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ONE STEP BACKWARD: THE NINTH CIRCUIT'S UNFORTUNATE RULE 404(B) DECISION IN *UNITED STATES V. LAGUE*

Dorie Klein∗

The federal courts' current approach to character evidence is widely recognized as problematic. Although Rule 404(b)(1) categorically prohibits the use of character evidence, Rule 404(b)(2) presents a list of examples of permitted purposes that has tempted courts to view the admission of other-acts evidence as proper so long as the evidence is merely relevant to a non-character purpose. Additionally, courts have misconstrued the inclusive structure of Rule 404(b) as creating a presumption in favor of admissibility. Recent efforts to correct this mistakenly permissive view include decisions by several of the federal circuit courts of appeals recognizing that Rule 404(b) requires a more careful approach, as well as a revision to Rule 404(b) itself. Despite these efforts, some federal circuit court opinions continue to mistakenly regard Rule 404(b) as nothing more than a minor impediment to the admission of other-acts evidence—a speed bump rather than a roadblock. The recent opinion of the Ninth Circuit Court of Appeals in the case United States v. Lague *is an unfortunate example of this approach. This opinion makes both of the typical Rule 404(b) mistakes—it allows mere relevance to a non-character purpose to substitute for careful analysis, and it uses the rule's inclusive structure to justify the lack of careful analysis. Additionally, the published opinion contributes to a disagreement among several of the federal circuit courts of appeals regarding the admissibility of practice-wide data in prosecutions for unlawfully prescribing controlled substances.*

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INTRODUCTION

Rule 404(b) of the Federal Rules of Evidence categorically and absolutely prohibits the use of "character evidence," sometimes also called "propensity evidence," or "other-acts evidence" offered to prove "action in accordance with character."[1] The core purpose of the rule is to focus jurors' attention on the specific act alleged, such as an alleged assault against a certain person on a certain date at a certain time, rather than on the general disposition of the person alleged to have committed the act. For example, the rule would prohibit a prosecutor from using evidence of a criminal defendant's prior conviction for assault—an "other act"—to prove that the defendant is a violent person—character—and therefore he likely is guilty of a current assault charge—action in accordance with character.[2]

Despite this prohibition, other-acts evidence, especially evidence of prior criminal convictions, is routinely admitted against criminal defendants on the basis of a prosecutor's invocation of a non-character purpose.[3] For example, prosecutors commonly assert that a prior drug conviction is relevant to proving a defendant's intent to possess or

1. *See* FED. R. EVID. 404(b). Some other rules provide exceptions that allow the admission of character evidence, but Rule 404(b) does not. Although the rule itself states that it is about "character," the term "propensity" more precisely and more accurately captures the rule's purpose. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 778 (2013) ("The prohibited use of character evidence, often called the 'propensity inference,' is to suggest that because the accused has a particular character trait he or she probably acted in conformity with that trait at the time in question and therefore probably committed the crime charged." (footnote omitted)).

2. *See* United States v. Gray, 771 F. App'x 976, 980 (11th Cir. 2019) ("[E]ven if it were possible to accidentally commit armed carjacking, Gray's prior convictions do nothing to rebut that possibility. They were relevant only to invite precisely the sort of propensity reasoning that Rule 404(b) forbids: that Gray probably carjacked this car because he is the sort of person who does that kind of thing."); United States v. Matthews, 431 F.3d 1296, 1313 (11th Cir. 2005) (Tjoflat, J., specially concurring) ("The evidence of Matthews's 1991 arrest was admitted for no purpose other than to show propensity to engage in criminal activity: exactly the purpose for which Rule 404(b) prevents evidence to be admitted."); United States v. Sanders, 964 F.2d 295, 299 (4th Cir. 1992) ("All that the evidence of the prior conviction of assault could possibly show was Sanders' propensity to commit assaults on other prisoners or his general propensity to commit violent crimes. . . . This is exactly the kind of propensity inference that Rule 404(b)'s built-in limitation was designed to prevent."); United States v. Brown, 880 F.2d 1012, 1015 (9th Cir. 1989) ("The prior acts clearly establish Brown's propensity for violence, but that is precisely the use of evidence barred by Rule 404(b).").

3. *See* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018) (noting that "federal courts routinely admit other-acts evidence, especially in drug cases"); Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 347 (2018) ("Despite the time-honored judicial principle that 'we try cases, rather than persons,' courts routinely allow prosecutors to use defendants' prior, unrelated bad acts at trial.").

distribute drugs in a later case.[4] The problem with such assertions is not that they are necessarily wrong; a past intent to possess or distribute drugs might well make future intent to do the same thing more likely.[5] The problem in many cases is that the prior conviction is relevant to proving intent only because it suggests to the jury that the defendant is the kind of person who intends to possess or distribute drugs.[6] While the prosecutors who present tenuous claims of non-character purposes are partly to blame for such circumventions of Rule 404(b), some responsibility also lies with the judges, both trial and appellate, who fail to scrutinize how—and not merely whether—evidence of prior convictions helps to prove the prosecutors' claimed non-character purposes.

Recently, several of the U.S. courts of appeals have recognized that their applications of Rule 404(b) had become too permissive.[7] In particular, within the past several years, the Third, Fourth, and Seventh Circuits have issued published decisions that set forth approaches to Rule 404(b) that require district court judges to carefully scrutinize other-acts evidence to ensure that the evidence is not being offered to prove character. These decisions, which are discussed in Part II, represent important steps toward better compliance with Rule 404(b)'s mandate to exclude character evidence.

A recent decision of the Ninth Circuit is a regrettable step backward from this progress. In *United States v. Lague*,[8] the appellate court adopted a Rule 404(b) framework that is far too lax to ensure that, as is required by Rule 404(b), other-acts evidence is not admitted when the purpose of the evidence is to prove action in accordance with character.[9] Although many federal appellate opinions continue to adhere to overly permissive approaches to Rule 404(b)—and thus *Lague* is by

4. *See* David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 242 (2011).

5. The test for relevance is whether the evidence "has any tendency to make a fact more or less probable than it would be without the evidence" and whether "the fact is of consequence in determining the action." FED. R. EVID. 401.

6. *See* Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 543 (2015) ("Courts' justification for admitting prior convictions to prove intent, however, often collapses into *only* general propensity reasoning, which is explicitly forbidden under 404(b)."); *see also* Thompson v. United States, 546 A.2d 414, 421 (D.C. 1988) ("Intent is an element of virtually every crime. If the 'intent exception' warranted admission of evidence of a similar crime simply to prove the intent element of the offense on trial, the exception would swallow the rule.").

7. *See infra* Section II.A.

8. 971 F.3d 1032 (9th Cir. 2020).

9. *Id.* at 1040.

no means unique in its laxness—*Lague* is deserving of particular criticism in part because the panel chose to publish the Rule 404(b) part of the decision and in part because the case takes a position on a disagreement among several of the federal circuit courts of appeals regarding a particular kind of other-acts evidence.

This Article begins in Part I with a brief discussion of the structure and purpose of Rule 404(b). Part II examines several recent decisions of the Third, Fourth, and Seventh Circuits, explaining how these decisions represent progress toward ensuring that Rule 404(b) is properly applied. Part III discusses the *Lague* opinion, showing how the Ninth Circuit's Rule 404(b) analysis is deficient. The Article concludes that it is past time for the Ninth Circuit to reassess its approach to Rule 404(b).

PART I: RULE 404(B)

A. The Rule's Purpose

Rule 404(b) is in essence a codification of the common-law prohibition against character evidence.[10] Character evidence has long been inadmissible because it risks jury decisions that are based on inferences about what kind of person someone is—especially a criminal defendant.[11] In particular, prosecutors often want to present evidence that a defendant previously has been convicted of a crime.[12] Rule 404(b) limits the admissibility of other-acts evidence because of the ever-present possibility that jurors will use the prior conviction to infer that the defendant is the kind of person who commits crimes, so he probably committed the presently charged crime, and will be inclined to convict the defendant even if proof of the presently charged crime

10. *See* United States v. Lynn, 856 F.2d 430, 434 (1st Cir. 1988) ("Rule 404(b) codifies the common law prohibition against the admission of propensity evidence—that is, evidence presented to encourage the inference that because the defendant committed a crime once before, he is the type of person to commit the crime currently charged.").

