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So-Called MIMIC Exceptions

BY RICH KLARMAN

Rich Klarman is a private tutor based in Ann Arbor, Michigan. Since 1992, he has helped hundreds of students conquer the LSAT, law school coursework/exams, and the bar exam. To learn more, visit http://testguru.com.

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Achtung!

Before learning about (so-called) exceptions to a rule, it's a good idea to have your head thoroughly around said rule. In that spirit, I'd urge you to make sure you're well grounded in evidence law's general treatment of propensity arguments — i.e., character offered to show conduct in conformity therewith. Most study materials tend to obscure rather than clarify the unifying themes. This creates extra confusion in that many students don't even know that they don't know what hell's going on (cf. Donald Rumsfeld). (So, even if you "know" that this Achtung! doesn't apply to you, it nevertheless *does* apply to you. Wink.)

Therefore, please check out my propensity argument primer [http://pub.testguru.com/character-evidence.pdf]. Go read that, and then come back. I'll wait...

Okay... Ain't no such thing as MIMIC exceptions!

Many students seem to harbor the notion (apparently derived from a misreading of FRE 404(b)) that there is a discrete, defined set of "exceptions" — i.e., MIMIC (motive, intent, lack of mistake, identity, common plan) — where character may be proven by other crimes, wrongs, or acts. This is, in addition to being extremely unhelpful, just plain wrong. Those other acts are not admissible — and, indeed, are not being offered — to prove character at all. Rather, it's simply that in certain circumstances, other instances of conduct have a powerful, non-propensity usefulness. That is, they are quite probative apart from any propensity-based inference they may give rise to. While this sounds abstract, I hope the following examples will make it crystal clear.

Note on the examples

The following examples are not intended to be an exhaustive list of anything. Rather, they merely present a handful of situations in which "other crimes, wrongs, or acts" may be admissible. I'm furnishing (and fleshing out) these examples because I have found that many students benefit from actually seeing how the non-propensity usefulness manifests in different contexts. This approach can cure you of any MIMIC-addiction you may be suffering from. The first step is admitting you have a problem. Let's get to it.

Idiosyncratic serial killer

Suppose Lex is currently on trial for murder. The victim in this case was found naked (except for a single, green flip-flop on the left foot), strangled, with hands duct taped, and with the text of the 9th Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny...") carved into the flesh of the back. The prosecutor offers evidence that Lex committed a different murder some years ago, in which the victim was found naked (except for a single, green flip-flop on the left foot), strangled, with hands duct taped, and with the 9th Amendment carved into the back. This evidence is *not* being offered to prove that Lex is *the kind of guy who* would do such a strange and sadistic thing. Rather, it's being offered to establish the *identity* of the perpetrator. The other murder is quite probative on the question of who committed the murder in the present case, because both murders appear to be the work of a single individual, and the evidence emphatically proclaims that "we know who that individual is."

As a side effect of this evidence, the jury may come to revile Lex. They may conclude that he has a sadistic character, and that he acted in conformity therewith in the present case. This would be an impermissible chain of reasoning.

However, the legitimate probative value of the evidence — i.e., that Lex is *the individual* who committed these murders — is not substantially outweighed by the danger of unfair prejudice — i.e., that Lex is a creepy, sadistic bastard, and so he probably acted creepily and sadistically. Which is good enough for FRE 403! Indeed, the legitimate channel seems way, way more powerful here than does the illicit channel. One of my former bar exam students put it rather poetically: "So we've got a non-propensity body casting a propensity shadow." Très belle!

One final word: Obviously, there are copycat killers, random coincidences, and so forth. So the fact that Lex did the first murder doesn't necessarily mean that he did the second one. To be admissible, though, evidence need not establish anything beyond a shred of doubt (it needn't even establish it by a preponderance); it's quite enough if "its probative value is not substantially outweighed by [the bad stuff]" (FRE 403).

Humdrum liquor store robbery

Mel is on trial for armed robbery of a liquor store. The robber in this case wore a ski mask, pointed a gun at the clerk, and said, "Give me the f***in' money!" The prosecutor offers evidence that Mel robbed a different liquor store 6 months ago, wearing a ski mask, pointing a gun at the clerk, and demanding, "Give me the f***in' money!" This should probably not be admitted. The other crime is not especially probative of the perpetrator's identity. (Mind you, I myself have no direct experience robbing liquor stores. But I gather that the ski mask/gun/"Give me the f***in' money!" trifecta is pretty much a usage of trade among armed robbers.) In this case, the risk of unfair prejudice — i.e., that the jury will reason, "He's a robber, and he used profanity no less! Therefore, he's probably guilty of doing it again." — substantially outweighs the very, very slight legitimate probative value — i.e., that these two (garden-variety) armed robberies are the work of the same individual.

