

OTHER BAD ACTS AND THE FAILURE OF PRECEDENT

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I.	INTRODUCTION	151
II.	A CENTURY OF BAD ACTS EVIDENCE IN THE MINNESOTA SUPREME COURT	154
	A. <i>The First Four Decades</i>	154
	B. <i>The Law at Mid-Century</i>	161
	C. <i>The Spreigl Era</i>	163
	D. <i>The End of the Century</i>	167
	1. <i>State v. Eling</i>	168
	2. <i>State v. DeWald</i>	170
	3. <i>State v. Cogshell</i>	171
	4. <i>State v. Shannon</i>	172
	5. <i>Can They Be Reconciled?</i>	173
	E. <i>A Long Look Back</i>	175
III.	PRECEDENT AND THE FUNCTIONS OF JUDICIAL OPINIONS.....	177
IV.	ASSESSING THE LAW OF BAD ACTS EVIDENCE	187
	1. <i>Bad Acts Law and the Function of Opinions</i>	189
	2. <i>The Need for a Dramatic Remedy</i>	191
V.	CONCLUSION.....	195

*The more precedents there are, the less occasion is there for law;
that is to say, the less occasion is there for investigating principles.*

— Dr. Samuel Johnson¹

I. INTRODUCTION

Minnesota Rule of Evidence 404(b) provides that “[e]vidence of another crime, wrong, or act is not admissible to prove the

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1. JAMES BOSWELL, LIFE OF SAMUEL JOHNSON 615 (1906).

character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”² Despite the apparent simplicity of the rule’s prescriptions, the law of other bad acts³ evidence in Minnesota is confusing and inconsistent. Cases within this body of law are difficult to square with one another and often the doctrine articulated within a given opinion is itself subject to internal tension.

In these respects, the Minnesota law of bad acts evidence is not unlike many other large bodies of law.⁴ Whenever a court must repeatedly apply the same rules, some aspects of its case law will almost inevitably reflect inconsistent results and doctrine. To some extent this may be a product of intent, as judges craft opinions based on an understanding of the law not shared by all of their colleagues. It is perhaps more often a result of the practical difficulty of obtaining a comprehensive grasp of a large body of law, such that no new case is likely to be decided by a court having all—rather than a select few—of its cases in mind.

Whatever its causes, the phenomenon ought to be troubling. The notion that like cases are to be treated alike is fundamental to our justice system. Inconsistent results mean that like cases have not been treated alike and inconsistent doctrine means that inconsistent results can nevertheless be consistent with the stated law. The concern is even greater with respect to the criminal justice system. It is particularly important in that context, as the Supreme Court has observed, that “justice must satisfy the appearance of justice.”⁵ Where judicial opinions do not consistently state the law and cannot consistently apply the law, however, that goal is compromised.

The nature of bad acts evidence is such that the law governing

2. MINN. R. EVID. 404(b).

3. Subsequent references in this article are to “bad acts evidence,” simply because “other bad acts evidence”—which I prefer to “other crimes evidence” because Minn. R. Evid. 404(b) is not limited to other crimes—is somewhat unwieldy. I avoid the commonly-used “*Spreigl* evidence” because using the name of an old opinion would be incongruous with my arguments.

4. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1394 (1995) (noting, in the administrative law context, the “tendency for the ‘winning’ and ‘losing’ description of the same standard to become increasingly polarized over time, confusing and frustrating agencies and litigants as to what is the ‘real standard.’”).

5. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

its use may be especially susceptible to the development of inconsistencies. Evidence that a defendant has committed another, usually similar, crime is obviously relevant to the question of whether he committed the crime for which he is on trial. Just as obvious is the tremendous potential for that evidence to unfairly prejudice a defendant. By the time the issue is put before an appellate court, however, the evidence will have been admitted and the defendant convicted. It is, as a result, easy to appreciate the psychological pull toward affirmance present in nearly every one of these cases. For this very reason, it is critical that the law governing the admissibility of bad acts evidence be both certain and susceptible to relatively easy and justifiable application. Such clarity not only makes for easier administration of the law by the trial courts, but, by effectively precommitting the appellate court, also helps to ensure that this psychological pull does not lead to results contrary to what more abstract consideration would generate. Stated more simply, it provides greater assurance that like cases will, in fact, be treated alike.

This article argues that because the law relating to bad acts evidence in Minnesota suffers from these problems, it needs to be thoroughly reconsidered and recast. The article proceeds as follows. Part II traces the treatment of bad acts evidence by the Minnesota Supreme Court during the twentieth century. That history reveals that the law was unsettled, often dramatically so, for the entirety of the century and that a number of internal tensions and inconsistencies remain. Part III considers the functions of written opinions in our judicial system as well as the doctrine of precedent, which is central to those functions. Part IV considers the law of bad acts evidence in light of the material explored in Part III. It concludes that this body of law has reached the point where no written opinion can meaningfully fulfill the functions for which the device was designed. This article further concludes that the only remedy is for the Minnesota Supreme Court to undertake a top-to-bottom reconsideration of the law, and in the process, to expressly discard all of its pre-existing case law on the subject.⁶

6. I do not consider or take any position regarding what the results of such a reconsideration ought to be.

II. A CENTURY OF BAD ACTS EVIDENCE IN THE MINNESOTA SUPREME COURT

A. *The First Four Decades*

The century in Minnesota bad acts evidence law opened with a pair of bribery cases against members of the Minneapolis police force. The first was *State v. Fitchette*,⁷ in which the defendant, a captain on the force, was charged with accepting two hundred dollars to secure the reappointment of a former policeman. The trial court allowed not only testimony and evidence relating to the incident for which Fitchette was on trial, but also testimony regarding an incident six months earlier in which he accepted money to obtain an appointment for another applicant. Fitchette was convicted and he appealed. The supreme court opened its analysis by noting that the evidence introduced as to the incident for which Fitchette was tried “if credited, was sufficient to establish every substantive element of the crime for which defendant was prosecuted.”⁸ Yet it concluded that Fitchette was so prejudiced by the introduction of the testimony regarding the prior incident that he was deprived of a fair trial and reversed the conviction.

In so doing, the court articulated a strong formulation of the general rule against the admission of bad acts evidence. Because a defendant is to be presumed innocent, and because he is entitled to be informed of the precise act with which he is charged so that he can prepare for trial,

the proof of independent offenses of the same nature and character as the one for which the accused is tried cannot be given in evidence as a makeweight against him. In the conduct of a trial in a court of law against a person charged with crime the suspicions of the detective or interested prosecutor, derived from a minute examination of the previous career of the accused, are not to be

7. 88 Minn. 145, 92 N.W. 527 (1902). The court decided another bribery case involving a Minneapolis police officer on the same day which also presented a question relating to the admissibility of bad acts evidence. *State v. Gardiner* [sic], 88 Minn. 130, 92 N.W. 529 (1902) (the case title in the Minnesota Reporter is *State v. Gardner*). The court reversed that conviction as well and, referring to *Fitchette*, stated, “[i]t is an elementary rule that on the trial of a party for a crime evidence that he or others committed another unrelated crime is not relevant.” *Id.* at 144, 92 N.W. at 535.

8. *Fitchette*, 88 Minn. at 147, 92 N.W. at 528.

regarded as the legitimate subject of inquiry by the tribunal which is to determine the issue of his guilt or innocence. These principles are elementary. They are recognized and declared with unvarying unanimity by every reputable text-writer who has referred to the subject.⁹

To further bolster the point, the court quoted three contemporary treatises on evidence in support of this statement of the rule.¹⁰

While emphasizing the strength of the general prohibition, the court was careful to note the existence of “well-defined” exceptions, such as to “show a distinct hostility, jealousy, or erotic passion;” to establish intent in cases where the defendant claims the charged act was a mistake; to establish identity where the two acts are “so connected or involved” as to relate to one another; and where the prior act is “part of a scheme or conspiracy incidental to or involved with the one on trial.”¹¹ But, the court emphasized, these exceptions to the general prohibition are just that. As a result, if the proposed evidence’s fit within one of these narrow exceptions “is not clear in any particular instance, and the trial judge does not clearly perceive that the evidence falls within its purview, the accused is to be given the benefit of the doubt, and the evidence rejected.”¹²

The state had alleged that the evidence of the prior incident ought to have been admitted against Fitchette because it suggested that he was engaged in a system of accepting bribes. The court dismissed this argument, suggesting that it would expand the exception to swallow the rule. “It is said that this charge is very similar to others which might be a part of an iniquitous scheme. This might be, for this is but little originality in the commission of crime. One bribery, robbery, or larceny is very much like any other.”¹³ Thus, in the court’s view, the evidence presented against Fitchette went to the very heart of the prohibition and the conviction was reversed.

Seven months later, the court—whose personnel had not changed—issued an opinion with a much different feel. *State v.*

9. *Id.* at 147, 92 N.W. at 528.

10. *Id.* at 147-48, 92 N.W. at 528 (citing the Jones, Wharton & Underhill treatises).

11. *Id.* at 148, 92 N.W. at 528.

12. *Id.* at 148-49, 92 N.W. at 528 (citations omitted) (Minnesota Reporter states “is doubtful in any particular instance . . .”).

13. *Id.* at 150, 92 N.W. at 529.

*Ames*¹⁴ was also a bribery case. Ames was the superintendent of the Minneapolis police department, charged with receiving a fifteen dollar protection payment from a local madam.¹⁵ In the state's view, this incident was merely part of a larger undertaking, as the court put it, "to put the abandoned women of Minneapolis under tribute to him in return for his official protection"¹⁶ The case put on against Ames reflected this view. Witnesses testified that Ames visited the brothels of Minneapolis with two of his officers and told the proprietors that they could expect to soon begin making payments to him, that one of these officers paid a subsequent visit accompanied by a local jeweler, and that this pair instructed the madams to make payments to the jeweler. The evidence challenged under the doctrine of *Fitchette* related to payments made to the jeweler by other madams. Ames claimed that these were separate crimes and inadmissible pursuant to the general prohibition of bad acts evidence. The court disagreed, concluding that the evidence of these acts was inextricably bound up in the overall scheme, and thus within one of the approved exceptions.¹⁷

For purposes of this article the *Ames* opinion is striking not for its result, which is arguably consistent with the doctrine articulated in *Fitchette*, but rather for the court's statement of the rule and its distancing of itself from the still-fresh opinion in *Fitchette*. With nearly as much authoritative window-dressing as adorned the confident statement of the law in *Fitchette*, the court articulated a vision of a very different regime. Instead of a broad prohibition subject to narrowly-drawn and jealously-guarded exceptions, "reduced to its narrowest compass, the *true rule* is that evidence of the commission of other crimes is admissible when it tends corroboratively or directly to establish the defendant's guilt of the crime charged in the indictment on trial, or some essential ingredient of such offense."¹⁸ This requirement is met when the evidence "discloses a motive, a criminal intent, guilty knowledge, the absence of mistake, identifies the defendant, or is a part of a common scheme or plan embracing two or more crimes so related

14. 90 Minn. 183, 96 N.W. 330 (1903).

15. *Id.* at 188, 96 N.W. at 331.

16. *Id.* at 193, 96 N.W. at 333.

17. *Id.* at 193, 96 N.W. at 333.

18. *Id.* at 192, 96 N.W. at 333 (emphasis added).

to each other that the proof of one tends to establish the other.”¹⁹ As for the court’s quite different statement of the law just seven months prior: “[w]hat was said in the general discussion of the subject in the *Fitchette* case was not with a view of laying down any hard and fast rule in such cases.”²⁰

For the next dozen years, the court ignored *Fitchette* and cited *Ames* as having articulated the general rule. In *State v. Peterson* the court stated the rule as being “that evidence of the commission of other crimes by the defendant is competent if it tends, corroboratively or directly, to establish his guilt of the crime charged in the indictment on trial, or some essential ingredient thereof. . . .”²¹ Again in *State v. Briggs*, the court found that evidence of other crimes was admissible to establish a plan “to commit the crimes for the purpose of plunder and gain” under “the rule by which evidence of other crimes is admissible in corroboration of the specific charge laid in the indictment.”²²

Not until 1916 did the court find it appropriate to cite *Fitchette* again, taking the position that the “general rule” was that articulated in *Fitchette*, namely “that it cannot be shown that the accused has committed other crimes.”²³ For a while, it appeared as though this might merely have been an aberration. For at least three more years, the court’s opinions continued to reflect the view that *Ames* established the general rule.