11. This Article focuses on the use of other-acts evidence by prosecutors because this is the most common as well as the most problematic use of this evidence. *See* Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 1992 UTAH L. REV. 67, 77 ("It is the prosecution that most often seeks to use the Rule and the accused who most often will be unfairly prejudiced by it."); *see also* Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1, 15 (2021) ("Historically, the common law was principally concerned with jurors hearing about a criminal defendant's past bad acts. Criminal defendants are already at a disadvantage by virtue of the state's indictment, and the stakes are much higher than in the civil law.").

12. *See* Jonakait, *supra* note 11, at 77.

is lacking.[13] The harm from such an inference is even more substantial when the prior and presently charged crimes are the same: a jury might conclude that a defendant who sold drugs in the past is the kind of person who sells drugs, so he probably sold the drugs he is presently charged with selling.[14] Recent commentators have summed up Rule 404(b)'s rationale as preventing the inference "once a drug dealer, always a drug dealer."[15] Even if the prior and presently charged offenses are dissimilar, the prior conviction might improperly contribute to a conviction in the present case by persuading the jury that the defendant is simply a bad person deserving of punishment.[16]

Importantly, character inferences are prohibited not because they are unreasonable; it is quite reasonable to infer that someone who behaved a certain way on one occasion is likely to have behaved that same way again. On the other hand, much social science evidence documents that when attributing causes to behavior, people tend to overestimate the influence of character traits and underestimate the

13. *See* United States v. Tse, 375 F.3d 148, 156 (1st Cir. 2004) ("Evidence of other bad acts always carries with it a danger of a forbidden propensity inference."); United States v. Myles, 96 F.3d 491, 495 (D.C. Cir. 1996) ("[O]ther crimes evidence is always prejudicial to a defendant because '[i]t diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character.'" (second alteration in original) (quoting United States v. Jones, 67 F.3d 320, 322 (D.C. Cir. 1995))). A limiting instruction can, perhaps, mitigate this risk, although judges and scholars disagree about the likely effectiveness of limiting instructions. *See* United States v. Garcia-Sierra, 994 F.3d 17, 34 (1st Cir. 2021) ("Sometimes careful limiting instructions can cure the prejudice that would otherwise render inappropriate the introduction of prior-bad-acts evidence."); United States v. Roberts, 735 F. App'x 649, 653 (11th Cir. 2018) ("Although we presume juries follow limiting instructions, we have also acknowledged that despite limiting instructions, it is very difficult for juries not to draw propensity inferences when prior convictions are admitted." (citation omitted)); United States v. Jones, 455 F.3d 800, 811 (7th Cir. 2006) (Easterbrook, J., concurring) ("Prosecutors sometimes argue that we need not worry because district judges give limiting instructions. Most of these are formulaic, however, and of little help—and they may make things worse. Telling juries not to infer from the defendant's criminal record that someone who violated the law once is likely to do so again is like telling jurors to ignore the pink rhinoceros that just sauntered into the courtroom.").

14. *See* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994) ("When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can.").

15. *See, e.g.*, United States v. Miller, 673 F.3d 688, 700 (7th Cir. 2012) ("The relevance of the prior conviction here boils down to the prohibited 'once a drug dealer, always a drug dealer' argument.").

16. *See* Old Chief v. United States, 519 U.S. 172, 181 (1997) (observing that "propensity evidence" creates "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment" (quoting *United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982)).

influence of situational factors.[17] Prohibiting character inferences protects defendants from being convicted because of jurors' overestimation of the likelihood that past behavior is an accurate basis for determining present behavior. Justice Jackson explained the reasoning that underlies the prohibition of character evidence in the 1948 case *Michelson v. United States*[18]:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[19]

The exclusion of character evidence helps protect several due process rights guaranteed to criminal defendants, including the presumption of innocence of the defendant[20] and the burden of the government

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17. Psychologists call this tendency the "fundamental attribution error": "The fundamental attribution error has two components: First, people have an inflated belief in the importance of individual character differences and dispositions. Second, they underestimate the degree to which situational factors influence behavior." Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 766 (2005) (footnote omitted); *see also* Brown, *supra* note 11, at 23 ("The common law got it right. People *are* more likely to explain others' behavior by referencing their 'allegedly enduring dispositions and intentions than by other plausible accounts, for example the circumstances.'" (quoting Lasana T. Harris et al., *Attributions on the Brain: Neuro-Imaging Dispositional Inferences, Beyond Theory of Mind*, 28 NEUROIMAGE 763, 763 (2005), *and* citing Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 MIND 47, 47 (2002))).

18. 335 U.S. 469 (1948).

19. *Id.* at 475–76 (footnotes omitted). The Advisory Committee's Note to Rule 404(a) similarly explains:

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

FED. R. EVID. 404(a) advisory committee's note (quoting CAL. L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE: ARTICLE VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY 615 (1964)).

20. *See* Spencer v. Texas, 385 U.S. 554, 575 (1967) (Warren, C.J., dissenting in part and concurring in part) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged."); United States v. McCallum, 584 F.3d 471, 476 (2d Cir. 2009) ("[E]vidence of prior convictions merits particularly searching, conscientious scrutiny. Such evidence easily lends itself to generalized reasoning about a defendant's

to prove every element of the charged offense beyond a reasonable doubt.[21] Character evidence unfairly tips the scales in favor of the government.

B. The Rule's Structure

Rule 404(b) consists of several subparts: subpart (1), which presents the straightforward prohibition against the admission of other-acts evidence for the purpose of proving action in accordance with character; subpart (2), which unnecessarily and confusingly presents a list of purposes for which other-acts evidence is admissible; and subpart (3), which includes a recent revision to the rule intended to help ensure that other-acts evidence is properly excluded.[22]

1. The Straightforward Part

Subpart (1) of Rule 404(b) states: "Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[23] This part of the rule is not unnecessarily confusing—it states that a certain kind of evidence (evidence of any other crime, wrong, or act) is inadmissible for a particular purpose (the purpose of proving propensity, or that a person has a certain kind of character trait and as a result acted in accordance with the character trait).[24] Applying this part of the rule can be complex; it

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criminal propensity and thereby undermines the presumption of innocence."); United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes.").

21. *See* United States v. Wright, 901 F.2d 68, 70 (7th Cir. 1990) ("The purpose of Rule 404(b) is to exclude a type of evidence—evidence that the defendant had previously engaged in a broadly similar criminal activity—which has some probative value but the admission of which would tend as a practical matter to deprive a person with a criminal record of the protection, in future prosecutions, of the government's burden of proving guilt beyond a reasonable doubt."). Ironically, some courts use a criminal defendant's decision to not plead guilty as an excuse to allow the admission of prior convictions. *See, e.g.*, United States v. Perry, 14 F.4th 1253, 1270 (11th Cir. 2021) ("Perry pleaded not guilty to the conspiracy charge in this case and a 'defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence.'" (quoting United States v. Edouard, 485 F.3d 1324, 1345 (11th Cir. 2007))).

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

23. FED. R. EVID. 404(b)(1).

24. The only unnecessarily confusing aspect of this subpart of the rule is its heading, "Prohibited Uses," which is misleading because the rule only has a single prohibited use: proving action in accordance with character.

is not always easy to determine when other-acts evidence is being offered for the purpose of proving propensity.[25] But despite the complexity of applying the rule to the facts of some cases, it is important to appreciate that the starting point of Rule 404(b) is a clear statement that other-acts evidence is inadmissible to prove action in accordance with character. This point is important because federal appellate courts often imply that Rule 404(b) imposes only minimal restrictions on the admissibility of other-acts evidence.[26]

2. The Unnecessary and Confusing Part

Subpart (2) of Rule 404(b) states: "Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[27] This part of the rule is both unnecessary and confusing—unnecessary because it adds nothing substantive to the rule and confusing because it suggests that these examples of permitted uses have some special power to make other-acts evidence admissible.[28] This list is partly to blame for some courts' failures to properly exclude other-acts evidence, because some judges have come to view the list as a set of exceptions to the rule's general exclusion of propensity evidence rather than a set of examples of permitted, non-propensity purposes for which other-acts evidence may be admitted. For example, the Eleventh Circuit has stated: "Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose, 'such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'"[29] Similarly, the Ninth Circuit very recently stated:

> Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the

25. United States v. Gomez, 763 F.3d 845, 856 (7th Cir. 2014) (en banc) ("Spotting a hidden propensity inference is not always easy.").

