(E2). As a corollary, if (but only if) events E1 and E2 are independent, P(E1 ∩ E2) = P(E1) ∩ P(E2).

160. It is important to remember that the correlation between the two probabilities is not the same as the *magnitude* of the two probabilities. High probabilities can be independent and low probabilities can be dependent. For example, the probability that a card will be either red or a spade is independent of the probability of it being a spot card (an ace through ten) even though both probabilities are approximately 75%. The probability of drawing a major jack and the probability of drawing a one eyed jack are perfectly correlated even though each probability is less than 4%. As a result, the fact that the evidence against defendant is weak does not mean that the correlation is weak. For example, if the only evidence that defendant possessed 1000 pounds of cocaine is the dubious testimony of a three-time perjurer, the jurors may not be likely to find that the defendant possessed the cocaine. But, if they do, they are *very* likely to find that he intended to distribute the drug. The two probabilities may be small, but the correlation between them is still strong.

161. The text discusses examples where the correlation is positive but correlations can also be negative. To take an extreme example, there is a negative correlation between the probability that a card is a heart and the probability that it is a spade. If you know that the card is a heart, the probability that it is a spade has shrunk from one in four to zero. Similarly, there is a negative correlation between the probabilities that a card is a face card and that it is lower than a queen. If you know that the card is a face card, the odds that it is lower than a queen have decreased from ten in thirteen one in three. If you know that the card is lower than a queen, the odds that it is a face card have decreased from three in thirteen to one in ten.

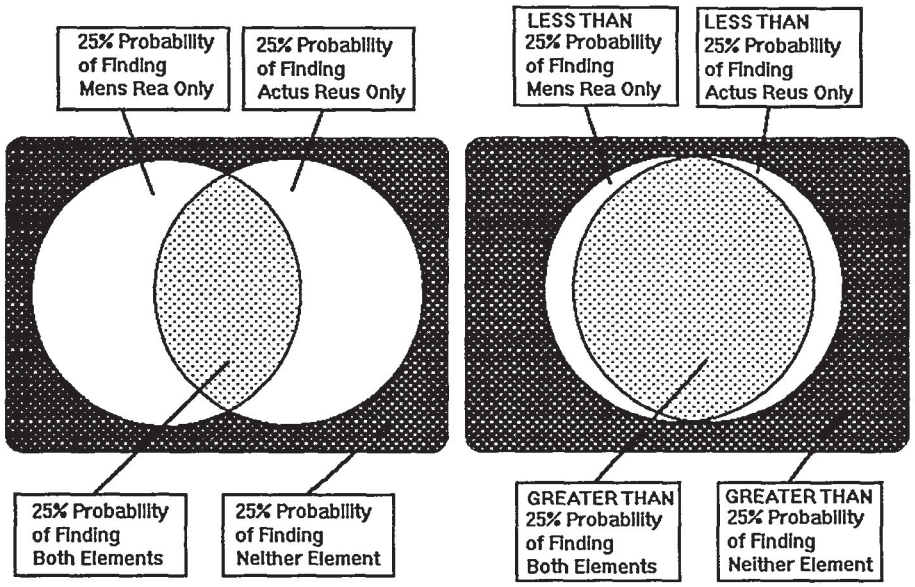

Figure 18-A
Independent
Probabilities
(50% Each)

Figure 18-B
Correlated
Probabilities
(50% Each)

Figure 18

The *Ring* rule identifies an important category of cases in which there is a very strong correlation between the probability of an actus reus finding and the probability of a mens rea finding.[162] Because that correlation is strong, it is highly likely that the prejudicial effect of UCE will substantially outweigh its probative value. To say that the correlation is strong is to say that the probability of a guilty finding (without considering the UCE) is quite close to the entire probability of a finding of actus reus.[163] There is very little likelihood that the jury will find the actus reus without also finding the mens rea. See Figure 19 below:

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162. As discussed below, it incorrectly ignores other classes of cases in which a similar correlation exists. *See infra* notes 179-80 and accompanying text.

163. $P(AR \cap MR) \approx P(AR)$.

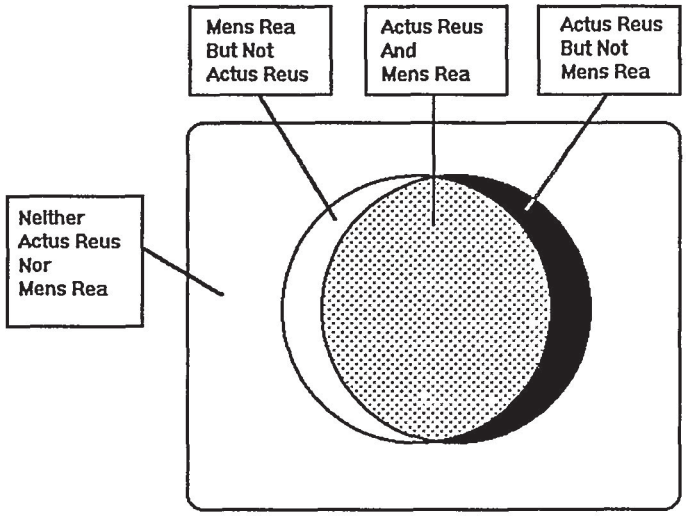

Figure 19

In Figure 19, the small, black crescent on the right represents the probability that the jury will find actus reus without also finding mens rea. It is from this area—and only from this area—that probative value can come.[164] As a result, there is very little potential for the UCE to have probative value. Unless the jury would have found actus reus without the UCE, any guilty verdict caused by that evidence would be prejudicial.

164. Recall that the probative value of UCE is the mens rea guilt effect, i.e., the probability that it will cause a finding of mens rea for a jury that was *already* going to find actus reus. *See supra* notes 48-49 and accompanying text.

On the other hand, the two white areas represent the probability that the jury failed to find actus reus. Prejudicial effect can come from either white area.[165] As a result, there is substantial potential for prejudicial effect.