In December of 1918, the court extended the logic of *Ames*

19. *Id.*

20. *Id.*

21. *State v. Peterson*, 98 Minn. 210, 211, 108 N.W. 6, 7 (1906).

22. *State v. Briggs*, 122 Minn. 493, 500, 142 N.W. 823, 826 (1913). Two months prior to *Briggs*, the court reversed a conviction in part on the trial court’s failure to allow broad evidence of the defendant’s good character. Citing *Ames*, the court noted that “[e]vidence of good character goes to the probabilities of defendant’s guilt, and bears on the general question of guilty or not guilty.” *State v. Hutchison*, 121 Minn. 405, 408, 141 N.W. 483, 484 (1913).

23. *State v. Newell*, 134 Minn. 384, 386-87, 159 N.W. 829, 830 (1916). The defendant was charged with manslaughter based on her alleged performance of an abortion. *Id.* at 385, 159 N.W. at 829. She apparently denied it, though the opinion does not describe whether she denied performing any procedure or instead denied that the procedure she performed was an abortion. The court nonetheless upheld admission of evidence of defendant’s consent to perform an abortion for another person as relevant to establishing intent. *Id.* at 386, 159 N.W. at 830. That exception to the general rule, however, typically applies only where a defendant does not dispute the act, but instead argues that it was committed by accident or mistake. See 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 190 (5th ed. 1999).

nearly as far as it would go in *State v. Hartung*.²⁴ The defendant in that case lived in the small town of Welcome and was sitting outside a store in that town when Red Cross volunteers happened by soliciting contributions to fund the organization's assistance of the American war effort. Hartung suggested that they were working for the wrong side and that he would not contribute unless the money went to Germany. For this he was charged with and convicted of violating a statute prohibiting speech advocating that citizens "should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."²⁵ On cross-examination he was asked about a similar incident which occurred four months later, to which his counsel objected. The trial court overruled the objection and the supreme court affirmed. Justice Hallam reasoned for the court that "[t]he evidence tended to show a continued state of mind and habit of speech. It showed inclination to commit an offense of the character charged, and had some tendency to corroborate the evidence of the state's witnesses and to show the guilt of the defendant of the crime charged."²⁶

Justice Hallam authorized a similar opinion nine months later in *State v. Whipple*.²⁷ The defendant in that case was a doctor charged with the sale of morphine to an addict and the state was allowed to introduce evidence of his sales to other addicts. Though the court might easily have justified introduction of the evidence under the intent exception to the *Fitchette* rule,²⁸ it instead cited *Ames* and *Hartung* for the proposition that such evidence "is admissible if it is part of one plan or scheme carried on by defendant to willfully violate the law or if it tends to show an inclination or predisposition to commit the offense charged."²⁹

24. 141 Minn. 207, 169 N.W. 712 (1918).

25. 1917 Minn. Laws Ch. 463 § 3.

26. *Hartung*, 141 Minn. at 211, 169 N.W. at 714.

27. 143 Minn. 403, 173 N.W. 801 (1919).

28. The defendant's position was that he sold the drug as part of a course of treatment for the addiction via "the gradual reduction method." In contrast to *Newell*, evidence that he sold morphine to other addicts was likely relevant to establishing that his intent in making the sale at issue was impure.

29. *Whipple*, 143 Minn. at 407, 173 N.W. at 802 (citation omitted). Justice Hallam was not finished. In *State v. Clark*, 155 Minn. 117, 192 N.W. 737 (1923), he wrote the opinion for the court in a case arising out of a conviction for the sale of liquor in which it affirmed the admission of evidence of other sales by the defendant. Notably, Justice Hallam did not rely on the *Ames* formulation of the rule, but rather affirmed the conviction on the theory that the sales demonstrated "a general system or plan to commit crimes similar to the one charged." *Id.* at 118, 192 N.W. at 737. In other words, they fit within one of the exceptions to the

The *Ames* formulation of the rule last appeared in the garb of a general standard in December, 1920.³⁰ In *In re Nash*, the court stated the rule in the following manner: “[p]roof of other offenses of the same nature as the offenses charged, and which tend to show that the defendant was pursuing a general scheme or course of conduct which embraced the commission of such offenses, is admissible for the purposes of corroboration even in criminal trials.”³¹

Fitchette’s resurgence was taking root even as these last few opinions relied on the *Ames* rule. In May of 1919, the court in *State v. Monroe*, though affirming the conviction, cited *Fitchette* in acknowledging the “well-established” rule against the admission of evidence of other crimes.³² *Ames*, in contrast, was relegated to a string cite supporting the equally well-established exception to the general rule for admission of other crimes “which appear to be members of a disclosed system.”³³ Subsequent cases endorsed this formulation.³⁴

Fitchette rule. Even so, Justice Dibell dissented in a powerfully written opinion. He observed that the evidence presented established no more of a common scheme or plan than would any evidence that the defendant had in the past committed similar acts. *Id.* at 120, 192 N.W. at 738. Relying on arguments similar to those advanced in this article, he argued that if the court disagreed with the general rule, it ought to change the rule rather than simply stating without analysis that the evidence fit within one of the exceptions. *Id.* at 120-22, 192 N.W. at 738-39.

30. *In re Nash*, 147 Minn. 383, 181 N.W. 570 (1920). The court latched onto the *Ames* formulation again in *State v. Upson*, 162 Minn. 9, 201 N.W. 913 (1925), but not for purposes of admitting evidence of crimes by the defendant. The defendant in that case, a farmer living with his parents, was convicted of selling a pint of moonshine. The dispute on appeal concerned evidence of two sales made by his mother. The court observed that “[e]vidence is neither within nor without the ‘rule of exclusion’ simply because it shows other offenses. The relevancy of such evidence is to be determined as is that of any other. *Id.* at 15, 201 N.W. at 915 (citing *Ames*). This seems correct, though the opinion did generate a dissent by Justice Wilson (though not from Justice Dibell, who dissented in *Clark*), see *supra* note 29.

31. *In re Nash*, 147 Minn. at 390, 181 N.W. at 573.

32. *State v. Monroe*, 142 Minn. 394, 398, 172 N.W. 313, 315 (1919).

33. *Id.*

34. See *State v. Friedman*, 146 Minn. 373, 378, 178 N.W. 895, 897 (1920). The court endorsed the *Monroe* discussion, though it appeared to equate *Monroe* and *Whipple*. See *id.* See also *State v. Nelson*, 148 Minn. 285, 300, 181 N.W. 850, 856 (1921) (citing *Fitchette* in support of the general rule that “[e]vidence of independent crimes is generally incompetent,” though one subject to exceptions, as stated in *Monroe*, “which go quite far.”). Cf. *State v. Pugliese*, 149 Minn. 126, 182 N.W. 958 (1921) (citing *Monroe* and *Fitchette* as standing for the proposition that admission of a separate and independent crime is sound).

The court finally turned the corner in *State v. Friend*.³⁵ In that case the defendant was charged with statutory rape and the victim testified that the defendant told her about a number of other underage girls with whom he had also had sex. The court cited *Fitchette* in support of the proposition that “[e]vidence of other crimes is not in general admissible in proof of the crime charged,” noted that this case did not fall within any of the exceptions to the rule, and further quoted *Fitchette* in asserting that the testimony regarding the asserted prior acts amounted to “makeweight” against the defendant.³⁶ The court was not finished. Perhaps not confident that mere reliance on its own caselaw would serve to convince that reversal was appropriate, the court canvassed a variety of authorities from which it extracted the purpose for the rule. “That evidence of other crimes has probative force is without question. It affects the judgment of the average juror, and of the trained legal mind of the lawyer and of the judge accustomed to scrutinize and weigh evidence.”³⁷ For that reason, the court concluded, the evidence in a criminal trial should generally relate only to the specific act with which the defendant is charged.³⁸ Here the evidence relating to other acts was of neither the quality nor type to overcome this presumption and a new trial was required.

From that point on, the court never again cited *Ames* in support of a general rule, but rather in support of the proposition that the general rule of *Fitchette* is subject to exceptions.³⁹ Through at least the 1930s *Fitchette* was the leading case on the subject of bad acts evidence.⁴⁰ This did not, however, prevent the court from reaching results inconsistent with *Fitchette*'s rationale. In *State v.*

35. 151 Minn. 138, 186 N.W. 241 (1922).

36. *Id.* at 139-40, 186 N.W. at 241 (Minnesota Reporter quotes as “makeweight”).

37. *Id.* at 140, 186 N.W. at 242.

38. *Id.* (quoting *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903)).

39. See *State v. Drews*, 274 Minn. 426, 431, 144 N.W.2d 251, 255 (1966); *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962); *State v. Glazer*, 176 Minn. 442, 444, 223 N.W. 769, 769-770 (1929); *State v. Sabatini*, 171 Minn. 137, 139, 213 N.W. 552, 553 (1927); *State v. Eames*, 163 Minn. 249, 251-52, 203 N.W. 769, 770 (1925). See also *City of St. Paul v. Greene*, 238 Minn. 202, 206, 56 N.W.2d 423, 426 (1952) (citing *Ames* in support of the proposition that the court there had come “near to following the rule” pursuant to which relevance is the only consideration); *State v. Clark*, 155 Minn. 117, 192 N.W. 737 (1923) (citing *Ames* in support of the proposition that evidence of the crimes of others may be relevant).

40. See *State v. Yurkiewicz*, 212 Minn. 208, 210-11, 3 N.W.2d 775, 776 (1942); *State v. Stuart*, 203 Minn. 301, 306, 281 N.W. 299, 302 (1938); *State v. Sweeney*, 180 Minn. 450, 455-56, 231 N.W. 225, 227-28 (1930).

Voss, for example, the court articulated the governing standard in the appropriate manner, but nonetheless concluded that it was not error for the district court to have admitted evidence of the stealing of barley in a case concerning the theft of hogs.⁴¹

This article is concerned primarily with the court's statement of the applicable rule (rather than whether the rule—whatever it is—is an appropriate way of dealing with other bad acts evidence). Viewed from that perspective, the first four decades of the twentieth century break down into two distinct and nearly separate periods. Though in *Fitchette* the court opened the century with possibly the strongest statement of the rule disfavoring bad acts evidence it has ever made, it quickly, and with no change in personnel, came back with nearly its strongest statement of the rule in the other direction in *Ames*.

Following *Ames*, the court simply ignored *Fitchette* for over a decade. The general rule favored admission and, under it, the court sanctioned results that could not have been justified consistent with any faithful adherence to *Fitchette*. Some of the explanation undoubtedly rests in matters not addressed in the opinions, namely the social pressures accompanying World War I and Prohibition. Even so, it is curious that the court did not bother to confront *Fitchette* in any of these opinions. Instead, the court confidently proceeded as if the *Ames* rule had long been settled and needed no reconsideration.

Fitchette's reemergence occurred in a similar fashion. The court did not acknowledge, let alone explain, its lengthy absence. Nor did the court's opinions pause to consider that by bringing *Fitchette* to the fore it was implementing a significant jurisprudential change of course. The court went from legal relevance to logical relevance and back, the entire time purporting to do nothing more than follow precedent. In this way, the close appearance of *Fitchette* and *Ames* foreshadowed what was to follow throughout the rest of the century.