26. *See* cases cited *infra* note 56.

27. FED. R. EVID. 404(b)(2).

28. *See infra* note 56 and accompanying text.

29. United States v. Sterling, 738 F.3d 228, 237 (11th Cir. 2013) (quoting FED. R. EVID. 404(b)(2)).

> evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b).'"[30]

Viewing the list of permitted purposes as exceptions rather than examples undermines the exclusionary purpose of Rule 404(b) and allows for the erroneous admission of other-acts evidence.[31]

3. The Revised, Remedial Part

Subpart (3) of Rule 404(b), as revised in 2020, states:

> *Notice in a Criminal Case*. In a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

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30. United States v. Holiday, 998 F.3d 888, 895 (9th Cir. 2021), *petition for cert. docketed*, No. 21-5326 (Aug. 9, 2021) (alterations in original) (quoting United States v. Sims, 617 F.2d 1371, 1378 (9th Cir. 1980)). For other recent examples, see United States v. Bratton, No. 20-4298, 2021 WL 4352388, at *2 (4th Cir. Sept. 24, 2021) ("Rule 404(b) provides a nonexhaustive list of such appropriate uses of propensity evidence, including motive, knowledge, intent, lack of accident, and plan."); United States v. Berckmann, 971 F.3d 999, 1002 (9th Cir. 2020) ("Rule 404(a) bars admission of '[e]vidence of a person's character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion.' However, Rule 404(b) makes an exception to that general rule for prior act evidence that proves 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" (alteration and omission in original) (citation omitted) (quoting United States v. Cruz-Garcia, 344 F.3d 951, 954 (9th Cir. 2003))); United States v. Pizarro, 756 F. App'x 458, 459 (5th Cir. 2019) ("This court has often 'held that proof of prior drug activities is more probative than prejudicial' in proving Rule 404(b) exceptions such as knowledge or intent." (quoting United States v. Kinchen, 729 F.3d 466, 474 (5th Cir. 2013))); and United States v. Manzano, 793 F. App'x 360, 366 (6th Cir. 2019) ("Federal Rule of Evidence 404(b)(1) generally bars the government from introducing evidence of a defendant's prior 'bad acts' to show that it was more likely that the defendant committed the crime at issue. Yet an exception allows the government to use this evidence for other purposes—to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" (citation omitted) (quoting FED. R. EVID. 404(b)(2))).

31. Other Rules—413, 414, and 415—are genuine exceptions to Rule 404(b), allowing the admission of other-acts evidence to prove action in accordance with character. *See* FED. R. EVID. 413–415. Some circuits also recognize other "exceptions," such as a "background exception," a "res gestae exception," and an "intrinsically intertwined exception," which also might function as true exceptions. (Some courts seem to view these "exceptions" as ways to identify evidence that is "intrinsic" to the charged conduct and thus outside Rule 404(b), which applies only to "other acts.") For a comprehensive discussion, see Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582 (1994). A discussion of these exceptions to Rule 404(b)(1) is outside the scope of this Article; they are cited here only to highlight that the examples of permitted purposes in Rule 404(b)(2) are not exceptions.

> (C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.[32]

The most important part of this revision is the requirement that prosecutors "articulate . . . the reasoning" that explains how the other-acts evidence helps to prove something other than propensity. This provision is intended to prevent prosecutors from justifying the admission of other-acts evidence by simply reciting one or more—or all—of the examples of non-prohibited purposes from subpart (2), without explaining how the proffered other-acts evidence helps to prove intent or plan or absence of mistake or whatever other non-propensity purpose(s) the prosecutor has offered. As the Judicial Conference Advisory Committee on Evidence Rules explained:

> The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose.[33]

Explaining how the other-acts evidence proves something other than propensity is especially important when the other-acts evidence does help to prove intent or plan or absence of mistake, *but only* because the evidence proves that someone is the kind of person who would have a particular intent or make a particular plan or not make a particular mistake. That other-acts evidence is probative of a permitted purpose is not sufficient to make the evidence admissible. Instead, the other-acts evidence must be probative of the permitted purpose by means of a line of reasoning that does not include character.[34] For

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32. FED. R. EVID. 404(b)(3). Prior to the amendment, subpart (2) stated:

> On request by a defendant in a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

FED. R. EVID. 404(b)(2) (2018) (amended 2020).

33. FED. R. EVID. 404(b)(3) advisory committee's note.

34. The need for relevance that is not based on an inference about propensity is the core problem with the heuristics that some circuits have created regarding the admissibility of certain kinds of prior convictions. *See, e.g.*, United States v. Henry, 848 F.3d 1, 8 (1st Cir. 2017) ("Rule 404(b)(2) specifically permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute."); United States v. Hinton, 670 F. App'x 178, 179 (4th Cir. 2016) ("In drug cases, evidence of a

example, if a defendant's prior conviction for possession of cocaine with intent to distribute is probative of his intent in the present case only because it proves that he is the kind of person who tends to possess cocaine with intent to distribute, then the prior conviction is inadmissible character evidence.[35]

PART II: PROGRESS

A. Rule 404(b) Is a Rule of Exclusion, Not (Only or Primarily) Inclusion

One long-standing source of error in applying Rule 404(b) has been courts' affinity for referring to the rule as a "rule of inclusion" rather than a "rule of exclusion."[36] The problem with describing the rule as one of inclusion is that this language has led courts to embrace permissive approaches to the admissibility of other-acts evidence, some even going so far as to adopt a "presumption of admissibility" despite the exclusionary purpose of the rule.[37]

Admittedly, Rule 404(b) is in one very limited sense properly described as "inclusive." As codified in 1975 in the Federal Rules of Evidence, Rule 404(b) differed from some versions of the common law rule regarding character evidence in that the codified rule prohibits other-acts evidence when offered for one purpose (to prove propensity), whereas in some jurisdictions the common law rule had prohibited other-acts evidence for all purposes except for specifically allowed non-propensity purposes.[38] The rule as codified can be

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defendant's prior, similar drug transactions is generally admissible under Rule 404(b) as evidence of the defendant's knowledge and intent." (quoting United States v. Cabrera-Beltran, 660 F.3d 742, 755 (4th Cir. 2011))); United States v. Anthony, 537 F.3d 863, 866 (8th Cir. 2008) ("When a defendant makes a general denial defense, he places his state of mind at issue. Thus, when a defendant makes a general denial, 'prior drug . . . convictions are probative [and likely admissible] to show that [a defendant] had the intent and knowledge necessary for a jury to convict him.'" (alterations and omission in original) (citation omitted)).

35. As the Seventh Circuit recently summarized: "A more colloquial way to state the rule might be to say that a court may not allow in evidence of prior acts to show that the defendant is 'the kind of person who would do such a thing.'" United States v. Morgan, 929 F.3d 411, 427 (7th Cir. 2019).

36. For recent examples, see United States v. Dunnican, 961 F.3d 859, 874 (6th Cir. 2020) ("[W]e view Rule 404(b) as 'a rule of inclusion rather than exclusion.'" (quoting United States v. Blankenship, 755 F.2d 735, 739 (6th Cir. 1985))); United States v. Cristerna-Gonzalez, 962 F.3d 1253, 1264 (10th Cir. 2020) ("This rule is one of inclusion, rather than exclusion . . . ." (quoting United States v. Smalls, 752 F.3d 1227, 1237 (10th Cir. 2014))); and United States v. Croghan, 973 F.3d 809, 820 (8th Cir. 2020) ("Rule 404(b) is thus a rule of inclusion rather than exclusion . . . .").

37. *See infra* notes 42–46 and accompanying text.