Figure 20 illustrates the prejudicial and probative effects of UCE in the *Ring* situation.

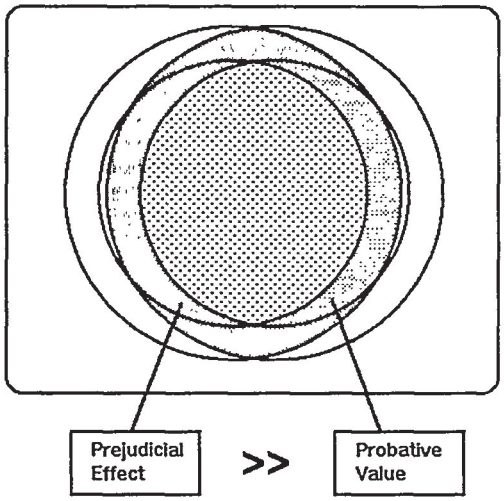

Figure 20

In Figure 20, the strong correlation between actus reus findings and mens rea findings leaves very little area available for probative value. Even though the UCE consumed almost all of that area (i.e., convinced the jury to find mens rea

165. Recall that the prejudicial effect of UCE includes both the actus reus guilt effect and the dual element guilt effect. The correlation increases the potential for dual element guilt effect. Dual element guilt effect can only occur if the jury—before the UCE—found neither element. A strong pre-existing correlation between the two elements means that there was a high probability that the jury found both elements, but it also means that there was a high probability that it found neither.

A strong correlation does restrict the potential for actus reus guilt effect since it reduces the pre-existing probability that the jury found mens rea without finding actus reus. However, this effect is offset by the similar restriction of the potential for mens rea guilt effect.

in almost all the remaining cases in which it had found actus reus), its probative value is still substantially outweighed by its prejudicial effect. The magnitude of the effect can be illustrated by the paradigmatic defendant charged with possessing and intending to distribute a large quantity of marijuana. Suppose that, without the UCE, there is a 60% probability that the jury will find that the defendant possessed the marijuana (actus reus),[166] a 60% probability that it will find that he intended to sell it (mens rea),[167] and a 55% chance that it will find both elements.[168] The total probability that the jury will find that the defendant did *not* intend to sell the drugs (i.e., that he did not have the mens rea) would be 40%.[169] Of that 40%, only one-eighth (5%) represents the probability that the jury will find that the defendant possessed the marijuana but did not intend to sell it.[170] The remaining seven-eighths (35%) is the probability that the jury will find neither element.[171] The total probability that the jury will find that the defendant did *not* possess the drugs is similarly divided.[172] These probabilities are shown in a tabular form in Table 21:

166. $P(AR|\bar{a}) = 60\%$.

167. $P(MR|\bar{a}) = 60\%$.

168. $P(AR|\bar{a} \cap MR|\bar{a}) = 55\%$.

The probability of finding both elements exceeds the product of the probabilities of each element (i.e., $P(AR|\bar{a} \cap MR|\bar{a}) > P(AR|\bar{a}) \times P(MR|\bar{a})$) because possession of such a large quantity strongly implies that the drugs were for sale rather than for personal use. This implication prevents the two probabilities from being independent.

169. $P(\overline{MR}|\bar{a})=40\%$.

170. $P(AR|\bar{a} \cap \overline{MR}|\bar{a})=5\%$.

171. $P(\overline{AR}|\bar{a} \cap \overline{MR}|\bar{a})=35\%$.

172. $P(\overline{AR}|\bar{a})=40\%$.
$P(\overline{AR}|\bar{a} \cap MR|\bar{a})=5\%$.
$P(\overline{AR}|\bar{a} \cap \overline{MR}|\bar{a})=35\%$.

Table 21[173]
Probabilities of Jury Findings Without UCE
(Strong Pre-Existing Correlation)

	Intended to Sell	Did Not Intend to Sell	Total
Possessed the Drug	55%	5%	60%
Did Not Possess the Drug	5%	35%	40%
Total	60%	40%	100%

Suppose the prosecution offers UCE that would increase the probability of each finding to 70%. The effect of the uncharged conduct evidence is shown in Table

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173. Cell-A=P(AR $\lceil$a$\cap$MR $\lceil$a)
Cell-B=P(AR $\lceil$a$\cap\overline{\text{MR}}\rceil$a)
Cell-C=P($\overline{\text{AR}}\lceil$a$\cap$MR $\lceil$a)
Cell-D=P($\overline{\text{AR}}\lceil$a$\cap\overline{\text{MR}}\rceil$a).

Table 22[174]
Probabilities of Jury Findings After UCE
(Strong Pre-Existing Correlation)
(10% Changes With No Correlation Between Changes)

	Intended to Sell		Did Not Intend to Sell		Total
Possessed the Drug	55 +1.25 +1.25 +2.1875 ======= 59.6875	pre-UCE from B from C from D Total A	5 -1.25 +6.5625 ======= 10.3125	pre-UCE to A from B Total B	70%
Did Not Possess the Drug	5 -1.25 +6.5625 ======= 10.3125	pre-UCE to A from D Total C	35 -2.1875 -6.5625 -6.5625 ======= 19.6875	pre-UCE to A to B to C Total D	30%
Total	70%		30%		100%

Cell A of Table 22 breaks down the increased probability of a guilty verdict into its three component parts: the probative mens rea guilt effect (increased probability from Cell B), the prejudicial actus reus guilt effect (increased probability from Cell C), and the prejudicial dual element guilt effect (increased probability from Cell D). Because of the strong pre-existing correlation between the probabilities, the dual element guilt effect is the largest component and the evidence would have a prejudicial effect that is almost three times (275%) its probative value.[175] In sharp contrast, if there had been no pre-existing correlation

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174. $\text{Cell-A}=P(AR \mid a \cap MR \mid a)$
$\text{Cell-B}=P(AR \mid a \cap \overline{MR} \mid a)$
$\text{Cell-C}=P(\overline{AR} \mid a \cap MR \mid a)$
$\text{Cell-D}=P(\overline{AR} \mid a \cap \overline{MR} \mid a)$.
For the basis for these calculations, see *infra* note 177.