B. *The Law at Mid-Century*

Little had changed by 1953, when bad acts evidence was the

41. 192 Minn. 127, 255 N.W. 843 (1934). The court offered no analysis, but rather a bare conclusion that the evidence was appropriate in connection with establishing the defendant's intent. *Id.* at 129, 255 N.W. at 844.

subject of a Note published in the *Minnesota Law Review*.⁴² Consistent with the history outlined above, the author suggested that the court had to that point in the century been inconsistent in both its statement and its application of the law.⁴³ Worse yet, the court had simply invented new exceptions where it could not plausibly fit the evidence within an existing exception.⁴⁴ In the context of sex crimes, the court appeared to have abandoned the rule entirely, a result the author deemed “somewhat illogical.”⁴⁵ “Since natural prejudice against the sex offender is so great, it would seem that he should be afforded more, rather than less, protection.”⁴⁶ In sum, the Note describes a system in which, though the author appears by and large not to find the results of the cases he surveyed exceptionable, the law was unsettled and such strict adherence to it as might have been possible in the circumstances was forsworn where it would lead to undesirable results.

The occasion of the Note appears to have been the court’s decision in *City of St. Paul v. Greene*.⁴⁷ The two defendants in that case were convicted of selling liquor to minors. On appeal, they challenged the district court’s allowance of evidence that they had on other occasions sold liquor to the same minors. The supreme court affirmed the conviction via an opinion heavier on bark than bite. Justice Knutson quoted liberally from a number of the court’s past opinions on the subject of bad acts evidence, discussed recent scholarly criticism of the general rule excluding such evidence, and noted that the court in *Ames* “came near to following” the inclusionary version of the rule.⁴⁸ Having built up this doctrinal conflict, however, he did nothing to resolve it. Where the reader expects a bold proclamation in favor of one standard or the other, Justice Knutson instead noted with respect to the evidence before it that “it is clear that it is admissible under our decisions.”⁴⁹

42. Note, *Evidence of Defendant’s Other Crimes: Admissibility in Minnesota*, 37 MINN. L. REV. 608 (1953).

43. *Id.* at 611-13 (noting the court’s failure to consistently place admitted evidence within one of the articulated exceptions to the general prohibition) and 615-16 (noting the court’s failure, on a broader level, to articulate the general rule in terms of exclusion or relevance).

44. *Id.* at 615.

45. *Id.* at 614.

46. *Id.*

47. 238 Minn. 202, 56 N.W.2d 423 (1952).

48. *Id.* at 203-06, 56 N.W.2d at 425-26.

49. *Id.* at 207, 56 N.W.2d at 426. Interestingly, three years earlier Justice Knutson wrote an opinion for the court in which he stated, without any of the

Three years later, however, the court in *State v. DePauw* expressly declared its allegiance to “[t]he general and well-established rule in criminal cases . . . that evidence which in any manner shows or tends to show that the accused has committed another crime independent of that for which he is on trial is inadmissible. . . .”⁵⁰ The court adhered to this position more or less consistently for the next decade.⁵¹

C. *The Spreigl Era*

Possibly the century’s most important opinion dealing with bad acts evidence, at least if status as a shorthand reference to an entire body of law is any indication, came in *State v. Spreigl*.⁵² Theodore Spreigl was convicted of “taking indecent liberties” with his stepdaughter, based in part on her testimony regarding prior instances during the preceding year, coupled with similar testimony from another stepdaughter and a stepson. On appeal, Spreigl argued that the trial court ought to have excluded this evidence, or at least instructed the jury that it was not to consider the evidence as bearing on his guilt or innocence of the charged act.⁵³

Justice Otis’ opinion for the court is impressive. Its analytical sweep is broad, taking into account both the court’s historical treatment of the issue and scholarly commentary on how it ought to be dealt with.⁵⁴ More importantly, the opinion evidences a consistent awareness of the rationale for the rule and a struggle to square that rationale with both the facts of the case at hand and the larger context in which evidence of other bad acts is utilized.

Still, the opinion is not faultless. It presents as the “basic issue” for resolution as

hesitation apparent in *Greene*, that “[i]t is a general rule that evidence of separate and independent crimes is inadmissible to prove the guilt of a person charged with having committed a crime.” *State v. Bock*, 229 Minn. 449, 454, 39 N.W.2d 887, 890 (1949).

50. 246 Minn. 91, 93, 74 N.W.2d 297, 299 (1955).

51. See, e.g., *State v. Wofford*, 262 Minn. 112, 117, 114 N.W.2d 267, 271 (1962) (“It is well established that evidence that the accused has committed another crime unrelated and unconnected with the one for which he is on trial is inadmissible since it is not competent to prove one crime by proving another.”); *State v. Connelly*, 249 Minn. 429, 440, 82 N.W.2d 489, 496 (1957) (“It is the general rule that evidence of other separate and independent crimes is inadmissible in the trial of a defendant charged with a criminal offense.”).

52. 272 Minn. 488, 139 N.W.2d 167 (1965).

53. *Id.* at 489-90, 139 N.W.2d at 168-69.

54. *Id.* at 490-96, 139 N.W.2d at 169-72.

whether the unquestioned relevance of testimony that a defendant has committed other sex offenses, if true, gives it sufficient probative value to outweigh the patent unfairness which results to an innocent defendant who is confronted with charges against which he is not prepared to defend, which are inflammatory in the extreme, and which emanate from witnesses who are manifestly susceptible to influence and suggestion.⁵⁵

Ultimately, however, the court failed to resolve a number of these issues. While it noted, for example, both its apparent past adoption of a presumption that bad acts evidence is more appropriate in sex cases because of an implicit assumption that sex offenders are more prone to recidivism⁵⁶ and the existence of studies questioning that assumption,⁵⁷ it ultimately took no position on whether a different standard applies in sex cases.⁵⁸ In similar fashion, the opinion dwells on the fact that the witnesses offering the testimony were especially susceptible to suggestion and improper influence; nevertheless, the opinion does not resolve how such situations ought to be addressed.⁵⁹

The court did, however, take two important steps toward clarifying the law applicable to bad acts evidence. First, citing to *Fitchette*, it reiterated the rule that the defendant is to be given the benefit of the doubt whenever proposed evidence does not clearly fall within one of the exceptions to the general rule against admissibility.⁶⁰ This is not an obvious clarification because such a presumption was arguably the law all along. Still, it is a rule of potentially great significance if applied consistently and one almost

55. *Id.* at 490, 139 N.W.2d at 169.

56. *Id.* at 493, 139 N.W.2d at 170.

57. *Id.* at 493 n.10, 139 N.W.2d at 120 n.10.

58. *See id.* at 488, 139 N.W.2d 167.

59. *Id.* at 494, 139 N.W.2d at 171. In a continuation of this discussion, the court did note that the fact that

two of the children who claim to have been victims of repeated and shocking misconduct over an extended period of time made no complaint to their mother nor to anyone else until after the offense for which defendant is here charged, and the third child made no complaint at any time. This is something we cannot ignore in weighing the question of whether defendant should have a new trial.

Id. Though perhaps related in this case, the questions of susceptibility to suggestion and whether a sustained failure to object reflects on credibility are distinct issues.

60. *Id.* at 495, 139 N.W.2d at 172 (citing *State v. Fitchette*, 88 Minn. 145, 149, 92 N.W. 527, 528 (1902)).

never mentioned—and therefore, presumably, rarely applied—in the cases between *Fitchette* and *Spreigl*. Second, the court adopted a notice requirement.⁶¹ Specifically, the court articulated a rule pursuant to which evidence of other bad acts “shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularity required of any indictment or information. . . .”⁶²

Two years later, in *State v. Billstrom*,⁶³ the court, again speaking through Justice Otis, expanded on the rules articulated in *Spreigl*. Although the parties’ arguments were devoted largely to whether the proffered bad acts evidence fell within the common scheme or plan exception, the court determined that the truly applicable exception was that allowing for the introduction of bad acts evidence to establish identity. In so doing, the court set forth six procedures to be followed in cases involving bad acts evidence:

- (1) Notice must be given as required by *Spreigl*;
- (2) The prosecutor must identify, at the time the evidence is offered, the exception under which it is being offered;
- (3) Even where the evidence is offered to establish identity, “there must nevertheless be some relationship in time, location, or modus operandi between the crime charged and the other offenses;”
- (4) In cases where the evidence is offered to establish identity, it is only admissible where the other evidence relating to the perpetrator’s identity is “otherwise weak or inadequate;”
- (5) The defendant’s participation in the incidents offered must be established by clear and convincing evidence; and
- (6) “Both at the time the evidence is received and in the final charge, the court should admonish the jury that the testimony is received for the limited purpose of establishing identity.”⁶⁴

61. *Id.* at 497, 139 N.W.2d at 173.

62. *Id.* at 497, 139 N.W.2d at 173. The court adopted three exceptions to the notice requirement: “(a) offenses which are part of the immediate episode for which the defendant is being tried; (b) offenses for which defendant has previously been prosecuted; and (c) offenses which are introduced to rebut defendant’s evidence of good character.” *Id.*

63. 276 Minn. 174, 149 N.W.2d 281 (1967).

64. *Id.* at 178-79, 149 N.W.2d at 284-85. As an opinion, *Billstrom* does not quite measure up to *Spreigl*, primarily because it is not at all clear to what extent

Despite the fact that *Spreigl* and *Billstrom* were plainly intended to be opinions that redefined the court's approach to bad acts evidence, the court at first only sporadically regarded them as such. Just nine months after *Spreigl* purported to breathe new life into the notion that defendants are to be given the benefit of the doubt when the admissibility of bad acts evidence is questionable, the court in *State v. Sorg*⁶⁵ affirmed the admission of evidence which it acknowledged it did not feel "was very strong or convincing so as to link defendant" with the charged crime, and did so without making any reference to this presumption.⁶⁶ In *State v. Saucedo*,⁶⁷ the court chose to rely on *State v. Sweeney*⁶⁸ for its statement of the general rule and cited *Spreigl* only in support of the rule it ignored in *Sorg*. Perhaps significantly, each of these opinions had different authors.⁶⁹

In 1977, the rule gained a more authoritative statement in the form of Rule 404(b) of the Minnesota Rules of Evidence, which provides:

Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁷⁰

This rule, while based on and substantively nearly identical to its counterpart in the Federal Rules of Evidence,⁷¹ was not regarded by its drafters as having effected any change to the then-applicable doctrine in Minnesota.⁷² Indeed, the rule was amended after its initial adoption to bring it more completely in line with the

the court meant for some of its rules to apply outside the context of the identity exception.

65. 275 Minn. 1, 144 N.W.2d 783 (1966).

66. *Id.* at 9, 144 N.W.2d at 788.

67. 294 Minn. 289, 200 N.W.2d 37 (1972).

68. 180 Minn. 450, 231 N.W. 225 (1930).

69. *Saucedo*, 294 Minn. 289, 200 N.W.2d 37 (1972) (MacLaughlin, J., opinion); *Billstrom*, 276 Minn. 174, 149 N.W.2d 281 (1967) (Otis, J., opinion); *Sorg*, 275 Minn. 1, 144 N.W.2d 783 (1966) (Gallagher, J., opinion); *Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965) (Otis, J., opinion). As noted below, the system by which opinion authorship is assigned in the Minnesota Supreme Court may contribute to doctrinal tension by placing too much responsibility for any given case with a single justice. See *infra* note 156.

70. MINN. R. EVID. 404(b).

71. See MINN. R. EVID. Preliminary Cmt. (2001); FED. R. EVID. 404(b).

72. See MINN. R. EVID. Preliminary Cmt.

requirements of the case law.⁷³

While the adoption of Rule 404(b) put to rest the larger question of whether there ought to be any special restriction on the admissibility of bad acts evidence, it did not remove all or even much of the room for disagreement. Many of the specific procedures adopted in *Spreigl* and *Billstrom* were not incorporated into the rule. Moreover, one need only take an expansive view of the exceptions enumerated in the rule, which do not even comprise an exhaustive list, to end up with something very much like the *Ames* rule. As the next section discusses, simply by shifting the terms of the debate from the now-settled broader question to the particulars of the rule's implementation, the court has come near to doing just that.

D. *The End of the Century*

In the last two decades, the court has rarely departed from stating the general rule as one of presumptive exclusion. It would be difficult for it to do so, given that *Spreigl's* name has become synonymous with bad acts evidence, and the presumption of exclusion has been incorporated into Rule 404. Indeed, some of the court's most recent cases have even stated that the benefit of the doubt is to be given to the defendant where it is not clear that the proffered evidence fits within one of the exceptions;⁷⁴ although, as discussed below, it is difficult to imagine what effect this has given the tremendous discretion that the cases grant to the trial courts.