38. The Third Circuit summarized the history of the rule's structure:

described as having an "inclusive" structure because it allows all other-acts evidence that is not offered to prove propensity. The Third Circuit's recent opinion in *United States v. Repak*[39] provides an excellent explanation of the limited way in which Rule 404(b) may properly be considered inclusive:

> [O]ur prior reference to Rule 404(b) as inclusionary "merely reiterated the drafters' decision to not restrict the non-propensity uses of evidence." We used that language because, prior to Rule 404(b), the corresponding common law rule for other-acts evidence limited the uses of such evidence. Rule 404(b) altered the common law rule with "inclusionary language," allowing the proponent of other-acts evidence to identify any non-propensity purpose and no longer requiring the proponent "to pigeonhole his evidence into one of the established common-law exceptions, on pain of exclusion." In sum, Rule 404(b) is a rule of exclusion, meaning that it excludes evidence unless the proponent can demonstrate its admissibility, but it is also "inclusive" in that it does not limit the non-propensity purposes for which evidence can be admitted.[40]

Although describing the structure of Rule 404(b) as "inclusive" is not technically incorrect,[41] such a description is problematic because it has led courts to give insufficient attention to the exclusionary purpose of the rule: the rule's purpose is to exclude *all* character evidence.

> Over the past two hundred years, the prior-acts rule has changed much in form but little in function. In the early days of the common law, courts used an inclusionary approach: evidence of prior acts was presumptively admissible unless it was relevant only to the defendant's propensity to commit a crime. In the nineteenth century, the rule slowly became exclusionary: such evidence was presumptively inadmissible unless the proponent could show that it was relevant to one of several specific purposes, such as motive or intent. But that trend faded, and courts began to use different approaches—some inclusionary, some exclusionary. The Federal Rules of Evidence settled the matter in 1975, establishing a uniform inclusionary approach. Yet this change, "like the nineteenth century switch from the inclusionary to the exclusionary approach, did not give rise to any significant change in the admissibility of such evidence."

United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) (citations omitted) (quoting Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1560).

39. 852 F.3d 230 (3d Cir. 2017).

40. *Id.* at 241 (citations omitted).

41. On the other hand, it is technically incorrect to describe Rule 404(b) as only a rule of inclusion; technically, Rule 404(b) is a rule of both inclusion—with respect to structure—and exclusion—with respect to purpose. Thus, proclamations that Rule 404(b) is "a rule of inclusion and not exclusion" are inaccurate. *See infra* Section II.A (discussing the structure and purpose of Rule 404(b)).

The opinions of the federal courts of appeals are full of discussions that begin with the words "rule of inclusion" and proceed directly to a kind of presumption of admissibility.[42] The Eighth Circuit's opinions are the best (or worst) examples of this reasoning. For example, one recent opinion stated: "We have described Rule 404(b) as a rule of inclusion, meaning that evidence offered for permissible purposes is presumed admissible absent a contrary determination."[43] This same reasoning is repeated essentially verbatim in dozens of other Eighth Circuit opinions.[44] Other courts have stated that because Rule 404(b) is inclusive, the rule "emphasizes"[45] or "favors"[46] the admissibility of other-acts evidence.

The Second Circuit has recognized that attending to the inclusive structure of Rule 404(b) can lead to an erroneous presumption of admissibility:

> This Circuit follows the "inclusionary" approach, which admits all "other act" evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402. Even under this approach, however, district courts

42. *See, e.g.*, United States v. Brown, 845 F. App'x 1, 7 (D.C. Cir. 2021) ("Rule 404(b) 'is a rule of inclusion rather than exclusion, and it is quite permissive, excluding evidence only if it is offered for the sole purpose of proving that a person's actions conformed to his or her character.'" (quoting United States v. Long, 328 F.3d 655, 660–61 (D.C. Cir. 2003))).

43. United States v. Nordwall, 998 F.3d 344, 347 (8th Cir. 2021) (quoting United States v. Johnson, 860 F.3d 1133, 1142 (8th Cir. 2017)).

44. *See, e.g.*, United States v. Aungie, 4 F.4th 638, 644 (8th Cir. 2021) ("Rule 404(b) is a rule 'of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination.'" (quoting United States v. LaFontaine, 847 F.3d 974, 981 (8th Cir. 2017))); United States v. Johnson, 860 F.3d 1133, 1142 (8th Cir. 2017) ("We have described Rule 404(b) as 'a rule of inclusion, meaning that evidence offered for permissible purposes is presumed admissible absent a contrary determination.'" (quoting United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005))); United States v. Graham, 680 F. App'x 489, 491 (8th Cir. 2017) ("Because Rule 404(b) is a rule of inclusion, 'evidence offered for permissible purposes is presumed admissible.'" (quoting United States v. Wilson, 619 F.3d 787, 791 (8th Cir. 2010))).

45. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 728 (3d Cir. 2013) ("Rule 404(b) is a rule of inclusion, not exclusion, which emphasizes the admissibility of other crimes evidence." (quoting Virgin Islands v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990))); United States v. DeMuro, 677 F.3d 550, 563 (3d Cir. 2012) ("Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility.'" (quoting United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992))).

46. *See, e.g.*, United States v. Henderson, 573 F. App'x 226, 230 (3d Cir. 2014) ("Rule 404(b) operates as a 'rule of inclusion rather than exclusion,' where admission is favored if the evidence is relevant for any purpose other than propensity to commit a crime." (quoting United States v. Cruz, 326 F.3d 392, 395 (3d Cir. 2003))); United States v. Pete, 463 F. App'x 113, 116 (3d Cir. 2012) ("We have recognized that Rule 404(b) is a rule of inclusion rather than exclusion. We favor the admission of evidence of other criminal conduct if such evidence is 'relevant for any other purpose than to show a mere propensity . . . of the defendant to commit the crime.'" (omission in original) (quoting United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003))).

> should not presume that such evidence is relevant or admissible.[47]

At least one Fourth Circuit judge has similarly recognized that referring to the rule as "inclusive" can lead to an improper presumption of admissibility:

> In rendering its judgment, the majority opinion characterizes Rule 404(b) as "a rule of inclusion." To be sure, this Court has characterized Rule 404(b) as "a rule of inclusion." We have done so to make clear that Rule 404(b)'s "list of proper purposes is not exhaustive." "That characterization does not displace the longstanding rule . . . that prior 'bad act' evidence is '*generally inadmissible*.'" Accordingly, the majority opinion should not—and cannot—be read as holding that other bad acts evidence is presumptively admissible.[48]

One consequence of regarding Rule 404(b)'s inclusive structure as creating any sort of presumption of admissibility is that the proponent of other-acts evidence is relieved of its burden of establishing that the evidence is being offered for a non-propensity purpose, while the opponent of the evidence is improperly given the burden of establishing inadmissibility. For example, the Eighth Circuit has reasoned:

> Evidence of prior bad acts is admissible for the purpose of proving intent, knowledge, or absence of mistake or accident. Rule 404(b) is a rule of inclusion, so we presume that evidence of other crimes is admissible for one of the listed purposes unless the party seeking to exclude the evidence can show that it serves only to prove the defendant's criminal disposition.[49]

Requiring the opponent of the evidence to establish its inadmissibility is improper, because the proponent of the evidence has the burden of establishing its admissibility.[50] As the Fourth Circuit has

47. United States v. Curley, 639 F.3d 50, 56 (2d Cir. 2011) (citation omitted).

48. United States v. Bell, 901 F.3d 455, 474 n.1 (4th Cir. 2018) (Wynn, J., dissenting) (citations omitted).

49. United States v. Roberson, 439 F.3d 934, 941 (8th Cir. 2006) (citation omitted).

50. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.23[5][b], at 404-171 (Mark S. Brodin & Joseph M. McLaughlin eds., 2d ed. 2021) ("Once the question of admissibility has been raised, the party offering the evidence has the burden of convincing the court that it is relevant to a consequential fact in issue other than propensity, and that Rule 403 does not require exclusion."); United States v. Gomez, 763 F.3d 845, 860 (7th Cir. 2014) (en banc) ("[T]o overcome an opponent's objection to the introduction of other-act evidence,

explained: "[T]he party seeking to admit evidence under Rule 404(b)(2) bears the burden of demonstrating its applicability. Our opinions have repeatedly and consistently emphasized that the burden of identifying a proper purpose rests with the proponent of the evidence, usually the government."[51] The recently revised subpart (3) makes clear that the party seeking to admit other-acts evidence has the burden of establishing that the evidence is being offered for a non-propensity purpose.[52]

Contrary to the permissive approach to the admissibility of other-acts evidence that has resulted from describing Rule 404(b) as "inclusive," the purpose of Rule 404(b) is to exclude evidence. As the Fourth Circuit has stated:

> [U]nder Rule 404(b), evidence of a defendant's prior bad acts is *generally inadmissible*, properly coming into evidence only when the government meets its burden to explain each proper purpose for which it seeks to introduce the evidence, to present a propensity-free chain of inferences supporting each purpose, and to establish that such evidence is relevant, necessary, reliable, and not unduly prejudicial.[53]

The Third Circuit cogently explained why Rule 404(b) is properly considered a rule of exclusion despite its inclusive structure:

> We have on occasion noted that Rule 404(b) adopted an inclusionary approach. Our use of the term "inclusionary" merely reiterates the drafters' decision to not restrict the non-propensity uses of evidence. It does not suggest that prior offense evidence is presumptively admissible. On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it "no presumption of admissibility." The Rule reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—*unless* the

the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way.").