175. The probative value of the evidence is increased by the probability of a guilty verdict due to the increased probability of a mens rea finding alone, i.e., the mens rea guilt effect. *See supra* notes 48-49 and accompanying text. This increase can be expressed as:

$$(\Delta MR)\ \frac{P(AR \mid a \cap \overline{MR} \mid a)}{P(\overline{MR} \mid a)}$$

where ΔMR represents the increased probability of a mens rea finding due to the UCE. In the example in the text, the probative value would be only 1.25%, computed as follows:

(e.g., if possession had not implied intent to distribute because a very small quantity was involved), the dual element effect would have been much smaller and the prejudicial effect would have been only slightly greater than the probative value.[176]

Thus, the *Ring* rule reflects an important insight: the more that the commission of the actus reus implies possession of the mens rea, the more likely it is that the prejudicial effect of UCE will outweigh its probative value.

However, while that insight is important, it is incomplete. *Whenever* there is a strong correlation between actus reus and mens rea—whatever the source of that correlation—it is likely that UCE will be more prejudicial than probative. It is not the implication but, the correlation, that creates the effect.

The correlation between actus reus and mens rea can be strong even when performing the actus reus does *not* imply possession of the mens rea. For example, suppose that the paradigmatic defendant is charged with possessing and

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$$(.05) \times \frac{.10}{.05+.35} = 0.0125$$

The prejudicial effect of the evidence is the increased probability of a guilty verdict due to the increased probability of an actus reus finding alone, i.e., the actus reus guilt effect, plus the increased probability of a guilty verdict due to changes in both elements, i.e., the dual element guilt effect. *See supra* notes 52-59 and accompanying text. This increase can be expressed as follows:

$$(\Delta MR)\ \frac{P(AR \mid a \cap \overline{MR} \mid a)}{P(\overline{AR} \mid a)} + (\Delta MR)\,(\Delta AR)\ \frac{P(\overline{AR} \mid a \cap \overline{MR} \mid a)}{P(\overline{MR} \mid a) \times P(\overline{AR} \mid a)}$$

where MR represents the increased probability of a mens rea finding due to the UCE and AR represents the increased probability of an actus reus finding due to the UCE. In the text example, the prejudicial effect would be 3.4375% computed as follows:

$$(.05) \times \frac{.10}{.05+.35} + (.05) \times (.05) \times \frac{.35}{(.05+.35) \times (.05+.35)} = .034375$$

As a result, in the text example, the prejudicial effect would be 275% (.0125 ÷ .034375) of the probative value.

Table 22 and the computations described above are based on the assumption that the increased probabilities would be proportionately drawn from the pre-existing probabilities. For reasons discussed in Part III.C. the effect of the correlation would be even more pronounced if that assumption were not made. For the results based on different assumptions, see *infra* Table 23 at p. 1128.

176. If there had been no pre-existing correlation, the prejudicial effect would have been only 1.167 times the probative value as shown below:

$$PV = .10 \times \frac{.24}{.24 + .16} = .06$$

$$PE = \left(.10 \times \frac{.24}{.24+.16}\right) + \left(.10 \times .10 \times \frac{.16}{(.24+.16) \times (.24+.16)}\right) = 0.07$$

$$PE \div PV = .07 \div .06 = 1.16667$$

intending to distribute a single marijuana cigarette. Possession of such a small quantity probably creates no implication of intent to distribute and so the *Ring* rule would not, by its terms, apply. However, if the findings of possession and of intent to distribute depend on the credibility of the same witness, there is likely to be a very strong correlation. If the witness testifies, "I saw him [the defendant] with a joint. He offered to sell it to me," it seems unlikely that the jury will believe the first sentence and disbelieve the second. The correlation in such a case can be just as strong as the correlation in cases that do fall under the *Ring* rule.[177] If the correlation between the two elements is the same, the balance between prejudice and probativeness will also be the same.[178]

Thus, the *Ring* rule should be extended. Whenever there is a strong correlation between actus reus and mens rea—whenever the jury is disproportionately likely either to find both or neither—UCE should be excluded. It should be excluded whether the correlation results from the fact that the particular actus reus implies mens rea, from the fact that findings of both elements depend upon the credibility of a single witness, or from some other cause. It is the existence and strength of the correlation, not its source, that is crucial.

C. *The Falsity of the Assumption of Independence*

The calculations in Part IV.B. assumed that the UCE's effect on the jurors' finding of one element would be independent of its effect on their finding of the other. As a result, the increased probabilities were proportionately drawn from the pre-existing probabilities. For example, in Table 21, there was a total 40% pre-existing probability that the jury would find that the defendant did *not* intend to distribute.[179] Seven-eighths of that pre-existing probability represented situations in which the jurors found that the defendant did *not* possess the marijuana,[180] while one-eighth represented situations in which they found that he *did* possess the drugs.[181] When the UCE increased the probability of a mens rea finding to

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177. Correlation is a matter of degree regardless of the source of the correlation. For example, possession of 1000 grams of cocaine is more strongly correlated with intent to distribute than possession of 30 grams, and possession of 30 grams is more strongly correlated than possession of five grams. Similarly, while there are situations in which a jury is almost forced to choose between believing all of a witness's testimony or none of it, there are others in which—to a greater or lesser degree—the jury can rationally try to separate wheat from chaff. To the extent that the jury can make that separation, the correlation will be weaker. *Cf.* United States v. Femia, 57 F.3d 43, 49 (1st Cir. 1995) (noting that jurors are permitted to believe one part of a witness's testimony while disbelieving other parts); United States v. Prince, 883 F.2d 953, 959 (11th Cir. 1989) (stating that a jury may choose to believe part or all of a witness's testimony).