This is not to suggest that doctrinal consistency reigns supreme. While the stated general presumption has remained largely consistent,⁷⁵ the rules by which it is implemented have not. The exceptions have received similar treatment. Again, there are greatly differing formulations of the standards, the most permissive of which are, in effect, so broad as to swallow the rule. Thus, although the terms in which it is conducted have changed slightly, the unacknowledged debate regarding whether evidence of other bad acts is to be presumptively inadmissible continues.

Because the doctrinal tension has migrated to the lower-order

73. See MINN. R. EVID. 404 Committee Cmt. (1989).

74. E.g., *State v. Lynch*, 590 N.W.2d 75, 80 (Minn. 1999); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

75. Cf. *State v. Eling*, 355 N.W.2d 286, 292 (Minn. 1984) (discussed at text accompanying notes 80-86, *infra*).

questions, and because the number of cases considering bad acts evidence has increased dramatically,⁷⁶ the article shifts focus here from an examination of the courts statement and application of the general rule to consideration of the case law within a single exception, namely evidence of other bad acts relevant to establish the perpetrator's identity.

Under the traditional view the identity exception is rarely a distinct ground for admission.⁷⁷ The classic instance in which another crime would be admissible to establish identity would be a so-called "signature" crime, in which common details between the prior crime and the one for which the defendant is on trial are so distinctive as to make it likely that the two were committed by the same person.⁷⁸ Most often, however, relevance as to identity will be incidental to evidence admissible under some other exception, such as that for evidence establishing a common scheme or plan. Moreover, according to one respected evidence treatise, "courts tend to apply stricter standards when the desired inference pertains to identity as opposed to state of mind."⁷⁹

At least since *Billstrom*, however, the Minnesota Supreme Court has applied a *looser* standard to the admissibility of bad acts evidence to show identity than under the other exceptions. Despite that general trend, however, as the following cases demonstrate, there is presently some confusion in the case law. The confusion relates to whether the standard pursuant to which bad acts evidence offered to show identity is to be assessed is also the same standard to be used to assess the relevance of bad acts evidence generally. Moreover, at least some cases suggest that the court has at times viewed this standard as encompassing the entirety of the substantive inquiry relating to admissibility. If this is the case, *Ames* may have returned via the back door.

1. *State v. Eling*

In *State v. Eling*,⁸⁰ the defendant was convicted of first-degree

76. As of May 18, 2001, *Spreigl* had been cited in 253 Minnesota appellate court opinions.

77. See 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 190, at 668 (1999).

78. See *id.*; 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.22[5][c] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001).

79. See STRONG ET AL., *supra* note 77, at § 190.

80. 355 N.W.2d 286 (Minn. 1984).

murder of a security guard during the course of an attempted robbery of a hospital pharmacy. Two informants connected Eling to the crime, as did an individual who had helped to plan the crime but backed out before its commission. One of the informants and the coconspirator told police that Eling had been shot in the leg, which was consistent with blood stains the police had found in the getaway van. Though the opinion does not expressly say as much, one infers that Eling was in fact found to have been shot in the leg.

Eling did not testify. Instead he relied on the testimony of friends and family who stated that he had been with them at the time of the robbery. He also claimed that he had injured his leg the day before. Reasoning that this testimony placed defendant's identity in issue, the trial court allowed the prosecution to present evidence relating to two armed robberies of pharmacies committed by Eling eight and ten years before. The three robberies were similar in that they involved pharmacies, the defendant was armed, pharmacy personnel were ordered to lie on the floor, and a specific request was made for "Class A" drugs. The supreme court affirmed.

Speaking through Justice Wahl, the court framed its analysis with a statement of the rule reminiscent of *Ames*: "Faced with the question of whether prior-crime evidence is admissible, the trial court must determine whether the relevance of the evidence is sufficient to outweigh its potential for prejudice."⁸¹ Further, "[g]enerally, the prosecution must demonstrate a tangible similarity between the prior crime and the charged offense in terms of time, location, or *modus operandi*."⁸² Although—based on *Billstrom*—this latter statement presumably only relates to bad acts evidence proposed to be admitted to establish identity, the opinion does not call out that limitation, such that it can be read as standing for the proposition that bad acts evidence must be more relevant than prejudicial; that relevance is to be judged by reference to time, location, or *modus operandi*; and that nearly all the responsibility for making this assessment rests in the trial court.⁸³

Despite the opinion's somewhat variant statement of the law, one can make a colorable, if not entirely convincing, argument that these convictions were admissible even under the traditional statement of the rule. That is, in both the two prior robberies of

81. *Id.* at 291 (citing *State v. Filippi*, 335 N.W.2d 739, 743-44 (Minn. 1983)).

82. *Id.* at 292 (citing *Filippi*, 335 N.W.2d at 743).

83. *See id.* at 291-92.

which defendant was convicted and the one at issue, the robbers requested “Class A” drugs. As the court pointed out, a reference to “Class A” drugs was, by 1982, anachronistic,⁸⁴ such that it may have had some value as a “signature” aspect of the crime. Rather than focusing on this, however, the court appeared to place at least as much reliance on the fact that Eling’s counsel had warned him that evidence of these prior convictions would probably be admitted⁸⁵ and that, in any event, he had actual notice of the state’s intention to introduce the evidence.⁸⁶ Moreover, the court undertook no analysis of the strength of the remainder of the state’s evidence relating to identity and made no reference to any of the other applicable safeguards. In sum, the opinion evinces a very permissive approach to the admissibility of bad acts evidence.

2. *State v. DeWald*

In *State v. DeWald*,⁸⁷ the court, again speaking through Justice Wahl, outlined a very different sort of analysis. The defendant was charged with the murder of an elderly South Minneapolis woman, a crime the police had difficulty solving. Three weeks after the murder, however, an elderly man was murdered in South Minneapolis and DeWald was connected to that murder. The police then determined that he had been to the murdered woman’s house twice roughly a year prior to her death, that a fingerprint taken from a faucet in the woman’s house matched his, and that he owned a knife of the same brand as the one with which she was stabbed. Arguing that this evidence only weakly tied DeWald to the murder, the state requested that it be allowed to offer evidence of the man’s murder, which the trial court granted.

Where *Eling* did not bother with lengthy summaries of law or an analysis tied to precedent at each step, *DeWald* adopted a more formalist air. Justice Wahl opened the discussion by gravely noting that the court recognized that bad acts evidence can lead both judge and jury astray. She recited the general rule against

84. *Id.* at 292.

85. *Id.* at 290, 291.

86. *Id.* at 292. Given that prior notice had long since been required by *Spreigl* and *Billstrom*, it is difficult to see how this is relevant to the analysis of any argument that such evidence should not have been admitted, since if there had been no prior notice, the analysis would presumably not need to progress to this stage. See *State v. Billstrom*, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967); *State v. Spreigl*, 272 Minn. 488, 497, 139 N.W.2d 167, 173 (1965).

87. 464 N.W.2d 500 (Minn. 1991).

admission of the evidence and articulated, at least in broad form, the analysis required under *Spreigl*, including the notion that the benefit of the doubt is to be given to the defendant in close cases.

The trial court had admitted the evidence of the man's murder based on a finding that "it established identity, motive, and modus operandi,"⁸⁸ and the supreme court found that there was "no doubt" that the evidence "had probative value on the issues of identity and common scheme or plan..."⁸⁹ Though it acknowledged that there were dissimilarities between the two offenses, the court cited authority for the proposition that absolute similarity is not a prerequisite.⁹⁰ In considering what the court deemed the more difficult question of whether the other crime's unquestioned probative value was outweighed by the potential for prejudice, the court likewise sought refuge in citations to authority. Thus, it resolved the issue not through a consideration of the troubling dynamics of this analysis, but rather through a series of syllogisms leading it to the conclusion that the trial court did not abuse its discretion in allowing the evidence.⁹¹

3. *State v. Cogshell*

In *State v. Cogshell*,⁹² the defendant was convicted of selling crack cocaine to an undercover officer. Because the sale occurred during the course of an ongoing investigation, the officer did not make an arrest at the time of the sale. Instead, Cogshell was arrested over two months later on the basis of a tip from a confidential informant, followed by the undercover officer's

88. *Id.* at 503.

89. *Id.* It is difficult to characterize the evidence as relevant to motive or common scheme or plan/*modus operandi* as those exceptions are traditionally formulated. Other bad acts are relevant to establish motive only where the motivation for the crime in question was directly related to the other crimes sought to be proved, as for example would be the case with a crime committed in an attempt to cover up earlier crimes. Common scheme or plan requires a similar integral relationship, as where a car is stolen to use as a getaway vehicle for a robbery. See 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 190 (5th ed. 1999).

90. *DeWald*, 464 N.W.2d at 503 (citing *State v. Filippi*, 335 N.W.2d 739, 743 (Minn. 1983) & *State v. Walker*, 310 N.W.2d 89, 91 (Minn. 1981)). The mere fact that absolute similarity is not required does not, of course, answer the question of why these particular similarities are sufficient, though the court appeared to consider that to be self-evident.

91. *DeWald*, 464 N.W.2d at 505. Justice Wahl's opinion for the court in *State v. Landin*, 472 N.W.2d 854 (Minn. 1991), has a very similar feel to it.

92. 538 N.W.2d 120 (Minn. 1995).

identification of Cogshell in a photo lineup. The trial court allowed the state to present evidence of a prior sale of crack by the defendant, which occurred fifteen months before the sale at issue, and both the court of appeals and the supreme court affirmed.

Justice Tomljanovich began her analysis of the issue by characterizing the principles relating to bad acts evidence as consisting of “verbal formulation[s] . . . honed over time” in a body of “well-settled” case law.⁹³ Here, the prior conviction was offered to establish identity, for which, the court noted, a “signature” aspect is not required, but rather “generally there must be some relation between the other crimes and the charged offense in terms of time, place, or modus operandi. This means . . . that the mere fact that the prior crime was of the same generic type as the charged offense (e.g., robbery and robbery) usually isn’t sufficient.”⁹⁴ Here, the court discerned more than just an identity of generic types. “[B]oth offenses occurred in the same general area of St. Paul . . . both involved the sale or attempted sale of crack cocaine, and . . . the crack cocaine was packaged in the same way in both cases.”⁹⁵ Conceding that the issue was close, and that other judges might have ruled the other way, the court nonetheless concluded that its admission was appropriate. This prompted a dissent from Justice Gardebring, who, joined by Justice Page, reasoned that admission of the prior conviction in this case would justify the admission of prior drug activity in the trial of any drug-related crime.⁹⁶

4. *State v. Shannon*

The defendant in *State v. Shannon*⁹⁷ was convicted of first-degree murder in connection with the shooting of a developmentally-disabled man who was walking near his home in South Minneapolis. The trial court allowed the state to introduce evidence regarding a shooting that occurred a few blocks away and five months before, in which the victim was shot in the course of being robbed of his marijuana. The circumstances surrounding the shootings suggested that both were gang-related. The state argued that evidence of the first shooting was admissible to

93. *Id.* at 123.

94. *Id.* (citation omitted).

95. *Id.* at 124.

96. *Id.* at 124-25 (Gardebring, J., dissenting).

97. 583 N.W.2d 579 (Minn. 1998).

establish identity or common scheme or plan. The supreme court disagreed and reversed.