51. United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014).

52. *See supra* Section I.B.3 (discussing Rule 404(b)(3)).

53. United States v. Hall, 858 F.3d 254, 277 (4th Cir. 2017) (emphasis added).

> proponent can demonstrate that the evidence is admissible for a non-propensity purpose.[54]

Referring to Rule 404(b) as a "rule of inclusion" adds nothing to a proper understanding of the admissibility of other-acts evidence but instead invites improper application of the rule, resulting in the improper admission of other-acts evidence. Referring to Rule 404(b) as a rule of general exclusion is far preferable, because it properly communicates that other-acts evidence is inadmissible unless the proponent of the evidence can demonstrate a non-character purpose—that does not rely on a propensity inference—for admitting the evidence.

B. The Need to Identify a Propensity-Free Chain of Inferences

"[T]he proponents of Rule 404(b) evidence must do more than conjure up a proper purpose—they must also establish a chain of inferences no link of which is based on a propensity inference."[55]

1. Relevance Is Not Enough

At the root of appellate courts' inadequate vigilance in applying Rule 404(b)(1) is a view that the rule requires only that other-acts evidence be relevant to a non-character purpose in order to be admissible. Rule 404(b)(2) has contributed to this erroneous view by offering up a ready-made, "enumerated" list of non-character reasons why other-acts evidence might be admissible.[56] The Supreme Court's

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54. *Caldwell*, 760 F.3d at 276 (citations omitted).

55. United States v. Smith, 725 F.3d 340, 345 (3d Cir. 2013).

56. Courts often note that a particular non-character purpose is "enumerated" in Rule 404(b)(2), as if that has some special significance (which it does not, because Rule 404(b)(2) is merely a non-exhaustive list of examples). *See, e.g.*, United States v. Merritt, 961 F.3d 1105, 1111 (10th Cir. 2020) ("While evidence may not be offered to prove character as a basis for raising the inference that conduct on a particular occasion was in conformity with this character trait, it can be offered for any of the enumerated purposes in Rule 404(b)(2)."); United States v. Michel, 832 F. App'x 631, 634 (11th Cir. 2020) ("For other act evidence to be admissible under Rule 404(b), it must pass a three-part test. First, it must be relevant to one of the issues enumerated in Rule 404(b)(2)."). "Express" is a variation. United States v. Boyle, 849 F. App'x 325, 328 (3d Cir. 2021) ("As the District Court correctly held, Rule 404(b)(2) expressly permits admission of other-acts evidence for, among other things, 'proving motive.'" (quoting FED. R. EVID. 404(b)(2))); United States v. Barnes, 822 F.3d 914, 921 (6th Cir. 2016) ("Rule 404(b)(2) expressly lists proving 'intent' as a permissible purpose for other acts evidence . . . ."); United States v. Curescu, 674 F.3d 735, 742 (7th Cir. 2012) ("The use of evidence of prior crimes to show 'absence of mistake' is an express exception to the prohibition of prior-crimes evidence." (quoting FED. R. EVID. 404(b)(2))); United States v. Hsu, 669 F.3d 112, 118 (2d Cir. 2012) ("[T]he Rule expressly allows the receipt of evidence of other crimes for a variety of other purposes." (citing FED. R. EVID. 404(b)(2))); United States v. Charley, 1 F.4th 637, 653 (9th Cir. 2021) (Bumatay, J., concurring) ("Rule 404(b) expressly allows courts to admit a person's prior acts to prove 'intent.'" (quoting FED. R. EVID. 404(b)(2))).

opinion in *Huddleston v. United States*[57] is also partly to blame, because courts have interpreted its assertion that one of the protections against unfair prejudice resulting from other-acts evidence is "the requirement of Rule 404(b) that the evidence be offered for a proper purpose"[58] to mean that so long as a proper purpose is "offered," the court need not worry further whether the evidence should be excluded as character evidence.[59] Many courts have begun—and ended—their Rule 404(b) analysis with a statement that the other-acts evidence is admissible because it is merely "probative of" or "relevant to" a non-character purpose.[60] But other-acts evidence that is relevant to a non-character purpose might well be relevant to that purpose only because of an inference about character, a possibility wholly missing from *Huddleston*'s discussion of Rule 404(b).[61] Extending *Huddleston*'s

57. 485 U.S. 681 (1988).

58. *Id.* at 691.

59. For example, the Tenth Circuit has developed this boilerplate summary of Rule 404(b)(1): "Rule 404(b) admissibility is a permissive standard and if the other act evidence is relevant and tends to prove a material fact other than the defendant's criminal disposition, it is offered for a proper purpose under Rule 404(b)." *See* United States v. Tennison, 13 F.4th 1049, 1056 (10th Cir. 2021) (quoting United States v. Davis, 636 F.3d 1281, 1298 (10th Cir. 2011)).

60. *See id.* at 1057 ("The extrinsic evidence of Mr. Tennison's February 2018 arrest is probative of his intent regarding the meth he possessed on January 31, 2017, and therefore it is relevant for the purposes of Rule 404(b)."); United States v. Patino, 912 F.3d 473, 476 (8th Cir. 2019) ("Because Patino pleaded not guilty to the charged offenses and contested their mens rea elements, evidence of his prior conviction for distributing HGH was relevant to his intent and knowledge."); United States v. Bowie, 232 F.3d 923, 930 (D.C. Cir. 2000) ("A proper analysis under Rule 404(b) begins with the question of relevance: is the other crime or act relevant and, if so, relevant to something other than the defendant's character or propensity? If yes, the evidence is admissible unless excluded under other rules of evidence such as Rule 403.").

61. *See Huddleston*, 485 U.S. at 681. Somehow *Huddleston* has become the ultimate authority on Rule 404(b). *See, e.g.*, United States v. Willis, 844 F.3d 155, 169 (3d Cir. 2016) ("To be admissible, prior-act evidence must satisfy the test set forth in *Huddleston v. United States*."); United States v. Rodella, 804 F.3d 1317, 1333 (10th Cir. 2015) ("'To determine whether Rule 404(b) evidence was properly admitted we look to the four-part test set out' in *Huddleston*." (quoting United States v. Watson, 766 F.3d 1219, 1236 (10th Cir. 2014))). This preoccupation with *Huddleston* is perplexing, given that the case did not address whether the other-acts evidence was in fact offered for a non-character purpose, because the petitioner conceded—perhaps erroneously—that it was. The prosecutor asserted that the stolen televisions were offered to prove knowledge that the Memorex tapes were stolen, not to prove character, and Huddleston did not challenge this assertion. *See Huddleston*, 485 U.S. at 686 ("Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen.").

Most directly, *Huddleston* was about Rule 104. *See id.* at 682, 689 ("This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the evidence to the jury. . . . We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a)."). *Huddleston* might also properly be considered something of a Rule 403 case. *See id.* at 691 ("We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a

dismissiveness regarding the care and attention required for proper application of Rule 404(b),[62] several courts of appeals have explicitly adopted the view that the rule creates a "permissive" or "not particularly demanding" standard.[63]

Also symptomatic of a too-permissive view of what Rule 404(b) requires is the willingness of some courts to accept the recitation of one or more—or all—of the subpart (2) examples of permitted purposes as sufficient to establish a non-character purpose, without examining whether the evidence is relevant to the non-character purpose by way of an impermissible inference about character.[64] Cases in which a prosecutor seeks to admit evidence of a defendant's prior conviction for the purpose of proving intent or knowledge are perhaps the largest category of instances of such improper admission of other-acts evidence. For example, appellate courts often affirm the admission of a prior conviction for possession of a controlled substance with intent

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preliminary finding by the trial court, but rather from four other sources . . . ." (citation omitted)); *see also* United States v. Ramirez, 894 F.2d 565, 568 (2d Cir. 1990) ("In *Huddleston*, the Court framed a four part test by which to determine if the admission of evidence under Rule 404(b) might be unfairly prejudicial." (citation omitted)). But *Huddleston* is not at all a case about determining whether other-acts evidence is being offered for a proper, non-character purpose.