Contrast: Idiosyncratic liquor store robbery

Otis is on trial for armed robbery of a liquor store (committed in 2006). The robber in this case wore a Darth Vader mask, roller skates, and a Bart Simpson t-shirt, pointed a flame thrower at the clerk, and said, "Render unto Caesar what you got in da cash drawer, me being Caesar." Obviously, the prosecutor would have no difficulty introducing evidence that Otis had robbed a different liquor store in 2004 wearing a Darth Vader mask, roller skates, and a Bart Simpson t-shirt, menaced the clerk with a flame thrower, and bellowed, "Render unto Caesar...." The logic is really simple:

(1) Caesar 2006 is probably the same guy as Caesar 2004.

(2) Caesar 2004 is Otis (or so the offered evidence asserts).

(3) Therefore, Caesar 2006 is probably Otis.

Serial fraud-meister

Grubster is on trial for defrauding a bunch of nursing home residents by selling them stock in Gigatronix, which he asserted to be "a leading developer of foobar quantum nematodes, with anticipated earnings growth of 480% annually over the next decade or two, and a solid patent portfolio (including a pending patent covering 'any and all uses of the letter Y as a vowel')." In fact, there was never any company called Gigatronix. Suppose that Grubster testifies in his own defense as follows: "Gosh! I myself am a victim here. I've been a stockbroker in Des Moines for goin' on 20 years now. All I cherish in this world is my good name, and now that's been tarnished. The nice, young man who told me to put all my best clients in Gigatronix seemed likable — he had kind eyes, a good soul [à la Vladimir Putin]. In retrospect, I wish I'd been less Christ-like in trusting him. Boy, I feel real bad for those seniors." If the prosecutor has evidence that over the years Grubster has hyped other non-existent companies, it will readily be admitted. It's highly probative that Grubster wasn't mistaken viz. Gigatronix, that he wasn't duped. After the 4th or 5th time you slip on the same banana peel, it stops looking like an accident.

(Those lost souls who wander in the wilderness of "MIMIC exceptions" would explain the foregoing example in terms of "intent" or "lack of mistake." Whatever floats your boat. Just understand that you're *not* offering it to prove that Grubster's *the kind of guy who* would do such a thing.)

The 6th heir to the throne

Rupert is the 6th heir to the throne of Doglandia. He is currently on trial for the murder of the 5th heir to said throne. Evidence that Rupert murdered the 1st-thru-4th heirs to the throne would be admissible, as it is highly probative that he committed the murder at issue in the present case — i.e., he's going down the list. (MIMIC exception fetishists would now say something like "common plan." Fine.)

Murder weapon obtained in prior burglary

I think the title pretty much says enough, no? Shlomo is currently on trial for murder. The prosecutor has evidence that Shlomo committed a burglary two years ago, in which he stole $500 in cash; some gaudy, diamond-encrusted jewelry; a largish stash of child pornography; and a handgun. Normally, we'd tell the prosecutor where to shove this evidence. However, suppose that the handgun obtained in that burglary just happens to be the very same weapon used in the present murder. Now, that prior burglary has a powerful, non-propensity usefulness: it puts the murder weapon in the defendant's hand. Evidence of the other items stolen in the burglary shouldn't be admitted, because they have no connection to the murder at issue. The child pornography especially should be excluded because of its tremendous potential to cause unfair prejudice — I express no opinion as to Shlomo's taste in jewelry!

Defendant played rhythm kazoo on Human League's breakout album

The defendant in the present trial is charged with, let us say, arson. While pouring gasoline on the victim's house, the perpetrator was overheard singing "I was working as a waitress in a cocktail bar. That much is true. But even then I knew I'd find a much better place. Either with or without you. [Blah blah blah.] Don't you want me, baby? Don't you want me oh? [etc.]" Investigators found a kazoo, hair gel, and a mascara brush — along with a gas can and matches — at the crime scene. The prosecutor has evidence that defendant played rhythm kazoo on the original recording of "Don't You Want Me." This "other act" is possibly admissible to prove the identity of the perpetrator (cf. OJ's Bruno Magli shoes).

Note that my reason for including this example is to demonstrate what should be obvious: Namely, that the other act needn't be a crime or wrong (in the legal, as opposed to artistic, sense). Many students seem to believe that, not only must the other act be criminal, but that the dude have been convicted of it. I suspect that this confusion is due to applying FRE 609 where it ought not be applied.