178. Nothing in the analysis contained in note 175, *supra*, depends on the source of the pre-existing correlation.

179. $P(\overline{MR}\,|\,\bar{a})=40\%$.

180. $P(\overline{MR}\,|\,\bar{a}\cap\overline{AR}\,|\,\bar{a})=35\%=7/8\text{x}40\%$.

181. $P(\overline{MR}\,|\,\bar{a}\cap AR\,|\,\bar{a})=5\%=1/8\text{x}40\%$.

70%, that increase was divided in the same proportions: seven-eighths from the former and one-eighth from the latter.[182]

Even making the assumption of independence, Part IV.B. showed that the *Ring* rule was correct: if there is a strong correlation between the pre-existing probabilities of actus reus and mens rea, UCE is likely to be far more prejudicial than probative.[183] However, if the assumption is false—if a change in the actus reus finding is disproportionately likely to lead to a change in the mens rea finding—the *Ring* rule is even more likely to be true.

The following sections will discuss two reasons to believe that the assumption of independence is not correct. Section 1 will discuss the credibility effect and Section 2 will discuss the derivative mens rea effect.

1. Credibility Effect

In most cases, there will be a correlation between changes in actus reus findings and changes in mens rea findings because of what might be called the "credibility effect."[184] Each change can occur only if the jury *believes* the UCE, i.e., believes that the uncharged conduct actually occurred. In the paradigmatic case, for the UCE to change the jurors' conclusion on whether the defendant possessed the drugs (actus reus), the jurors must take two steps. First, they must believe that the *uncharged* conduct occurred.[185] Second, they must infer from the uncharged conduct that the defendant possessed the drugs with which he is currently charged. For the jurors to change their conclusion regarding mens rea, they must take the same first step. Only after doing so, can they decide whether to infer that the defendant intended to distribute the charged drugs. Jurors who do not believe that the uncharged conduct occurred will draw neither inference.

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182. The increase in the probability of a finding of possession (actus reus) was treated in the same fashion. In computing the joint effects of both changes, one computes the effect of one increase and then computes the effect of the second based on the probabilities after the first increase. The outcome will not be affected by the choice of which increase to compute first.

183. *See supra* notes 159-78 and accompanying text.

184. The credibility effect will exist in all cases except those in which the evidence of the uncharged conduct is necessarily believed by all. For example, it may not exist or may become de minimis when the uncharged conduct is proved by an unquestioned judgment of conviction. On the other hand, it will have the greatest effect when the evidence of the uncharged conduct is most questionable. For example, it will be a very significant factor when the uncharged conduct is proved by the testimony of a witness subject to substantial impeachment.

185. This is not a trivial hurdle. Frequently, the evidence of uncharged conduct is the testimony of a seriously compromised witness. *See, e.g.*, United States v. Maravilla, 907 F.2d 216, 222 (1st Cir. 1990) (citing that prior bad act testimony was given by a co-conspirator and fellow smuggler); United States v. Cardenas, 895 F.2d 1338, 1342-43 (11th Cir. 1990) (noting that prior bad act testimony came from a drug courier who cooperated with prosecution after being arrested). The defendant may have been acquitted of the uncharged conduct. Dowling v. United States, 493 U.S. 342, 347-50 (1990). The testimony of UCE may be admitted even if the trial judge does not believe the witness's testimony. Huddleston v. United States, 485 U.S. 681, 687-88 (1988).

Jurors who do believe that the uncharged conduct occurred will be disproportionately likely to draw both inferences.

Consider, once again, the pre-existing probabilities represented by Table 21, and (as before) suppose that the prosecution offers UCE that will increase the probability of each finding from 60% to 70%. Without the credibility effect, Table 22 showed that the prejudicial effect of the evidence would be 275% of its probative value.[186] Taking the credibility effect into account will increase the probability of a guilty verdict and substantially increase the prejudicial effect. Suppose, for example, that there is a 50% chance that the jurors will believe the UCE. The same 10% increases assumed in Table 22 will produce the quite different joint probabilities illustrated in Table 23 below:

Table 23
Probabilities of Jury Findings After UCE
(Strong Pre-Existing Correlation)
(10% Changes — 50% Believe the UCE)

	Intended to Sell		Did Not Intend to Sell		Total
Possessed the Drug	55 +1.25 +1.25 +4.375 ======= 61.875	pre-UCE from B from C from D Total A	5 -1.25 +4.375 ======= 8.125	pre-UCE to A from B Total B	70%
Did Not Possess the Drug	5 -1.25 +4.375 ======= 8.125	pre-UCE to A from D Total C	35 -4.375 -4.375 -4.375 ======= 28.875	pre-UCE to A to B to C Total D	30%
Total	70%		30%		100%

Without recognizing the credibility effect, the ratio of prejudicial effect to probative value appeared to be 2.75 to 1.[187] Because of the credibility effect, the ratio is actually 4.5 to 1.[188]

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186. *See supra* Table 22 at p. 1124 & note 175 and accompanying text.

187. *See supra* Table 22 at p. 1124 & notes 174-78 and accompanying text.

188. The prejudicial effect is the sum of actus reus guilt effect (1.25%) and the dual element guilt effect (4.375%), while the probative value is the mens rea guilt effect (1.25%). These effects are reflected in the probabilities transferred to Cell A from Cells C, D, and B respectively. The effects are computed as follows:

2. *Derivative Mens Rea Effect*

Even in cases where there is no credibility effect,[189] a correlation will frequently result from the fact that a change in the actus reus finding will *cause* a change in the mens rea finding.[190] This "derivative mens rea effect" is particularly likely to occur in cases covered by the *Ring* rule.