62. Although it should be kept in mind that the question whether the other-acts evidence was admitted for a non-character purpose was not before the Court in *Huddleston*. *See Huddleston*, 485 U.S. at 686 ("Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen.").

63. *See, e.g.*, *Tennison*, 13 F.4th at 1056 ("Rule 404(b) admissibility is a permissive standard . . . ." (quoting United States v. Davis, 636 F.3d 1281, 1298 (10th Cir. 2011))); United States v. Galíndez, 999 F.3d 60, 66 (1st Cir. 2021) ("[A] judge performing a 404(b) analysis must ask whether the other-acts evidence is specially relevant to something other than a defendant's character—knowing that the special-relevance 'standard is not particularly demanding.'" (citation omitted) (quoting United States v. Wyatt, 561 F.3d 49, 53 (1st Cir. 2009))).

64. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4.28, at 730 (4th ed. 2013) ("Perhaps because the issue so inundates courts hearing criminal appeals, published opinions often give it but passing mention, and it is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars."); Steven Goode, *It's Time to Put Character Back Into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 715 (2021) ("Appellate courts often then look to affirm, typically doing so in one of two ways. Sometimes . . . they expressly deny that the probative value of the evidence flows from a propensity inference. More commonly, they implicitly deny this by reciting one, two, many, or sometimes all of Rule 404(b)(2)'s laundry list of permissible uses for other-acts evidence with little or no explanation."); *cf.* United States v. Drew, 9 F.4th 718, 726 (8th Cir. 2021), *petition for cert. docketed*, No. 21-6704 (Dec. 22, 2021) (Kelly, J., concurring in the judgment) ("[I]n my view, it is not enough for the government simply to claim, in any firearm case, that such evidence 'goes to the defendant's knowledge and intent' and therefore meets the relevance prong of our Rule 404(b) test. 'Mere recitation' of these permissible purposes under Rule 404(b) 'without an accompanying case-specific analysis risks couching criminal propensity in terms of knowledge, intent, or lack of mistake.'" (quoting United States v. Cotton, 823 F.3d 430, 435 (8th Cir. 2016))).

to distribute to prove intent to distribute in a later case.[65] Some courts just as readily affirm the admission of a prior conviction for simple possession, without intent to distribute, to prove later intent to distribute,[66] although other courts have refused to go this far.[67] Felon in possession cases are another large category, with courts affirming the admission of a prior offense involving a firearm to prove later knowledge of a firearm[68]—even though defendants in these cases are rarely if ever arguing that they do not know what a firearm is.[69] Many courts have all but admitted that they do not—and do not want to—carefully scrutinize such evidence.[70] Simply reciting all of the Rule 404(b) examples

65. *See, e.g.*, United States v. Morton, 843 F. App'x 699, 703 (6th Cir. 2021) ("This court has repeatedly recognized that prior drug-distribution evidence is admissible under Rule 404(b) to show intent to distribute." (quoting United States v. Cordero, 973 F.3d 603, 621 (6th Cir. 2020))); United States v. Henry, 848 F.3d 1, 8 (1st Cir. 2017) ("Rule 404(b)(2) specifically permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute.").

66. *See, e.g.*, United States v. Gelin, 810 F. App'x 712, 723 (11th Cir. 2020) ("We have previously rejected Mr. St. Fleur's argument that a prior conviction for drug possession is not probative of intent to distribute drugs."); United States v. Davis, 867 F.3d 1021, 1029 (8th Cir. 2017) ("It is settled in this circuit that a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." (quoting United States v. Horton, 756 F.3d 569, 579 (8th Cir. 2014))).

67. *See, e.g.*, United States v. Davis, 726 F.3d 434, 445 (3d Cir. 2013) ("We join other circuits in declaring that a possession conviction is inadmissible to prove intent to distribute.").

68. *See, e.g.*, *Drew*, 9 F.4th at 723 ("[A] not-guilty plea in a felon-in-possession case makes past firearm convictions relevant to show the 'material issue[s] of . . . *knowledge* of the presence of the firearm and his *intent* to possess it.'" (omission and second alteration in original) (quoting United States v. Walker, 470 F.3d 1271, 1274 (8th Cir. 2006))); United States v. Clark, 693 F. App'x 804, 807 (11th Cir. 2017) ("[W]hen a defendant pleads not guilty to knowingly and intentionally possessing a firearm as a felon, and does not stipulate to knowingly possessing a firearm, the government may introduce evidence of a prior knowing possession of a firearm to prove the *mens rea* element of the offense.").

69. *See* United States v. Brown, 765 F.3d 278, 292 (3d Cir. 2014) ("To be sure, Brown did not claim he was unfamiliar with firearms. Absent such a claim or suggestion by a defendant, a rule permitting the introduction of Rule 404(b) evidence for the purpose of showing the defendant 'knows what firearms are' would have the effect of rendering all prior bad acts related to firearms admissible in a felon-in-possession trial. Such a result could not have been the intent of the drafters of the Federal Rules of Evidence.").

70. *See, e.g.*, United States v. Dunnican, 961 F.3d 859, 874 (6th Cir. 2020) ("We have 'repeatedly recognized that prior drug-distribution evidence is admissible [under Rule 404(b)] to show intent to distribute.'" (alteration in original) (quoting United States v. Ayoub, 498 F.3d 532, 548 (6th Cir. 2007))); United States v. Banks, 884 F.3d 998, 1025 (10th Cir. 2018) ("[O]ur court has time and again held that past drug-related activity is admissible other-acts evidence under Rule 404(b) to prove . . . that the defendant had the knowledge or intent necessary to commit the crimes charged." (omission in original) (quoting United States v. Watson, 766 F.3d 1219, 1237 (10th Cir. 2014))); United States v. Sheffield, 832 F.3d 296, 307 (D.C. Cir. 2016) ("[T]he type of evidence the government introduced here—that of Sheffield's prior PCP dealing—would generally be permissible to show that Sheffield had the requisite knowledge and intent to possess and distribute the PCP the officers found in the armrest console."); United States v. Hicks, 671 F. App'x 135, 136

of permitted purposes is a less common but even more obvious indication that the prosecutor—or the court—is not really interested in determining whether the other-acts evidence is being offered for a proper purpose.[71]

2. A Few Steps Forward

In the past several years, the same concern that led to the recently revised subpart (3) also led some federal circuit courts of appeals to revise their approaches to determining the admissibility of other-acts evidence. Perhaps the most forceful rejection of an old, permissive approach is the Seventh Circuit's 2014 en banc decision in *United States v. Gomez*,[72] although the Third and Fourth Circuits have also issued strong opinions in recent cases.[73] One important aspect of these recent opinions is that they insist upon the identification of a chain of inferences that connects the other-act evidence to the non-prohibited purpose and that does not include an inference about character.[74]

(4th Cir. 2016) ("In drug cases, this court generally admits evidence of a defendant's prior, similar drug conduct to prove the defendant's knowledge and intent."); United States v. Adams, 783 F.3d 1145, 1149 (8th Cir. 2015) ("We have held on many occasions that prior convictions of firearm offenses are admissible to prove that the defendant had the requisite knowledge and intent to possess a firearm."); United States v. Wiggins, 747 F.3d 959, 963 (8th Cir. 2014) ("If a defendant puts his intent and knowledge of a drug conspiracy in issue, the government can introduce evidence of a defendant's prior similar acts to help prove its case."); *cf.* United States v. Matthews, 431 F.3d 1296, 1319 (11th Cir. 2005) (Tjoflat, J., specially concurring) ("[W]e have bypassed the strictures of Rule 404(b) by presumptively assuming that intent is always an issue in conspiracy cases and that all prior substantively-related acts are relevant to that intent. This is nothing more than propensity by any other name.").