Justice Gardebring's opinion for the court purported to canvass the relevant authority, including a detailed list of the *Billstrom* procedural rules applicable to bad acts evidence. Operating under a legal framework largely consistent with the *Spreigl/ Billstrom* approach, the court concluded that the evidence should not have been admitted because the prosecution had not established Shannon's participation in the prior incident by clear and convincing evidence. Moreover, the court found, there was not enough commonality between the two events, which were similar only in that they "occurred in roughly the same neighborhood within some five months of each other, that both were shootings, and that they involved handguns."⁹⁸ Finally, the court concluded that the error was not harmless and that a new trial was required. Justice Gilbert, joined by Justice Page, dissented, asserting that the evidence was properly admitted because it established "the common scheme or plan of gang dominance and enforcement in this particular neighborhood of South Minneapolis."⁹⁹

5. *Can They Be Reconciled?*

It is difficult to extract a consistent approach from these cases. *Eling's* discussion of the law is brief and indicative of a permissive approach, while *DeWald* and *Shannon* are more ponderous and acknowledge the presumption against admissibility, *Cogshell* treads a middle ground in what it characterizes as a well-settled body of law. Thus, despite Rule 404(b)—which generally receives less focused attention than one would expect of a governing rule—there remains at least some level of instability in the general standard itself.

The uncertainties and inconsistencies are more apparent when viewed at the next level of doctrine. No clear test for determining whether evidence relates to identity emerges from these cases. In an opinion issued seven months after *DeWald*, Justice Wahl cited it for the proposition that bad acts evidence offered to establish identity "must be similar to the charged offense either in time,

98. *Id.* at 585.

99. *Id.* at 586 (Gilbert, J., dissenting).

location, or modus operandi.”¹⁰⁰ Though *DeWald* used that phrase, it did so not in the context of articulating the contours of the identity exception to the general rule, but rather to state the standard used to determine whether bad acts evidence, once within an exception to the rule of exclusion, is relevant.¹⁰¹ Ultimately the formulation can be traced to *Billstrom*.¹⁰² As introduced there, however, it appears not to have been intended as the general test for determining whether evidence falls within the identity exception, but rather to establish the point that though such evidence, when introduced to establish identity, need not meet all the requirements necessary for admission under the common scheme or plan exception, it must still possess some of those attributes. In other words, these are attributes that identity-related evidence must possess to be admissible, rather than being the definition of such evidence. *Billstrom*, then, appears to contemplate retention of the two-step process pursuant to which a court must first determine which, if any, exception the proffered evidence falls under and then determine whether the evidence is admissible. These later cases, however, appear to reduce that inquiry to just the second step.

The use of the “time, location, or modus operandi” language as the general test for relevance can be traced to *State v. Filippi*,¹⁰³ where it was used not in the context of the court intentionally creating a rule, but rather as a doubly-qualified distillation of its past cases. “In determining relevancy, we have *generally* required that the other crime be similar in some way—either in time, location, or modus operandi—to the charged offense, *although this, of course, is not an absolute necessity*.”¹⁰⁴ Cases such as *Cogshell*, however, suggest an analysis in which this relevance test is the featured inquiry with respect to the admission of *any* bad acts evidence.¹⁰⁵ Taken at face value, these opinions suggest a regime

100. *State v. Landin*, 472 N.W.2d 854, 859 (Minn. 1991) (citing *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991)).

101. *DeWald*, 464 N.W.2d at 503.

102. 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967).

103. 335 N.W.2d 739 (Minn. 1983).

104. *Id.* at 743 (emphasis added).

105. Even Justice Gardebring’s dissent in *Cogshell* views the *Filippi* relevance test as the only test applicable to the admissibility of bad acts evidence to establish identity. *State v. Cogshell*, 538 N.W.2d 120, 125 (Minn. 1995) (Gardebring, J., dissenting). Another such opinion is *State v. Bolte*, 530 N.W.2d 191 (Minn. 1995), in which the court purported to restate the state of the art in bad acts evidence law: “Because of the potential for substantial prejudice to the defendant’s case

in which a court is to ask only whether the evidence is relevant—judged by similarity in time, location, or *modus operandi*—and, if it is relevant, to assess whether it is unduly prejudicial. This skips any consideration of which exception to the general rule applies and, as such, results in a rule that, at its core, amounts to the *Ames* rule, slightly embellished by the procedural trappings of *Spreigl* and *Billstrom*. It certainly would result in the evisceration of the common scheme or plan exception, since *Billstrom* clearly contemplated that a showing of similarity in time, location, or *modus operandi* is less than what is required to establish a common scheme or plan.¹⁰⁶

Potentially taking things even a step further, in *State v. Frisinger*,¹⁰⁷ the court stated the reason for the similarity rule as being “that the closer the relationship, the greater is the relevance or probative value of the evidence and the lesser is the likelihood that the evidence will be used for an improper purpose.”¹⁰⁸ This formulation appears even to omit the need for any separate prejudice analysis and comes dangerously close to saying that the entirety of the other bad acts analysis boils down to an assessment of whether the other act is close in time, location or *modus operandi*.

E. A Long Look Back

The century in bad acts evidence law in Minnesota began with a pair of cases setting forth nearly diametrically opposed views of the generally-applicable rule. *Fitchette* contains perhaps the most restrictive (in terms of admissibility) statement of the rule the court has ever articulated, while *Ames*—issued less than a year later by the very same court—contains perhaps the most permissive. This beginning foreshadowed all that was to follow in the century. Both versions of the rule enjoyed periods of predominance, though for most of the century the stated standard was some version of the *Fitchette* rule. At no point, however, did either version of the rule

from the improper admission of other-crime evidence, we take this opportunity to review the circumstances where other-crime evidence may be admitted.” *Bolte*, 530 N.W.2d at 196. The court’s otherwise thorough and detailed summary glosses over the categorization portion of the two-step inquiry, devoting most of its attention to the relevance requirement.

106. 276 Minn. at 178, 149 N.W.2d at 284.

107. 484 N.W.2d 27 (Minn. 1992).

108. *Id.* at 31.

completely vanish.

Given the adoption of Rule 404(b), it would be difficult to argue that *Ames* is still good law. Nonetheless, one can trace an unbroken line of precedent all the way back to either *Ames* or *Fitchette*. The court has never expressly disavowed any of its significant decisions relating to bad acts evidence, preferring for the most part simply not to acknowledge contrary authority in its opinions. Even now, when 404(b) seemingly mandates a moderated version of *Fitchette*, the court via cases such as *Cogshell* and *Frisinger* has at least occasionally articulated a rule that in operation is very near to the approach of *Ames*.

To the lawyer or judge looking to analyze the potential admissibility of bad acts evidence, there are two consequences of this history. First, because the court has never disavowed any portion of its case law, and because it has from time to time reached back to its older cases to extract language and principles, there are artifacts of that older law that appear along side, yet are inconsistent with, doctrines of more recent vintage. The most obvious of these is the notion that, in cases of questionable admissibility, the defendant is to be given the benefit of the doubt and the evidence excluded. The concept first appeared in *Fitchette*, was emphasized in *Spreigl*, and has appeared in opinions of the court as recently as 1999.¹⁰⁹ Yet, it is often placed near a statement emphasizing the trial judge's considerable discretion in determining whether bad acts evidence is admissible and emphasizing that the defendant "bears the burden of showing the error."¹¹⁰ It is difficult to imagine how the benefit of the doubt can operate consistent with such a grant of discretion and it is apparent from the cases that its effect, if any, must be narrow.¹¹¹ Indeed, it is difficult to believe that *Fitchette*, in which the presumption was first articulated, would be resolved the same way under the current abuse of discretion standard. This is just one example of the contradictory threads in the doctrine, which have multiplied as the court has implemented the *Billstrom* rules, such that the law has become increasingly complex in addition to unsettled.

The second consequence is that there is precedent for virtually

109. See *State v. Lynch*, 590 N.W.2d 75, 80 (Minn. 1999).

110. See *id.*; *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

111. See *State v. Cogshell*, 538 N.W.2d 120, 124 (Minn. 1995) (upholding admission of evidence despite the court's express acknowledgment that the issue was close and other judges might have ruled the other way).

anything. It is possible, based on cases of relatively recent vintage, for an advocate to make a strong argument for or against the admissibility of a broad range of bad acts evidence. Indeed, an examination of the briefs submitted on behalf of the state and the defense in any given case concerning bad acts evidence would likely reveal reliance on two largely distinct bodies of law, such that the parties are talking past one another as much as focusing on a single disputed point.

This article takes no position regarding the merits of any particular strand of precedent or the results in any of these cases, nor regarding any rule that could be extracted from those results.¹¹² Instead, the article's purpose is to attempt to assess the body of law as a body of law; in other words, to consider the court's statements of the law, how those statements have evolved over time, the existence of contradictions within that body of law, and the dissonance between at least some portions of what that body of law says and some of the results reached in the cases that comprise it. Rather than consider the much-analyzed question of how bad acts evidence ought to be used,¹¹³ I touch on even more examined questions related to the function of law. More specifically, I consider whether, in light of the lengthy history of this body of law, the number of cases within it, and the inevitable internal tensions that have developed, it is possible for a new opinion on the subject to meaningfully fulfill the functions of a judicial opinion.

III. PRECEDENT AND THE FUNCTIONS OF JUDICIAL OPINIONS

This article now turns to consideration of two inextricably related subjects, namely, the functions of a judicial opinion and the doctrine of precedent, as well as the related matter of the attributes of a judicial opinion that fulfills these functions. This discussion serves as a prelude to a subsequent analysis of the systemic factors that influenced the development of bad acts evidence law in Minnesota to its current state. As the preceding Part

112. Which, under a minimalist conception of the doctrine of precedent, would be the true rule by which bad acts evidence is assessed. See *infra* text accompanying note 129.

113. See, e.g., David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529 (1994); Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005 (1995); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993).

demonstrated, that state is one of doctrinal muddle, such that the entire body of law needs thorough reconsideration. This Part also serves as a foundation for the later argument that it would be appropriate for this reconsideration to take place in the context of a single opinion, rather than incrementally. I focus on three commonly-offered justifications for the practice of issuing written opinions: that judicial opinions are necessary to maintain the legitimacy of the judicial branch, to provide guidance to future actors, and to help ensure that similarly situated persons receive similar treatment.¹¹⁴

The value of opinions in furthering the legitimacy of the judiciary stems from the fact that courts operate largely outside the public eye. In contrast to the more political branches, the questions considered by the judiciary are almost uniformly discrete and of little immediate concern to anyone but the parties involved. In light of this, written opinions serve the goal of legitimacy in two ways. First, they make the court's reasoning public, thereby furthering the processes enumerated in the preceding paragraph.¹¹⁵ Second, and less obviously, they encourage the author to reason more carefully toward a conclusion. The process of justifying a decision may lead the judge to determine that her initial conclusions need modification.¹¹⁶ Thus opinions serve not

114. These justifications can be further refined. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 568-69 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (articulating twelve distinct reasons for adhering to prior holdings).

115. "One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995). See also Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 111 (2000) (noting "the value of transparency in judicial decisionmaking").

116. See, e.g., PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 31 (1976) ("[c]onclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision."). Two developments, both products of the explosive growth in appellate court caseloads over the past forty years, have combined to make this feature of opinions less true than it once was. The first is the rise of the law clerk, such that many if not most opinions are written by law clerks and merely edited by judges. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139-57 (1996) [hereinafter POSNER, *FEDERAL COURTS*]. Thus, judges, and the public, have lost the benefit of the reasoning that accompanies the writing process. Editing does not stimulate the same critical impulses and the law clerks who draft the opinions may lack the breadth of knowledge or the confidence to point out difficulties to their judge. The second is the rise of the unpublished and often nonprecedential opinion, which is typically less carefully-crafted than its published counterpart and often

only to expose the court's reasoning process, but to enhance it.

Even so, the issuance of a written opinion may do little to achieve the legitimacy goal in any given case. A court wishing to avoid a result seemingly compelled by strict adherence to the law has many devices available to enable it to do so.¹¹⁷ In most cases, only the parties to the litigation are likely to know of the avoidance and only the disadvantaged party is likely to care. Yet, over time, the individual cases coalesce into a body of law. Certainly in this broader sense, individual opinions, which are the only source of the stated reasons for the doctrines espoused in that body of law, are important both to facilitate the operation of the system of checks and balances¹¹⁸ and, at a more remote level, to maintain public confidence in the judicial system.¹¹⁹

The advisory function of opinions is self-evident. Regardless of whether one believes that the law is merely a prediction of what judges will do,¹²⁰ it is of great practical importance to be able to make such a prediction. To private parties structuring their affairs with an eye toward avoiding litigation, and to litigants and trial court judges looking to resolve a dispute in accordance with the law, a clearly-written appellate opinion that speaks to the question at hand is a welcome thing. Even an opinion addressing a related question can be useful so long as one can extract from that opinion

subject to even less scrutiny by the judge. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J., 899, 903 (2001).