For example, assume that the paradigmatic defendant is charged with possession of a substantial amount of marijuana with intent to distribute. The amount is large enough to create an extremely strong inference that whoever possessed it intended to distribute it, but there is sharply conflicting testimony regarding who possessed the drugs. Evidence of a previous possession of marijuana—even without evidence of a previous sale—can cause a jury to find both actus reus and mens rea. Some juries will make the forbidden inference that, since the defendant possessed in the past, he has the sort of character that makes it likely that he possessed the charged drugs. They will then be likely to conclude that, since the defendant possessed such a large quantity, the defendant undoubtedly intended to distribute it.[191]

Mens Rea Guilt Effect:

$$.10 \times \frac{.5 \times .05}{(.5 \times .05) + (.5 \times .35)} = .0125$$

Actus Reus Guilt Effect:

$$.10 \times \frac{.5 \times .05}{(.5 \times .05) + (.5 \times .35)} = .0125$$

Dual Element Guilt Effect:

$$(.10) \times (.10) \times \frac{.5 \times .35}{((.5 \times .05) + (.5 \times .35)) \times ((.5 \times .05) + (.5 \times .35))} = .04375$$

189. *See supra* note 186 and accompanying text.

190. The credibility effect is an example of correlation without causation. The change in the actus reus finding did not cause the change in the mens rea finding. Instead, both changes were caused by the same outside factor—belief or disbelief of the evidence of prior conduct. The classic example of correlation without causation is the correlation between going to the hospital and dying. Although the correlation is quite strong, going to the hospital does not ordinarily cause one to die. The two events are caused by the same outside event —being sick or injured.

191. *Cf.* United States v. Cardenas, 895 F.2d 1338, 1343 (11th Cir. 1990). Cardenas was charged with possession with intent to distribute more than 500 grams of cocaine and with conspiracy to commit the underlying offense. *Id.* at 1340. The only evidence that he had participated in the transaction was the testimony of a drug dealer, Quintero, who testified that Cardenas had delivered the cocaine to him and directed him to transport the cocaine to Gainesville, Florida. *Id.* Quintero subsequently delivered the cocaine to two other drug dealers. *Id.*

Remarkably, the court used Quintero's lack of credibility as a justification for admitting evidence of prior drug sales by Cardenas. But if Quintero's testimony about the actus reus is believed, the inference of mens rea is overwhelming. That testimony showed not just intent to distribute and to participate in a drug transaction, but actual distribution and participation—distribution and participation which could not be accidental. Thus, the prior sales increased the likelihood of a mens rea finding only because they increased the likelihood of an

This derivative mens rea effect will lead to a significant correlation between changes in actus reus and changes in mens rea.[192] As a result, it, like the credibility effect, will increase the ratio of prejudicial effect to probative value.

V. REFINEMENTS OF THE BASIC MODEL

A. *An Aside on More Advanced Models*

1. *The Bad Man Effect Overlay*

In one important respect, this Article's model significantly understates the prejudicial effect of UCE. The basic model ignores the risk that the UCE will cause the jurors to convict the defendant because they want to incarcerate him for the uncharged conduct rather than because they believe he is guilty of the charged offense.[193] This "bad man effect"—this belief that "the most important thing [is] to get [the defendant] behind bars"[194] rather than to decide if he is guilty as charged—is prejudicial even to the extent that it changes only the jury's mens rea finding.

At first glance, it might appear that the bad man effect cannot be subdivided into separate effects on the actus reus and the mens rea determinations. By hypothesis, it is not changing the jurors' beliefs about the defendant's guilt or innocence of the charged offense. But a realistic model should deal not with jurors' beliefs but with their votes. If the UCE improperly causes a juror to vote *as if* the juror believed that the defendant possessed the necessary mens rea or

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actus reus finding.

A finding of mens rea resulting from the derivative mens rea effect is a component of prejudicial effect for two reasons. First, it is part of the dual element guilt effect described in Part II.A., *supra*. The jury found the actus reus (and therefore reached its guilty verdict) only because it drew the propensity inference forbidden by FRE 404(b). Second, the jury's finding of *mens rea* was itself the result of the forbidden inference.

192. This is most easily seen in the extreme case in which the derivative mens rea effect is the *only* reason that the UCE changes mens rea findings. In such a case, the entire increase in probability of guilt is prejudicial. A jury changed its finding on mens rea only if it first changed its finding on actus reus. As a result, the increased probability of guilt consists entirely of the impermissible dual element guilt effect. Less extreme cases reduce the magnitude but not the nature of the dual element guilt effect.

193. *See, e.g.*, United States v. Ridlehuber, 11 F.3d 516, 521 (5th Cir. 1993) (discussing the risk that the jury will convict the defendant for the prior bad act rather than for the crime charged); United States v. Veltmann, 6 F.3d 1483, 1499 (11th Cir. 1993) (same); United States v. Brown, 880 F.2d 1012, 1014 (9th Cir. 1989) (same); *see also* United States v. Bradley, 5 F.3d 1317, 1321 (9th Cir. 1993) (noting an increased risk when the defendant has not been punished for the prior bad act); United States v. Beechum, 582 F.2d 898, 913-14 (5th Cir. 1978) (en banc) (same).

194. United States v. Menefee, No. 90-50495, 1992 U.S. App. Lexis 18423, at *13 (9th Cir. March 2, 1992).

performed the actus reus, the evidence has prejudiced the defendant. Thus, the bad man effect overlays both the mens rea effect and the actus reus effects.[195]

The bad man overlay on the mens rea effect can most easily be illustrated by situations in which the actus reus is not in dispute. Suppose, for example, that a defendant, charged with possession of a small amount of marijuana with intent to distribute, admits possession but claims the drug was for his personal use only. Evidence of a previous sale of a very large quantity of heroin would have some probative value on the issue of mens rea—one who sold heroin in the past is somewhat more likely to intend to sell marijuana in the present. However, it would also tend to make the jury want to incarcerate the defendant regardless of whether he intended to distribute the marijuana. Similarly, suppose that a defendant, charged with murder arising out of the death of a hunting companion, claims that the shooting was accidental. Evidence that the defendant had previously intentionally killed his wife has some probative value on the issue of intent. However, once again, the evidence may have the prejudicial side effect of causing the jury to convict regardless of the evidence in the present case.