71. *See, e.g.*, United States v. Rahami, 794 F. App'x 4, 8 (2d Cir. 2019) ("The court admitted the evidence under Federal Rule of Evidence 404(b) on the grounds that it was 'indicative of intent, preparation, plan, knowledge, identity, absence of mistake, etc.'"); United States v. Fogg, 922 F.3d 389, 393 (8th Cir. 2019) ("[T]he district court allowed the evidence of drugs and drug paraphernalia found in the front passenger area to be admitted, agreeing with the government it was relevant to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" (quoting FED. R. EVID. 404(b))); United States v. Mathis, 778 F. App'x 816, 824 (11th Cir. 2019) ("The government also argued that, if Rule 404(b) applied, the evidence was admissible as proof of 'motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake.'" (alteration in original) (quoting FED. R. EVID. 404(b))).

72. 763 F.3d 845 (7th Cir. 2014) (en banc).

73. *See infra* Sections II.B.2–3 (discussing cases).

74. References to a required chain of inferences can be found in earlier cases. *See, e.g.*, United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) ("[W]hen evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged."). Scholars also have argued for attention to a chain of inferences. *See, e.g.*, David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 442 (2001) ("If the chain of inferences leading from the evidence to the fact it is offered to prove *requires* a character inference, the evidence is inadmissible.").

a. The Seventh Circuit

In the 2014 en banc case *United States v. Gomez*, the Seventh Circuit clearly and forcefully rejected its prior, permissive approach to Rule 404(b) and adopted an approach that requires a more careful and precise analysis of other-acts evidence.[75] As the court stated: "Our four-part test for evaluating the admissibility of other-act evidence has ceased to be useful. We now abandon it in favor of a more straightforward rules-based approach."[76] The court first explained that the prior approach had become problematic because it risked the erroneous admission of other-acts evidence: "Especially in drug cases like this one, other-act evidence is too often admitted almost automatically, without consideration of the 'legitimacy of the purpose for which the evidence is to be used and the need for it.'"[77]

The court then explained that under its new, "more straightforward rules-based approach," admissibility of other-acts evidence requires not merely that the other-acts evidence is in some way relevant to a non-character purpose but that the other-acts evidence is relevant to a non-character purpose by means of a chain of inferences that does not include any inferences about character:

> The principle that emerges . . . is that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference.[78]

The *Gomez* opinion is an especially helpful contribution to efforts to reform the federal courts' permissive approach to other-acts evidence in part because of the clarity and forcefulness of the Seventh Circuit's en banc rejection of its prior, permissive approach and its adoption of a "more straightforward rules-based approach" and also in part because it unanimously[79] found that under the new approach, the

75. *Gomez*, 763 F.3d at 853.

76. *Id.* This four-part test had been taken straight from the Supreme Court's opinion in *Huddleston v. United States*, 485 U.S. 681 (1988), further proof that *Huddleston* should be rejected as dictating any sort of "Rule 404(b) test." *See supra* note 61 (discussing flaws with considering *Huddleston* to be authoritative regarding Rule 404(b)).

77. *Gomez*, 763 F.3d at 853 (quoting United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012)).

78. *Id.* at 853, 856.

79. All of the judges agreed that the trial court erred in admitting the other-acts evidence. However, four judges disagreed that the error was harmless:

admission of the other-acts evidence was erroneous.[80] Specifically, the court recognized that the prosecution's other-acts evidence—the defendant's possession of a user quantity of cocaine—was relevant to proving his identity as a participant in a conspiracy to distribute cocaine only if the jury inferred that he was the kind of person who would deal in cocaine.[81]

On the other hand, the force of the *Gomez* decision is somewhat diminished by the court's finding that the error in admitting the other-acts evidence was harmless.[82] A finding of harmlessness enables if not encourages future transgressions of the rule.[83] As Judge Harry Edwards observed (specifically with respect to constitutional rules, but the reasoning applies to evidentiary rules as well), a finding of harmless error undermines the purposes served by a rule:

> [W]e as appellate judges display a dangerous shortsightedness when, in pursuit of the goal of punishing the guilty, we trade away results in individual cases. We send a message through our criminal justice system each time we reverse or remand a conviction on the ground that the police or prosecutors have violated a defendant's individual rights. Upon receiving such a message, the criminal justice process corrects

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> The en banc court agrees unanimously that the district court erred by admitting under Rule 404(b) the evidence that Gomez was in possession of a small amount of cocaine nearly four weeks after the charged conspiracy ended. . . .
>
> . . . .
>
> Nevertheless, after having done so much to improve our circuit's law under Rule 404(b), the en banc majority still affirms Gomez's conviction despite the serious Rule 404(b) error. The majority does so by finding that the Rule 404(b) error was harmless, in Part II-B-2 of its opinion. From this conclusion and the resulting affirmance, I respectfully dissent.

Id. at 864–65 (Hamilton, J., concurring in part and dissenting in part).

80. *Id.* at 864–66 ("In this case, the entire court agrees that the 404(b) evidence should not have been admitted at all because its *only* use was to show propensity.").

81. *Id.* at 863 (majority opinion) ("[T]he government offers no theory other than propensity to connect the cocaine found in Gomez's bedroom to his identity as Guero, Romero's coconspirator.").

82. *Id.* at 864.

83. An error is "harmless"—as opposed to grounds for a reversal—only if it does not "affect a substantial right." *See* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights must be disregarded."); FED. R. CIV. P. 61 ("[Courts] must disregard all errors and defects that do not affect any party's substantial rights."); FED. R. EVID. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . ."). A discussion of the various criticisms of the harmless error doctrine is beyond the scope of this Article. For recent comprehensive discussions, see Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117 (2018); and Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017).

> itself accordingly. Thus, when we shrink from our duty to overturn convictions in individual cases, we accomplish nothing less than a subversion of the rules that we have devised to protect our shared values.[84]

Which is not to argue that every Rule 404(b) error should be reversible error, or even that the particular error in *Gomez* should have been reversible error—although the dissenting opinion makes a strong argument that it should.[85] Nevertheless, finding the error harmless means that everything that the en banc court said about Rule 404(b) is technically dicta.[86]

b. The Third Circuit

In *United States v. Caldwell*,[87] also a 2014 decision, the Third Circuit explained that the admissibility of other-acts evidence requires

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84. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1198–99 (1995); *see also* Rose v. Clark, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring in the judgment) ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."); United States v. Moreno, 991 F.2d 943, 950 (1st Cir. 1993) (Torruella, J., dissenting) (arguing that "Rule 404(b) and the harmless error doctrine have been converted, not to say subverted, into a wall behind which the Government apparently can continue *ad infinitum* to take pot shots with impunity"); United States v. Pallais, 921 F.2d 684, 691–92 (7th Cir. 1990) ("We rebuke prosecutors repeatedly for commenting on a defendant's failure to take the stand . . . . These rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct."). For a rare example of a federal appellate court recognizing that the harmless error doctrine does not discourage misconduct and actually finding reversible error, see United States v. Gracia, 522 F.3d 597, 606 (5th Cir. 2008) ("We cannot permit the prosecutor's remarks to be swept under the rug by the broom of the harmless error doctrine.").

85. *Gomez*, 763 F.3d at 864–65 (Hamilton, J., concurring in part and dissenting in part).

86. *See* Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 907 (1992) ("[I]f the appellate court explains an evidentiary rule, this may have some future effect regardless of whether the court reverses or finds harmless error. Presumably conscientious counsel and trial judges pay attention to appellate reasoning even though an affirmance on harmless error grounds means that the interpretation is merely dictum."); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 310 (2002) ("Where a court finds harmless error, it may nevertheless expound upon the nature of the error. Any discussion of the error is dictum, of course, because it is not essential to the resolution of the case: the court could simply refuse to resolve the question of whether error occurred by asserting that even if there were error, it was harmless."). *But see* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2045–46 (1994).

Indeed, although many opinions subsequent to *Gomez* have looked (more) closely for hidden propensity inferences, some have not. *See, e.g.*, United States v. Morgan, 929 F.3d 411, 427 (7th Cir. 2019) ("Morgan conceded that he possessed the methamphetamine, but contested that he intended to distribute it to others. Evidence of his intent, therefore, was clearly relevant for the non-propensity purpose of proving the required intent.").