117. See, e.g., POSNER, FEDERAL COURTS, *supra* note 116, at 165 (“the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty.”); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROC. 219, 223 (1999) (noting that the device of unpublished opinions allow a court to avoid strict adherence to the law by “sweeping the difficulties under the rug”).

118. See ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 4 (1961) (noting that the written opinion “serves as a check upon the judiciary under our system of checks and balances in a polity in which so many legal questions are political and so many political questions are legal.”).

119. See *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (“It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”); *id.* at 157-58 (Breyer, J., dissenting) (noting that the public’s confidence in the courts “is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.”).

120. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”). For a general discussion of prediction theory, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 221-28 (1990) [hereinafter POSNER, JURISPRUDENCE].

the principles at operation and do so in a form that makes it apparent how and why they might apply to the new situation.

The third justification, which is closely related to the first two, is that written opinions do a good deal to further the fairness of the system. Fairness is one of the central tenets of our judicial system, a goal often expressed in the maxim that like cases be treated alike.¹²¹ Though there is plenty of room for disagreement over the level of generality at which cases are regarded as sufficiently similar to receive the same treatment,¹²² and probably even over what it means for cases to be treated alike, there is, nonetheless, near-universal agreement that the manner in which the law is applied ought not to depend on legally irrelevant particulars of the parties before the court. The written opinion, in both the individual case and as part of the body of law, serves as a vehicle for courts to demonstrate that there is some content to this notion.¹²³

Essential to the working of all of these functions is the idea of precedent.¹²⁴ Conceptually, the notion of precedent is easy to understand—courts, in deciding a current case, are constrained by their decisions in prior cases. Where a court has before answered a question one way, it cannot—absent some very compelling reason—later answer that question another way. A recent case highlighting the requirements of precedent is *Anastasoff v. United States*,¹²⁵ in which a panel of the Eighth Circuit held itself bound to follow the decision of an earlier panel that a statutory mailbox rule did not apply to claims for federal income tax refunds.¹²⁶ Thus it

121. See, e.g., *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983) (“A fundamental duty of courts of justice is to decide like cases alike. . .”).

122. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-97 (1987).

123. See Price, *supra* note 115, at 111; Wald, *supra* note 115, at 1372 (observing that written opinions serve “to demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike.”).

124. See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 63 (1988) (“As a symbolic matter, disregard of what precedent courts say, if widely engaged in, would imply less than full respect for courts by courts, an attitude hardly calculated to instill respect for courts by others.”); Price, *supra* note 115, at 111 (“[T]he only way a court can know that it is treating like cases alike is through the discipline of a doctrine of precedent.”).

125. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

126. *Id.* at 905 (holding itself constrained by *Christie v. United States*, No. 91-2375 MN (8th Cir. Mar. 20, 1992)). *Anastasoff* was noteworthy because it held that the “judicial power” created in Article III of the United States Constitution was inherently limited by the doctrine of precedent, such that Eighth Circuit Rule 28A(i), which deems the court’s unpublished opinions to be nonprecedential, was

declined to reconsider the prior decision despite an intervening case in which the Second Circuit reached the opposite conclusion.¹²⁷ Had the court concluded otherwise, the functions of judicial opinions would not have been served. Similarly-situated parties would not have been treated alike, the ability to structure one's affairs in certain compliance with law would have been reduced, and, in consequence, public confidence in the judiciary and the law would have decreased. The net effect of any given opinion on these global concerns is, of course, quite small and, accordingly, can, in any particular case, be trumped by other concerns, such as for adopting the better rule of law. In any event, while the implications of the doctrine of precedent are clear in a case like *Anastasoff*, in which the question decided in the first case is identical in all material respects to the question presented in the second, things quickly become murky as differences appear between the authority and the case under decision.

Prevailing conceptions of the binding force of precedent have varied throughout American history.¹²⁸ Even today there is tremendous disagreement on this point. Some advocate a minimalist view of the doctrine, under which only the court's decision "measured by the precise adjudicative facts that give rise to the rule of the case," and not the reasoning behind that decision, has the force of law.¹²⁹ This view holds that an opinion generates law only to the extent that it assigns consequences to a specific set of facts, with principles of law emerging only after a number of

unconstitutional. 223 F.3d at 900. See generally Borger & Oldfather, *supra* note 116.

127. *Weisbart v. Unites States, Dep't of Treasury*, No. 99-6134, 2000 WL 1041231, at *1 (2d Cir. July 28, 2000).

128. See Price, *supra* note 115, at 107-15.

129. See, e.g., RUGGERO J. ALDISERT, OPINION WRITING 10 (1990) [hereinafter ALDISERT, OPINION]. Professor Schauer has suggested that this is the only possible meaning of precedent:

If precedent is seen as a rule directing a decisionmaker to take prior decisions into account, then it follows that a pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results. . . . If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior.

Schauer, *supra* note 122, at 576. His later work suggests that he might also acknowledge that a rule of precedent could direct a decisionmaker to follow the reasons supporting a prior decision, that is to say its mode of analysis, without regard to the validity of those reasons. See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1469-70 (1995).

similar cases have been decided.¹³⁰ At the other end of the spectrum are those who assign significance not only to the reasoning exhibited in a court's opinion, but also to the specific language used to express that reasoning.¹³¹

Both views are problematic. Under the minimalist view the doctrine has little content. If all that matters are the facts and the result reached on those facts, with everything else in an opinion amounting only to dicta, then it is entirely too easy to distinguish nearly every prior case. As a result, once one discards all or even most of a court's characterization of its decision, the notion of being bound by precedent loses almost all of its meaning.¹³² On the other hand, a conception of precedent under which courts are bound not only by the result and the reasoning of prior courts, but also the language in which that reasoning is portrayed, does too much. Courts hear individual cases, each presenting but a single version of all the situations that could possibly arise. The danger of placing too much emphasis on an earlier court's characterization of the rule it applied is that the earlier court cannot be expected to have thought through all of the possible variations that might arise, and so could inadvertently bind a later court to a result that not even the first court would have reached.¹³³ Though a definitive formulation of the law may be appropriate in the later stages of a doctrine's development, where a court will have developed enough experience to have a feel for the difficult areas and a perspective on how best to address them, too much emphasis on early opinions could easily result in the later court having to reach results the initial court would not have reached had the situation been presented.

What happens in practice is not a consistent application of any view of the scope of the doctrine of precedent. Lawyers and judges

130. See ALDISERT, OPINION, *supra* note 129, at 29-30. See also Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2D 17, 24 (2000).

131. See, e.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAWYER, June 2000, at 44 (expressing the view that for an opinion to constitute precedent, the judges on the panel must "subscribe not merely to the result but also to the phrasing of the disposition.").

132. See EISENBERG, *supra* note 124, at 53.

133. See Schauer, *supra* note 122, at 579-80 (noting that a decision "accompanied by an articulated and authoritative characterization of the decision and its underlying facts" creates a hurdle to a subsequent decisionmaker inclined to decide a case differently).

move from one approach to the next as it suits their purpose, minimizing the value of unfavorable cases while lauding every aspect of opinions that support the position they advocate or the holding they intend to reach.¹³⁴ Strict application of the minimalist view is rare.¹³⁵ Moreover, neither the bench nor the bar regards each decision from a given court as of equal precedential value with every other opinion of that court. Instead, an opinion's persuasive value varies with a number of factors, including the identity of its author, whether the court was unanimous and, if not, what was said in dissent, and the intrinsic quality of the opinion, which itself is assessed by such criteria as the authority relied on and the extent to which it gives the appearance that the court thoroughly considered the issue at hand.¹³⁶ Even professed minimalists acknowledge "[t]he brute fact . . . that not all precedent represents currency of equal value."¹³⁷

There are problems associated with a system based on precedent aside from its malleability. A by-product, if not a justification, for the use of precedent is that it creates an economy in the judicial task.¹³⁸ Judges need not reinvent the wheel by reasoning from first principles in every case. The big questions will almost always have been answered before, allowing the judge to focus her attention on the narrow problems presented in a given case. Most of the time this works exactly as intended—but not always. By encouraging unquestioned reliance on what courts have done in the past—even if courts appear to have done the same thing many times—precedent can lead to a failure to consider what ought to be disputable points. It is not so much that many new cases call for the reconsideration of the larger issues, but that a failure to give due consideration to the larger issues can lead to an incomplete analysis of the smaller problem at hand. As the separation between the particulars of the precedent and the case at hand increases, so does the danger that a court simply concluding itself to be bound by precedent is substituting a label in place of thoughtful consideration of whether the differences between cases are meaningful in light of the reasons and policies behind the legal

134. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 66-69 (1951); Wald, *supra* note 115, at 1399-1403.

135. EISENBERG, *supra* note 124, at 53.

136. See, e.g., Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

137. ALDISERT, *OPINION*, *supra* note 129, at 112.

138. Schauer, *supra* note 122, at 599.

rule to be applied. As Judge Posner has put it, the writer becomes so caught up in the task of marshaling authority for the conclusion he wishes to reach that he fails to give full consideration to the meaning of the legal principles at issue.¹³⁹ The result can be an opinion replete with citations to authority, all of which “disguise the fact that no reasons have in reality been given for a particular judgment.”¹⁴⁰

A variant on this problem arises in the context of dicta. It is easy for a lawyer or a judge to dismiss language from a prior opinion as dicta, further consideration of which is thereby rendered unnecessary. But this practice, too, tends to eviscerate the concept of precedent, because it is merely the other side of the minimalist view, under which nearly every case can be distinguished from those that have come before. Moreover, to dismiss something as dicta is to sweep it away by labeling it rather than by confronting it. Language does not make it into an opinion by accident. At least one judge, and possibly a panel of judges, thought about that language, intentionally placed it in the opinion and meant for it to have some effect in the context of a particular sort of case. It is legitimate for a later court to conclude that portions of a prior opinion are inapplicable because the earlier court clearly did not have a certain wrinkle in mind. It is not legitimate simply to say that the language is dicta and refuse to consider it with no further justification. The difference between these two approaches is rarely more than a couple of sentences in an opinion. Those sentences, however, are critical to that opinion’s legitimacy.

A final danger that accompanies reliance on precedent is that there can be too much of it. Once a body of law grows to a certain size it becomes inconvenient to cite to, let alone consider, all of the cases that ought properly to be viewed as precedent.¹⁴¹ At some point the system of precedent breaks down simply because it is not

139. See Richard A. Posner, *Judges’ Writing Styles and Do They Matter?*, 62 U. CHI. L. REV. 1421, 1441-42, 1447 (1995). The effect is similar to that arising from an unthinking dependence on metaphor. See Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 29-30 (1994).

140. RUPERT CROSS, PRECEDENT IN ENGLISH LAW 196 (2d ed. 1968).

141. See, e.g., John J. O’Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949) (tracing the perceived problem of too much law to as far back as 1831 and noting the consistent requests by members of the bar for limitations on publication). This concern initially motivated requests for courts not to issue published opinions in all of their cases, most of which originated with members of the bar who were having difficulty keeping abreast of the law.

realistically possible for courts or litigants to factor all relevant prior decisions into the analysis of any current case. When that point is reached, the inevitable result is that, whether viewed in terms of their results or their rationale, cases are not consistently decided.¹⁴²

None of this is meant to suggest anything but that the doctrine of precedent has its shortcomings and that for judicial opinions to serve their purposes—in both the individual case and as constituent parts of a body of law—these limitations must be taken into account. As noted above, a meaningful doctrine of precedent is essential for judicial opinions to serve the functions for which they were designed. Yet the doctrine of precedent itself depends on the issuance of written opinions.¹⁴³ If the courts that issue those opinions succumb to the dangers just outlined, however, the concept of precedent becomes meaningless. The way out of these difficulties is to take a flexible approach to precedent, where the focus is not so much on how broad the binding portion of a prior opinion ought to be, but rather on the extent to which any portion of it is binding. Under this view precedent constitutes a starting point, “a presumptive but not an absolute constraint on what courts may do.”¹⁴⁴ Ideally,

a determination of what rule a precedent stands for typically involves consideration not only of the intent of the precedent court, as revealed by its language taken in context, but also professional discourse concerning the precedent, changes in social propositions and in doctrine after the precedent was decided, and the judgment of the deciding court concerning what rule would be most socially congruent and systematically consistent. Accordingly, the role of a deciding court in determining what rule a precedent stands for is not so much to determine what the precedent was intended to stand for as to determine what it has or will come to stand for.¹⁴⁵

This, of course, entails a good deal of mindfulness on the part

142. CROSS, *supra* note 140, at 196 (“The result of [the] failure to cite [all relevant cases] is a goodly number, if not a plethora, of cases in conflict or near conflict with each other.”).