The windfall to the prosecution from the bad man effect is the difference between the likelihood of a guilty verdict and the likelihood of an "honest" guilty verdict, i.e., a verdict based on the honest belief that the defendant possessed the mens rea and performed the actus reus defining the charged crime.[196] Mathematically, this windfall can be expressed as the difference between the likelihood that the jury will vote *as if* it made concurrent findings of mens rea and actus reus and the likelihood that it will honestly make such findings:

$$P(ARV|a \cap MRV|a) - P(AR|a \cap MR|a)$$

where "ARV" and "MRV" represent the probabilities that, given the bad man effect, the jury will vote as if it had found actus reus and mens rea. The bad man windfall is illustrated graphically by Figure 24, below:

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195. This Article's basic model has treated the mens rea effect and the actus reus effect as limited to the UCE's effects on the jurors' beliefs. Having done so, it then treats the bad man effect as an overlay on top of those two effects.

Conceptually, it would have been equally correct to treat the mens rea effect and actus reus effect as the *total* effect of the uncharged conduct on the jurors' votes on each element—whether that effect reflected a change in belief or other factors. If that initial definition was adopted, the bad man effect would be treated as a component of—rather than an overlay on—the mens rea and actus reus effects. The difference is one of terminology and would have no effect on the analysis.

Similarly, this Article discusses the UCE's effect on beliefs before it discusses the evidence's bad man effect. The graphic model shows the bad man effect as outer rings surrounding the rings representing the actus reus and mens rea effects. Conceptually, since the effects result from the same evidence, either could have been discussed first and either could have been drawn as the outer ring. The fact that the outer ring may *appear* bigger has no analytical significance. It is simply an artifact of the way the diagram has been drawn.

196. *See supra* note 193 and accompanying text.

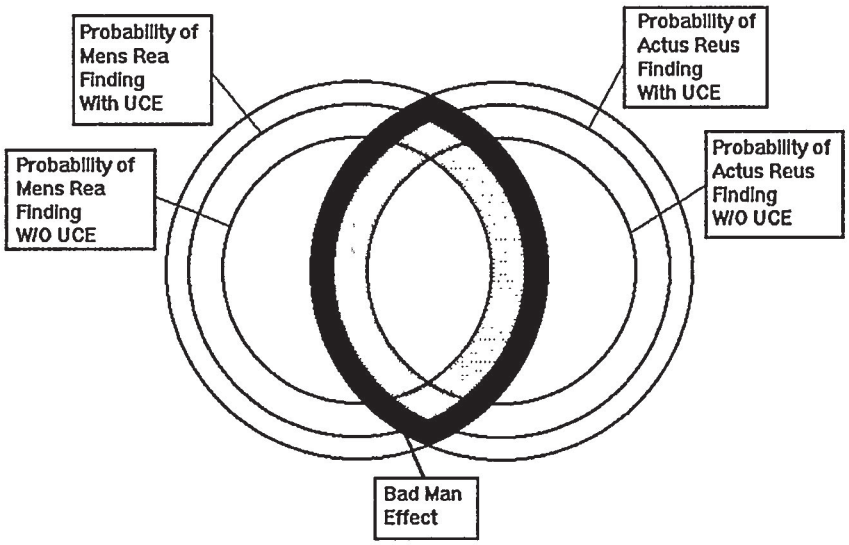

Figure 24

Since the entire bad man windfall is prejudicial, it has no effect on the basic model's definition of probative value. However, the basic model's definition of prejudicial effect must be increased by the amount of that windfall.[197] Similarly, the bad man effect must be recognized as an additional component of the prosecution's evidentiary windfall from the admission of the UCE. The FRE 403 balance under the advanced model is illustrated in Figure 25 below:

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197. The advanced model's definition of prejudicial effect including the bad man effect could be expressed:

$$P(ARV|a \cap MRV|a) - P(AR|a \cap MR|\bar{a}).$$

The advanced model would then dictate exclusion of UCE if:

$$P(ARV|a \cap MRV|a) - P(AR|a \cap MR|\bar{a}) \gg P(MR|a \cap \overline{MR}|a \cap AR\bar{a}).$$

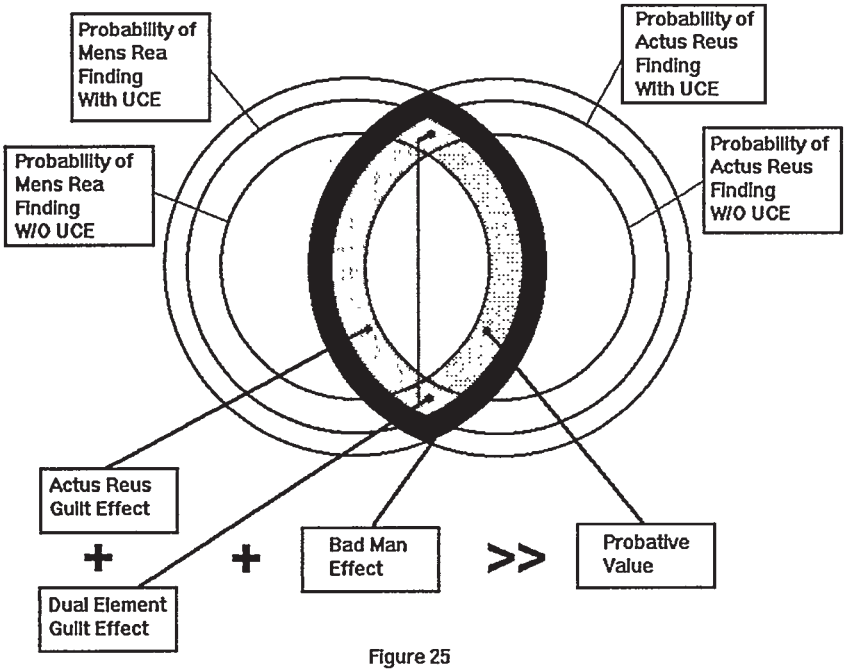

Figure 25

The bad man effect is not uniform. In some cases, it may be overwhelmingly large. For example, when evidence of a particularly heinous prior act (especially one for which the defendant has not been punished) is introduced against a defendant charged with a relatively minor offense, the bad man effect may well be decisive.[198] On the other hand, when the situation is reversed—when the prior conduct is relatively minor and the current charge is extremely serious—the bad man effect is likely to be slight.