Rhythm kazoo (remixed)

The defendant in the present trial is charged with burning down the house of the guy who produced the Human League's breakout album. Defendant recorded rhythm kazoo tracks which never ultimately made it onto the final version of the record. During the mixing phase, the producer had insisted on "muting that damn kazoo!" Defendant's career as a session kazoo player never recovered. Through decades of alcohol and opiate addiction, kleptomania, psychoanalysis, a botched attempt at a musical comeback, and generalized malaise, there has been one constant in defendant's life: a searing, all-consuming animus directed at the producer. The fact of defendant's animus (as well as the complete backstory of how it came to be) will be admissible. (MIMIC aficionados would now say something like "motive." Whatever.)

Human League from yet another angle

The defendant is being sued civilly for copyright infringement for publishing a song that includes the lyrics: "I was working as a waitress in a cocktail lounge. That much I will stipulate to. But even then I knew I'd escape my apparently low station. Regardless of whether you provided assistance or not. [Blah blah blah.] Baby, don't you want me? You want me, no?" Plaintiff will have no trouble offering evidence that defendant performed on the original recording of the Human League's "Don't You Want Me," as that tends to establish his previous knowledge of the allegedly infringed work. Does it matter that it's being offered in a civil case? Not at all. (I'd suggest that defendant try the "parody" defense. Hell, it worked for 2 Live Crew.)

Cellmate

While serving a 5-year sentence for armed robbery, Wang befriended Dixon, whom he noticed reading a Cole Porter biography in a shady corner of the prison yard one

morning. One thing led to another, and soon the two men became lovers. 3 years ago, Dixon and Wang were both paroled, and they went their separate ways. Fast forward to the present: Dixon is now on trial for assault with a deadly weapon. Suppose he calls Wang as an alibi witness, who testifies as follows: "Yeah, at the time of the assault, we were fishing up in northern Minnesota. The walleye were really jumping [wink wink, nudge nudge]!" The prosecutor should be able to offer evidence that Wang and Dixon had been lovers, as that obviously bears on Wang's bias as a witness (and the probative value as to bias is probably not substantially outweighed by the risks of generalized jury homophobia). Whether the jury should hear that said love affair occurred in prison, though, isn't clear — indeed, it would be highly prejudicial, as it would broadcast the defendant's ex-con status to the jury.

Incarceration for misdemeanor not involving dishonesty

Suppose in a negligence case Wilfred testifies as follows: "Yeah, I was just sitting at the bus stop on 4th Ave. in downtown Ann Arbor, eating my falafel, and minding my own business. Suddenly, a blue Cadillac came speeding by, ran through a red light, and crashed into a little boy. I remember it all quite vividly." The defendant offers evidence that at the time of the accident, Wilfred was serving a 3-month sentence for the misdemeanor of "urinating within 5 cubits of the flag of the Republic of Kreplachistan." He was serving this sentence in a maximum security yurt near Kreplachistan's border with Mongolia, and thus he could have had no first-hand knowledge of any events transpiring at that time in Ann Arbor. The evidence of Wilfred's incarceration is certainly admissible. No problem.

For some reason, though, many students will be uncomfortable with this. They'll say something like, "Umm... peeing on the flag is only a misdemeanor, and it doesn't involve dishonesty. So under FRE 609, this evidence shouldn't come in. Right?" Wrong. FRE 609 deals with the use of a criminal conviction to establish a witness's general propensity for dishonesty — i.e., criminals tend to be liars; therefore, the jury should discount this witness's testimony. Here, in contrast, Wilfred's conviction is not being offered for this "indoor-propensity" purpose. Rather, it's being offered to show that Wilfred was literally thousands of miles away from the scene of the accident at the time of the accident, and so he could not have seen what he claims to have seen.

(As to his crime, peeing on the flag of a fascist dictatorship like Kreplachistan doesn't impugn Wilfred's integrity in the least. To the contrary, it strikes a resounding blow for freedom! Wilfred should be lauded by people of good faith everywhere! Wilfred is the man! Three cheers for Wilfred! If you get the chance, you'd do well to read Wilfred's "Letter from the Kreplachistan Jail" (in which he articulates a morally compelling justification for civil disobedience under certain circumstances)! May Princess Leah present Wilfred with a medal, or a garland, or a what-have-you! Wilfred is like that tree planted by the water — in the sense that he shall not be moved! Etc. Etc. Etc. All that notwithstanding, he didn't see the accident at issue in the present case, did he?)

Now how 'bout you make up a few hypotheticals of your own?