143. James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1366 (1995) (“[T]he invocation of the past as authority . . . seems to require the existence of the judicial opinion, or something like it.”).

144. Price, *supra* note 115, at 86 (characterizing this concept of precedent as that embodied in Article III of the United States Constitution).

145. EISENBERG, *supra* note 124, at 52. Interestingly, Professor Eisenberg characterizes this as a description of how precedent operates in actual practice. *Id.*

of courts, not only in the way they go about deciding cases, but more importantly (for purposes of this article), in the way they justify their decisions. Though some contend that there is little relation between the style and the quality of a judicial opinion,¹⁴⁶ certain approaches to the task do appear to lend themselves more readily to opinions that convey an awareness of these limitations. Judge Posner, for example, prefers what he terms the “impure” style.¹⁴⁷ The author of such an opinion forswears the impersonality and formality of the traditional judicial opinion, instead writing as if he were “explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is.”¹⁴⁸ Rather than engaging in the formalist fiction that the “right” answers to the questions presented in a case can always “be resolved by the straightforward application of settled principles,”¹⁴⁹ or that opinions ought to at least look as though that is all the court is doing,¹⁵⁰ the pragmatist judge attempts only to reach “the most reasonable result in the circumstances, with due regard for such systematic constraints on the freewheeling employment of ‘reason’ as the need to maintain continuity with previous decisions and respect the limitations that the language and discernible purposes of constitutional and statutory texts impose on the interpreter.”¹⁵¹

As Professor Girardeau Spann has put it, this sort of opinion acknowledges that “[l]egal doctrines do not simply exist; they exist for a purpose.”¹⁵² What he terms a “functional analysis” makes it easier to assess the persuasiveness of a given opinion, in turn facilitating a healthy debate over the merits of both the result and

146. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1466 (1995).

Insofar as there is a standard of good judicial reasoning, and insofar as it is undesirable to hide bad judicial reasoning, it is far from clear that the characteristics of judicial opinions nowadays castigated are any more likely to facilitate such deception than are the characteristics celebrated by the contemporary critics.

Id.

147. See Posner, *supra* note 139, at 1429-30.

148. *Id.* at 1430.

149. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 147 (1996).

150. See Schaefer, *supra* note 136. “Although an opinion may be born only after deep travail and may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty.” *Id.* at 9.

151. Posner, *supra* note 139, at 1432-33.

152. Girardeau A. Spann, *Functional Analysis of the Plain Error Rule*, 71 GEO. L. J. 945, 979 (1983).

the form and content of the analysis leading to that result.¹⁵³ Opinions that justify their results through little more than references to ostensibly controlling precedent, in contrast, stifle debate by creating an unjustified aura of inevitability to decisions that, in reality, were the product of considerable discretion.¹⁵⁴ Even worse, where an opinion fails to describe why the policies behind the rules compel their application in that case, the judicial act appears to be based on instinct as much as on reason. Though instinct is undoubtedly an element of many, if not most, judicial decisions,¹⁵⁵ reason is supposed to be at the core of the system. Opinions ought to demonstrate that the process was undertaken in a manner consistent with that core value.

IV. ASSESSING THE LAW OF BAD ACTS EVIDENCE

As discussed in Part II, the law relating to bad acts evidence in Minnesota suffers from a number of the problems of a large body of law. The Minnesota Supreme Court has never disavowed any of its case law. Yet an examination of that law reveals two distinct and fundamentally conflicting lines of precedent dating back to the beginning of the century. Only rarely has the court acknowledged this conflict and its embrace of either line has always been incomplete at best. Furthermore, over time, the law has naturally drifted away from its starting place, taken on new emphases, and acquired new elements.¹⁵⁶ As this law has developed and become

153. *See id.* at 979-82.

154. *Id.*

155. *See generally* RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS: READINGS, MATERIALS, AND CASES* 374-88 (1976) [hereinafter ALDISERT, *JUDICIAL PROCESS*].

156. The primary explanation for this doctrinal drift is simply that it is an inherent by-product of lawmaking via the common law method. *See* POSNER, *JURISPRUDENCE*, *supra* note 120. “[A] series of small steps can add up to a giant stride, and although on the one hand moving incrementally gives judges a chance to stop as soon as experience demonstrates the error of their ways, on the other hand it may conceal from them the magnitude of the change they are cumulatively effecting.” *Id.* at 292. *See also* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark Dewolfe Howe ed., 1963). This effect can be magnified in the criminal context, where the equities of the situation generally make it not only easier, but more palatable in a “rough justice” sense, to affirm a conviction, thereby leading to an increasingly permissive approach to the admission of bad acts evidence. In addition, even if this permissiveness is not completely reflected in the language of opinions, the results of the cases may nonetheless signal a more permissive approach, just as most motorists’ experience is that the official, posted speed limit is not the effective speed limit.

There may also be other factors at work that are more specific to

more doctrinally complex, additional internal inconsistencies have arisen as artifacts from the older case law are carried over into the newer cases.¹⁵⁷ Moreover, as is inevitable in any body of law so large, even apart from doctrinal conflicts, the results reached in the cases cannot all be squared with one another.¹⁵⁸

This part measures the law of bad acts evidence in Minnesota against the criteria considered in Part III. In particular, it focuses on the likelihood that a judicial opinion crafted in the traditional style and utilizing the tools provided can meaningfully fulfill the functions that opinions are designed to serve. It concludes that, given the inherent demands of the doctrine of precedent and the dangers that stem from that doctrine, it is nearly impossible for an opinion to resolve a single dispute by reference merely to existing Minnesota bad acts caselaw. It next proposes that the Minnesota Supreme Court can consistently achieve the appropriate systemic goals only following a large-scale reconsideration of the

Minnesota. The Minnesota Supreme Court, for example, assigns opinions before cases are decided. In the view of one jurist, this practice “has the unfortunate tendency to encourage individual judges in a multi-judge court to concentrate only on the cases assigned to them and, conversely, to give too much deference, consciously or unconsciously, to the judge who has been assigned the opinion. This is a fertile field for a one-person opinion to emerge from a multi-judge court.” ALDISERT, OPINION, *supra* note 129, at 34. My review of the court’s cases in the course of researching this article suggests, on at least an impressionistic level, that individual members of the court often have a preferred way of stating the applicable standards, which are often inconsistent, in emphasis or otherwise, with other justices’ formulations. This, in turn, is at least in part the result of the need for collegiality, which prevents members of the court from an overly detailed critique of other members’ opinions. *See also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350-51 (1974) (discussing the institutional constraints under which the Supreme Court operates); Schaefer, *supra* note 136, at 9-10.

A final consideration is that many, if not most, of the court’s opinions on the subject are issued in first-degree murder cases. *See, e.g.*, State v. Shannon, 583 N.W.2d 579 (Minn. 1998); State v. Dewald, 464 N.W.2d 500 (Minn. 1991); State v. Eling, 355 N.W.2d 286 (Minn. 1984). The court must accept review of these cases. MINN. R. CRIM. P. 29.02, subd. 1. As a result, it is likely that they do not present the issues as well as other cases might. Since the court issues frequent opinions on the subject, however, it is probably less likely to accept discretionary review of those cases that present the issues well. Beyond that, because there is such an extensive body of law and apparent precedent speaking to nearly every question that might arise, it will be a rare case that invites fundamental reconsideration of the doctrine.

157. *See supra* text accompanying notes 109-11.

158. *See* CROSS, *supra* note 140, at 96 (noting the tendency toward conflicting decisions). This effect would undoubtedly be magnified were one to include opinions of the Minnesota Court of Appeals in the analysis.

admissibility of bad acts evidence. Though any such reconsideration would necessarily be constrained by the provisions of Rule 404(b), there nonetheless remains considerable room for the court to reconceptualize and streamline its approach and, more importantly, to articulate the objectives the law is intended to achieve.

1. *Bad Acts Law and the Function of Opinions*

Given the present characteristics of the body of bad acts evidence law in Minnesota, it is difficult for a traditional judicial opinion working with that law to fulfill the functions that opinions are designed to serve. This is not to imply any sort of improper motivation on the part of judges. It is simply that the traditional model of a judicial opinion calls for the analysis to be guided by precedent and for an explication of that analysis to be supported by a recitation of that authority, ideally in such a manner as to give the conclusion an aura of inevitability.¹⁵⁹ Where there are doctrinal tensions and conflicting precedents, however, the traditional model requires judges to choose between precedents and to elevate some aspects of doctrine over others and it encourages them to do so without acknowledgement. The processes of deciding and justifying a decision, though related, are distinct and many jurists candidly admit that there is often a disconnect between the factors utilized in the former process and those articulated in the latter.¹⁶⁰ But even where the judge intends complete identity between what was considered and what is stated, where precedent is unsettled, an opinion that purports to resolve a case largely by reference to precedent will fail to serve its intended purposes. The law of bad acts evidence as it presently stands in Minnesota is especially susceptible to such failures.

The fundamental problem is that there is too much law, both in terms of the number of opinions already part of the body of law and the amount and degree of variation in the characterizations of the rules within that body of law. As Part II demonstrated, there are individual cases that are difficult to square with one another and, more significantly, there are aspects of the stated rules that are

159. See Posner, *Judges' Writing Styles*, *supra* note 139, at 1439-42 (critiquing an opinion written pursuant to the traditional model).

160. See ALDISERT, *JUDICIAL PROCESS*, *supra* note 155, at 464; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 56 (1960).

difficult to square with one another. The situation is such that, in nearly any case involving bad acts evidence, both the defense and the prosecution can craft what in a vacuum appear to be strong arguments for their respective positions and do so using cases that are in all respects “good law.” In part, this is an inherent feature of the law’s subject matter. There are few easy cases. Because bad acts evidence is nearly always relevant and nearly always prejudicial, many cases will appear to fall close to the line. Rather than excusing doctrinal opacity, however, this underscores the need for a clear expression of the factors to be considered.

For the most part, however, these problems stem from the court’s failure to ever completely cast its lot with either *Fichette* or *Ames*. Because there are coexisting lines of precedent supporting fundamentally opposed approaches, any opinion that justifies its conclusion through the traditional means of marshaling authority in support of a result will necessarily fail to fulfill the functions of judicial opinions. Any result entails disregarding precedent, whether through distinguishing it or simply choosing not to mention it. This phenomenon was especially apparent in the early part of the century as *Fichette* and *Ames* themselves cycled in and out of favor. Though less evident in today’s more nuanced body of law, shades of it inhere in the uncertainty regarding the standards applicable to identity evidence.

In similar fashion, because there are internal tensions in the common articulations of the applicable rules, any result requires a court to elevate certain aspects of the rule over others. The best example of this comes in the conflict between the notion that defendants are to be given the benefit of the doubt when it comes to admissibility and the notions that trial courts have broad discretion on the same point and the defendant bears the burden of demonstrating that that discretion was abused.¹⁶¹ Because precedent—whether viewed as the results of previous cases, as the rules announced in previous cases, or something in between—is critical to the proper functioning of judicial opinions, and because precedent cannot be fully honored in these circumstances, the traditional opinion cannot do its job. There is not merely a danger, but a near certainty that like cases will not be treated alike. Each new case exacerbates this problem by adding another opinion to the conflicting lines of precedent, thereby decreasing the extent

161. See *supra* text accompanying note 109-111.

to which judges and lawyers can predict the result in the next case.