Regardless of its magnitude, the bad man effect can be treated simply as an undifferentiated additional component of prejudicial effect and therefore of the admission windfall. As such, it reinforces the analysis set forth in Parts III and IV. Since it increases the admission windfall without changing the conditional concession windfall, it provides an additional reason to accept conditional

198. *Cf.* United States v. Ridlehuber, 11 F.3d 516, 523 (5th Cir. 1993) (noting that where the defendant is charged with possession of a non-functioning sawed-off shotgun, evidence of prior drug manufacturing is grossly prejudicial because of the jurors' antipathy toward drug dealers).

concessions in lieu of UCE.[199] Since it increases prejudicial effect without increasing probative value, it provides an additional reason to exclude evidence under the *Ring* rule and under this Article's proposed expansion of that rule.[200]

2. *The Effect of Limiting Instructions*

The model described in this Article assumes that proper limiting instructions are given whenever UCE is admitted. The defendant is entitled to such an instruction upon request.[201] Without entering the extensive debate about the effectiveness of such instructions,[202] this Article has made the minimal assumption that such instructions are not fully effective.[203] The prejudicial effects described in this Article are the net effects after taking into account the fact that the jury has received proper limiting instructions. (For example, the actus reus effect described in Part II is the increased likelihood of an actus reus finding by a jury that has received a proper limiting instruction.) It would have been possible to show the various effects without considering the limiting instruction and then separately showing their diminution due to that instruction.[204] However, that would have complicated the analysis without changing its conclusions in any way.

B. *An Aside on the Effect of "Equally Persuasive" Evidence*

When UCE is offered to prove mens rea, the court is likely to ask itself two common sense questions. How likely is the evidence to change (permissibly) the jury's finding on the mens rea issue?[205] How likely is it to change (impermissibly)

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199. *See supra* notes 29-70 and accompanying text. The bad man effect has no effect on Part III C's conclusion that trial courts should sometimes require a conditional concession as a prerequisite to excluding otherwise inadmissible evidence. That conclusion depends on comparison of the conditional concession windfall and the exclusion windfall. Since the bad man effect leaves both of those windfalls unchanged, it would not modify the analysis.

200. *See infra* notes 159-78 and accompanying text.

201. Huddleston v. United States, 485 U.S. 681, 691-92 (1988); United States v. Davis, 546 F.2d 617, 619 (5th Cir. 1977).

202. For a small selection of the literature, see the sources cited in Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 24 nn.104-06 (1988).

203. This hardly seems a radical assumption. If limiting instructions were believed to be fully effective, FRE 403 would be unnecessary.

204. If this approach were adopted, the prejudicial effect, after considering the limiting instruction could be described as:

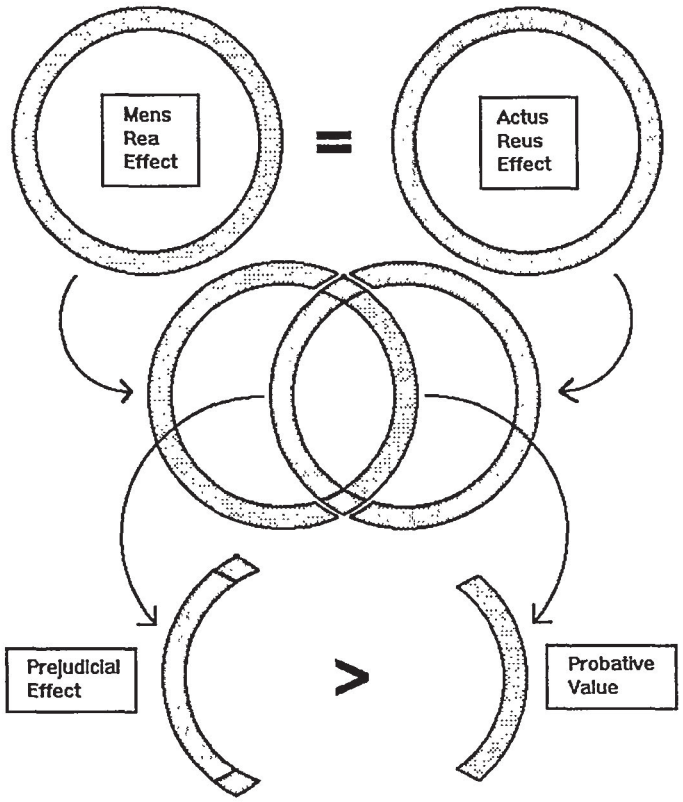
$$P(AR \mid a \cap i \cap \overline{AR} \mid \overline{a}) \cap P(MR \mid a)$$

where "a ∩ i" represents admission of the evidence and the giving of a limiting instruction.

205. This is the equivalent of asking the magnitude of the full mens rea effect.

the jury's finding on the actus reus issue?[206] Intuitively, if the two effects are equal, it would seem that the probative value and prejudicial effect would also be equal and therefore the evidence should be admitted.

This intuition is wrong.[207] The basic model described in Part II demonstrates an apparently unlikely proposition: if all other things are equal, UCE which is as persuasive on the mens rea issue as it is on the actus reus issue[208] will be more prejudicial than probative.[209] See Figure 26 below:



The excess prejudice results from the fact that, while the (probative) mens rea guilt effect and the (prejudicial) actus reus guilt effect are equal and therefore cancel each other out, the dual element guilt effect is prejudicial. Figure 27 illustrates the proposition:

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206. This is the equivalent of asking the magnitude of the full actus reus effect.