2. *The Need for a Dramatic Remedy*

Holmes described the development of the law as follows:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives new content, and in time even the form modifies itself to fit the meaning which it has received.¹⁶²

In the case of bad acts evidence, it is not so much that the reasons underlying the rules have changed. To be sure, social science research may have advanced our understanding of the validity of the assumptions behind the general prohibition against the admission of bad acts evidence, which relate not only to criminal behavior but also to jurors' behavior, to the point where the rules ought to account for these advances.¹⁶³ But the bigger problem is that the court has never ultimately determined the proper content of the applicable rules. This makes "adjusting" them a difficult proposition.

Holmes' conception of the law suggests that the doctrinal kinks will work themselves out over time. Under this view, the cases will eventually trend in one direction, with continual reexamination of the rules in the unending series of cases leading ultimately to doctrinal equilibrium. History suggests, however, that an incremental approach to change will not succeed in the context of bad acts evidence. The law has remained unsettled for at least a century. During that time, the court, or at least individual justices writing on behalf of the court, has attempted to clarify the law on a

162. HOLMES, *supra* note 156, at 8.

163. E.g., Rochelle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985) (examining the relationship between introduction of bad acts evidence, rates of conviction, and credibility of witnesses).

number of occasions. Each of these attempts has largely been ignored or at least not treated as a watershed. Even those opinions that resulted in legitimate reform—especially *Billstrom* and *Spreigl*—have seen much of the clarity they brought to the law drifted over by the blizzard of subsequent opinions. Moreover, in simply creating overlays to the existing doctrine, rather than reconsidering the issue from the ground up, *Spreigl* and *Billstrom* may well have engendered as many doctrinal difficulties as they solved.

Though these phenomena are likely to be present to some degree in any body of law in which the issues are frequently litigated, the nature of bad acts evidence may make it especially fertile ground for the cultivation of unsettled doctrine. It is easy in the abstract to understand both why bad acts evidence is relevant and why it is extremely prejudicial. It is not always easy in the context of an individual case to resolve these conflicting concerns. But in at least some portion of the cases, either relevance or prejudice clearly dominates the equation. In justifying these cases—particularly those where prejudice clearly outweighs relevance—it may be tempting to make statements of principle that become inconvenient when the opposite dynamic appears. The result is not an elegant jurisprudence. Because the cases continue to require choices between two divergent objectives, the likelihood of incremental adjudication leading to a consistent body of law is small.

Moreover, because the existing body of law is so vast, the likelihood that any new case will present what appears to be a novel situation, let alone raise questions that invite doctrinal reconsideration at a fundamental level, is slight. Even if the court were to attempt to effect a thorough reconsideration of its jurisprudence incrementally, the present anonymity of many of its past opinions that read as though they were meant to put the law on a different course suggests that an incremental approach is likely to fail. In addition, any true reconsideration would necessarily signal much of what a comprehensive rethinking would entail. The only workable way out of the current confusion and inconsistency is for the court to engage in a deliberate, top-to-bottom reconsideration of the law relating to bad acts evidence, constrained only by the terms of Rule 404(b).¹⁶⁴

164. This is nowhere near as significant a constraint as might first appear. The rule speaks in broad terms, and is thereby subject to a broad range of reasonable interpretations. Indeed, the federal courts have interpreted the nearly-identical

The focus of the inquiry should be to generate a definitive statement of the instrumental goals that are to guide application of the rule, with formulation of more specific rules by which those goals are to be implemented as only a secondary concern. Something approaching a complex set of rules has been, and may continue to be, appropriate in the context of other crimes evidence.¹⁶⁵ But absent a structure that requires, or at least encourages, resort to guiding principles in the application of the rules, a complex structure may simply encourage or enable a paint-by-numbers approach that results in the same systemic problems that characterize bad acts law today.¹⁶⁶ Especially in light of the inevitable pull toward affirmance that arises from the facts of nearly all bad acts cases, precommitment to a rule and a manner of application based on a largely dispassionate consideration of the policies at play can only enhance the integrity of the law going forward by ensuring that courts give due consideration to these policies in subsequent cases.

Beyond the mere practical need for clarity of approach, such an opinion would be consistent with—or at least not inconsistent with—the court’s role and nowhere near as radical a step as it might first appear. Courts’ responsibility for making law, though tied to the resolution of concrete disputes, is not limited by it.¹⁶⁷ Consistent with this, the Minnesota Supreme Court has regularly exercised its supervisory powers to create prospective requirements

Fed. R. Evid. 404(b) in a manner considerably different from the Minnesota court’s interpretation of Minn. R. Evid. 404(b). *E.g.*, *United States v. LeCompte*, 99 F.3d 274, 277-79 (8th Cir. 1996) (evinced more rigid interpretations of the scope of the exceptions); *United States v. Gessa*, 971 F.2d 1257, 1261-62 (6th Cir. 1992) (en banc) (holding that the determination of whether proposed bad acts evidence falls within the scope of an exception is a legal determination).

165. See Schauer, *supra* note 129, at 1470 (arguing that lengthy and complex opinions may be necessary given the present judicial structure, and that “it may be appropriate to think of opinion writing as (at least in part) a conscious process of rule making.”).

166. Posner, *Judges’ Writing Styles*, *supra* note 139, at 1439-41 (disparaging multi-factor tests as enabling a court to clothe a decision in an often unwarranted cloak of certainty).

167. See EISENBERG, *supra* note 124, at 4-5 (“Our society has an enormous demand for legal rules that private actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. . . . Accordingly, it is socially desirable that the courts should act to enrich the supply of legal rules . . . by attaching much greater emphasis to the establishment of legal rules than would be necessary if courts’ sole function were the resolution of disputes.”). *But see* ALDISERT, OPINION, *supra* note 129, at 9 (“Announcing a rule of law of the case is nothing but a byproduct of the court’s adjudicative function.”).

and otherwise address issues outside the narrow scope of the dispute before it.¹⁶⁸ Because this is a mature body of law, at least in the sense that the courts have a broad range of experience with the possible factual scenarios that may arise, the court need not be concerned that it would formulate a rule that history would reveal to be ill-advised.¹⁶⁹ In similar fashion, there exists a broad range of materials beyond its own past cases for the court to draw on in its consideration.¹⁷⁰ Many of the arguments against a global

168. See *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1984) *aff'd* 620 N.W.2d 706 (Minn. 2001) (establishing, pursuant to its “supervisory power to ensure the fair administration of justice,” a requirement that all custodial interrogations be electronically recorded). See also WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.5(i) (3d ed. 2000) (discussing rulings related to the supervisory authority of courts); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887 (2001) (considering generally the applicability of justiciability principles to state courts and noting specifically that “the standard critique of judicial activism . . . does not apply to state courts.”).

169. The court could further reduce the likelihood of this happening by emphasizing that the focus of courts’ consideration is to be on the rules articulated in the case as illuminated by the overarching policy concerns motivating those rules and by expressly providing that, in precedential terms, the opinion is intended to constitute a firm, but not wholly inflexible, starting point for analysis.

170. Though I cannot claim to have the sort of “ingenious mind” necessary under Holmes’ description to account for what the rule ought to be, I nonetheless offer the following non-exhaustive list of points that ought to be taken into account in any global reconsideration. (1) It is widely acknowledged to be fiction to suppose that juries will use bad acts evidence, once admitted, for only the limited purpose for which it is offered. That this is so creates the potential for broad disparities of result between similarly situated defendants, based entirely on the trial judge’s decision whether to admit bad acts evidence. (2) How should juries be instructed regarding the use of bad acts evidence? Despite the significant similarities between Fed. R. Evid. 404(b) and Minn. R. Evid. 404(b), the required instructions under the two rules are widely divergent. Compare 10 STEPHEN E. FORESTELL, *MINNESOTA PRACTICE* 30 (1999) (Minnesota pattern jury instruction) with JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, *JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT* 33-37 (2000) (Eighth Circuit pattern jury instruction). (3) Preventing the conviction of innocent defendants is generally acknowledged to be one of the central goals of our criminal justice system. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.4(e) (3d ed. 2000). Yet current law provides for no meaningful appellate review of the sufficiency of evidence supporting criminal convictions. See Jon O. Newman, *Beyond Reasonable Doubt*, 68 N.Y.U. L. REV. 979, 993-97 (1993). At least one judge has linked this conundrum to the use of bad acts evidence, suggesting that a rule of greater admissibility would be appropriate so long as it was coupled with more searching sufficiency review. See *id.* (4) As a general matter, the stated law relating to bad acts evidence in Minnesota is strikingly different from the standards set forth in at least one treatise on the law of evidence. See generally 1 JOHN W. STRONG ET AL., *MCCORMICK ON EVIDENCE* § 190 (1999). Though Minnesota may not be alone in that respect, see David P. Bryden & Roger C. Park, “Other Crimes” *Evidence in Sex*

reconsideration of the rule, such as that to do so would upset settled expectations, are simply not present here. Such an opinion, then, would be nothing more than a grander version of the sort of “brush-clearing” opinion issued by courts all the time.¹⁷¹

Finally, it is not insignificant that bad acts evidence is used almost exclusively in the criminal context. Fairness, or at least the appearance of fairness, is one of the criminal justice system’s cornerstone values.¹⁷² A system that places great discretion in trial court judges without providing clear or consistent guidance concerning how that discretion is to be exercised virtually ensures that similarly situated persons will be subject to disparate treatment.

V. CONCLUSION

The Minnesota Supreme Court opened the twentieth century with a pair of cases articulating diametrically opposed approaches

Offense Cases, 78 MINN. L. REV. 529, 540-56 (1994) (discussing courts’ application of various 404(b) exceptions), and though there are certainly strong arguments to be made in favor of jettisoning any special standard relating to such evidence, *see id.* at 560-65, this disconnect ought not to go unremarked upon. (5) The present law places significant emphasis on the discretion of the trial court. Great appellate deference to this discretion seems highly inconsistent with the notion that the defendant is to be given the benefit of the doubt if the question of admissibility is close; there appears no way around the conclusion that it is the trial judge’s decision to admit that will be given the benefit of the doubt. (6) Discretion is not a concept that provides its own content. To say that a decision is committed to the discretion of the trial court means different things in different situations. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754-55 (1982). Any reformulation ought to strive to articulate the contours of this discretion, including in particular whether it extends only to the decision to admit evidence found to fall within one of the 404(b) exceptions or also to the question of whether the evidence falls within an exception. *See generally* *United States v. Gessa*, 971 F.2d 1257 (6th Cir. 1992) (en banc) (holding that the determination of whether proposed bad acts evidence falls within the scope of an exception is a legal determination). (7) At least some of the rationale underlying the *Fitchette* form of the rule of general exclusion had to do with the unfairness inherent in making a defendant defend himself against other crimes with little or no notice. At least some of this unfairness was alleviated by the notice requirements of *Spreigl* and *Billstrom*. To the extent that this unfairness was a significant reason for the general exclusion, a more relaxed approach is more appropriate.

171. *See* Wald, *supra* note 115, at 1405 (discussing the rhetoric of opinions dispelling with conflicting and confusing precedent).

172. *See* Charles Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1195-96 (1979) (suggesting that the appearance, rather than the practice, of fairness may be the primary aim of the criminal justice system).

to the admissibility of bad acts evidence. Since then, the court has drifted between these extremes, never fully adopting one approach or the other and never repudiating any of its case law. This dynamic, coupled with the addition of requirements that have made the doctrine more complex, has produced a body of law replete with the inconsistencies both among and within the cases that constitute it. This, in turn, renders the notion of precedent meaningless, such that an opinion written in the traditional fashion can no longer speak with authority. Further, because the court's past attempts of incremental clarification have either failed or worsened the problems, the only way for the court to relegitimize this body of law is for it to fully reconsider the entire problem in the context of a single opinion.