207. It is wrong even without considering the bad man effect discussed in Part V.A., *supra*.

208. $P(MR|a \cap \overline{MR}|\overline{a}) = P(AR|a \cap \overline{AR}|\overline{a})$.

209. Whether it will be "substantially" more prejudicial, as required for exclusion under FRE 403, is a question which this analysis cannot answer. *See infra* note 211.

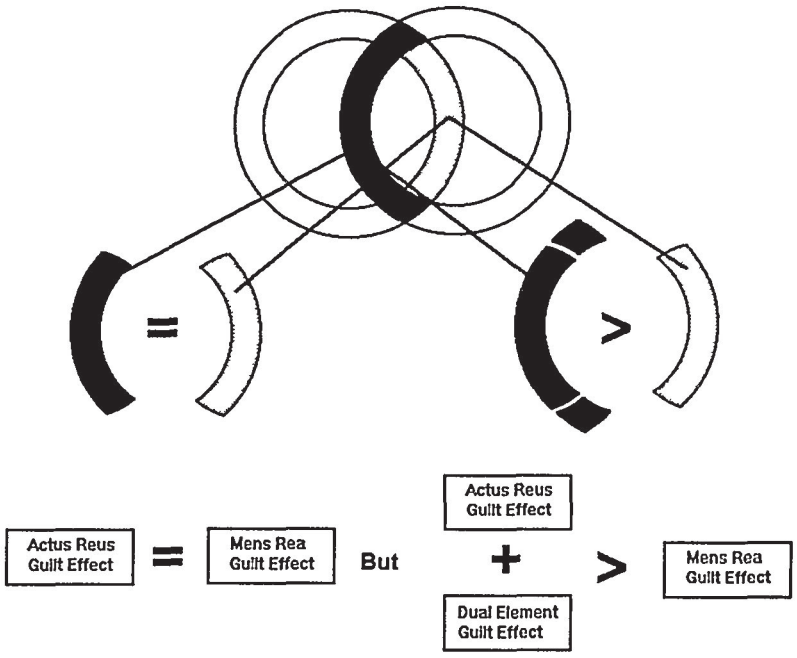
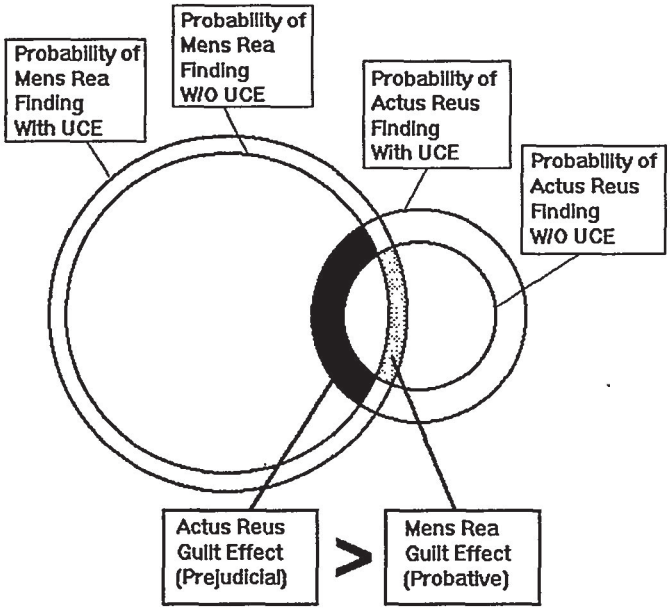


Figure 27

The excess of prejudicial effect over probative value is compounded if the pre-existing evidence of actus reus is weaker than the pre-existing evidence of mens rea.[210] In that situation, not only is the dual element guilt effect prejudicial, but the (prejudicial) actus reus guilt effect will be larger than the (probative) mens rea guilt effect. This effect is illustrated in Figure 28, below:

210. Many courts have noted that the probative value of evidence on an issue decreases as the strength of the pre-existing evidence on that evidence increases. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 914-15 (5th Cir. 1978) (en banc).



Pre-existing Evidence of Mens Rea Stronger Than Pre-existing Evidence of Actus Reus. UCE Equally Persuasive on Each Issue

Figure 28

The larger inside diameter of the mens rea "doughnut" necessarily requires that the doughnut be thinner than the actus reus "doughnut" if the two "doughnuts" are to have the same area. Similarly, the larger inside diameter

necessarily requires that the mens rea guilt effect's arc be straighter and thus shorter than the actus reus guilt effect's arc.[211]

Thus, if all other factors are equal, evidence that is equally persuasive on both issues will be more prejudicial than probative. If the pre-existing evidence of mens rea is stronger than the pre-existing evidence of actus reus, the excess of prejudice over probative value will be even greater.

VI. CONCLUSION

Windfall analysis and the model described in this article provide a new and more systematic way of looking at complex evidentiary problems. In this article, they were used to examine several problems arising from the use of UCE to prove mens rea. Windfall analysis demonstrated that the Seventh Circuit's *Chaimson* rule should be rejected. The model also demonstrated that the Sixth Circuit's *Ring* rule should be extended. The article suggested other results that the circuits have not yet adopted.

However, the real test of this type of analysis will be efforts to extend it to other evidentiary problems. This article has suggested two such extensions—examination of the cumulative effect of successive FRE 403 rulings and analysis of decisions to permit pleading out elements of criminal cases—but other possibilities abound. Windfall analysis and this article's model can be valuable tools for dealing with such issues.

211. For reasons that need not be discussed here, there is a third factor that further accentuates the effect. To maintain the same level of correlation between the probability of an actus reus finding and the probability of a mens rea finding, the two pairs of circles must be moved closer together.