87. 760 F.3d 267 (3d Cir. 2014).

demonstrating a propensity-free chain of inferences, not just invoking a particular non-propensity purpose.[88] The court stated:

> "In proffering [prior act] evidence, the government must explain how [the evidence] fits into a chain of inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference." We require that this chain be articulated with careful precision because, even when a non-propensity purpose is "at issue" in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way.[89]

The court added force to its opinion first by finding that the government's other-acts evidence had been improperly admitted and then also finding—perhaps most importantly, because it imposes a real consequence—that the improper admission of the other-acts evidence was reversible error.[90]

Subsequent opinions have reinforced the Third Circuit's commitment to a proper application of Rule 404(b). For example, in *United States v. Repak*, the appellate court criticized both the government and the district court for failing to explain how evidence of uncharged conduct was relevant to proving the defendant's "knowledge" and "intent": "Like the Government's explanation, [the District Court's] analysis is inexact and fails to adequately link the other-acts evidence to a non-propensity purpose with 'careful precision.' In essence, this was the 'mere recitation of the purposes in Rule 404(b)(2)' that we have previously deemed inadequate."[91] Similarly, the court in *United States v. Washington*[92] found that the district court failed to determine that the government's other-acts evidence was relevant by means of a chain of inferences not dependent on propensity:

> The court ignored the fact that we have clearly (and repeatedly) stated that, when a district court admits 404(b) evidence for a proper purpose, it "must put a chain of inferences into the record, none of which is the inference that the defendant has a propensity to commit this crime." Rather than doing

88. *Id.* at 277 (stating that "a mere recitation of the purposes in Rule 404(b)(2) is insufficient" (quoting United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013))).

89. *Id.* at 281 (alterations in original) (quoting *Davis*, 726 F.3d at 442).

90. *Id.* at 281, 285.

91. United States v. Repak, 852 F.3d 230, 244–45 (3d Cir. 2017) (citation omitted) (quoting *Caldwell*, 760 F.3d at 277, 281).

92. 602 F. App'x 858 (3d Cir. 2015).

> that here, the District Court merely stated a proper non-propensity purpose; that is not sufficient.[93]

United States v. Brown[94] is another carefully reasoned opinion that looks beyond the government's invocation of a non-propensity purpose for seeking to admit other-acts evidence (in this case, "knowledge"):

> [T]he District Court should have asked the Government to answer this question: "How, exactly, does Brown's admission to ATFE agents that he sold heroin in exchange for firearms in 2005 suggest that he had knowledge of the gun found under the driver's seat of the Impala on the morning of March, 23, 2011?" Put to this task, the Government would have been unable to articulate the requisite chain of inferences without resort to propensity-based links or attempts to build a bridge too far.[95]

All of these opinions properly find insufficient the mere invocation of some non-character purpose for admitting other-acts evidence and instead require a careful analysis of how the other-acts evidence helps to prove the non-character purpose.

c. The Fourth Circuit

The Fourth Circuit's opinion in the 2017 case *United States v. Hall*[96] similarly stressed the need for proponents of other-acts evidence to establish not merely that the evidence is relevant to some non-character purpose but also that the evidence is relevant in a way that does not involve a character inference. The court explained:

> [U]nder Rule 404(b), evidence of a defendant's prior bad acts is generally inadmissible, properly coming into evidence only when the government meets its burden to explain each proper purpose for which it seeks to introduce the evidence, to present a propensity-free chain of inferences supporting each purpose, and to establish that such evidence is relevant, necessary, reliable, and not unduly prejudicial.[97]

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93. *Id.* at 862 (citation omitted) (quoting United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992)).

94. 765 F.3d 278 (3d Cir. 2014).

95. *Id.* at 294.

96. 858 F.3d 254 (4th Cir. 2017).

97. *Id.* at 277.

The *Hall* court found that the government had failed to establish that its other-acts evidence—the defendant's prior conviction for possession of marijuana—was relevant to proving that he had committed the presently charged offense of possession of marijuana with intent to distribute in any way other than by means of an inference about character. The court explained:

> Because Defendant's prior possession conviction did not require a finding of specific intent, the only relevance that conviction could have to his intent to distribute marijuana on a later, unrelated occasion is that it tends to suggest that Defendant is, in general, more likely to distribute drugs because he was involved with drugs in the past. This is precisely the propensity inference Rule 404(b) prohibits.[98]

The court further found that even the defendant's prior convictions for possession of marijuana with intent to distribute were not relevant to proving that he committed the presently charged offense of possession with intent to distribute because relevance could be established only through an inference about the defendant's character.[99] Courts often consider a prior conviction for possession with intent to distribute to be relevant to a current possession with intent to distribute charge because the prior conviction required proof of intent and "intent" is a 404(b)(2) example of a permitted purpose.[100] But the *Hall* court stressed that admissibility requires more:

> [T]he government introduced the fact of Defendant's prior possession with intent to distribute convictions without providing *any* evidence linking the prior convictions to the charged offense. The government did so notwithstanding that it bears the burden of establishing the admissibility of Rule 404(b) evidence and that the fact of a defendant's past involvement in drug activity "*does not in and of itself* provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct."
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> . . . .

98. *Id.* at 267.

99. *Id.* at 268.

100. *See supra* note 65; *see also* United States v. Gomez, 763 F.3d 845, 858–59 (7th Cir. 2014) (en banc) ("Unfortunately, this line of precedent too frequently has been seen as a rule of automatic admission for other-act evidence in cases of specific-intent crimes.").

> We therefore conclude that Defendant's prior possession with intent to distribute convictions were relevant to Defendant's intent to distribute the marijuana inside the Steadham Road residence only if we credit the idea that Defendant's prior involvement with marijuana renders "[t]he charged acts . . . more plausible." "But this, once again, is precisely the criminal propensity inference Rule 404(b) is designed to forbid."[101]

Finally, the *Hall* court found that the erroneous admission of the defendant's prior convictions was not harmless.[102]

The court's decision elicited a dissent from Judge Wilkinson, who pushed back on the court's more searching analysis of other-acts evidence. The dissenting opinion refers to the "majority's hostility to the admissibility gateways of Rule 404(b)"[103] and quotes several Fourth Circuit cases expressing support for the view that prior drug offenses are generally admissible to prove presently charged drug offenses.[104] Finally, the dissent suggests that the majority opinion fails to give proper deference to the trial judge regarding the admissibility of evidence.[105] In essence, the dissent articulates a permissive view of Rule 404(b) that is unfaithful to the rule's exclusionary purpose, a view regrettably common among federal judges.

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101. *Hall*, 858 F.3d at 274–75 (citations omitted) (second alteration and omission in original) (first quoting United States v. Johnson, 617 F.3d 286, 297 (4th Cir. 2010); and then quoting United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992)).

102. *Id.* at 281.

103. *Id.* at 289 (Wilkinson, J., dissenting).

104. The dissenting opinion argues:

> "In drug cases, evidence of a defendant's prior, similar drug transactions is generally admissible under Rule 404(b) as evidence of the defendant's knowledge and intent." *United States v. Cabrera-Beltran*, 660 F.3d 742, 755 (4th Cir. 2011). "Consequently, we have construed the exceptions to the inadmissibility of prior bad acts evidence broadly, and characterize Rule 404(b) as an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." *United States v. Powers*, 59 F.3d 1460, 1464 (4th Cir. 1995) (internal quotation marks omitted); *see United States v. Briley*, 770 F.3d 267, 275 (4th Cir. 2014); *United States v. Rooks*, 596 F.3d 204, 211 (4th Cir. 2010).

Id. at 291.

105. *Id.* at 294 ("The district court made a routine discretionary call to admit highly relevant and probative evidence bearing directly on the elements of an alleged crime that the defendant had directly placed into dispute. I would uphold that ruling. While my fine colleagues in the majority opine at length about the errors of the trial court, the district judge ultimately made the sensible decision that is now the subject of our review.").

PART III: *UNITED STATES V. LAGUE*

The contrast between the majority and dissent positions in *Hall* highlights the differing views among federal judges regarding the admissibility of other-acts evidence under Rule 404(b). Despite the promise of cases such as *Gomez* and *Caldwell*, and the majority's opinion in *Hall*, many federal courts of appeals opinions continue to sound much like the dissent's opinion in *Hall*. Specifically, these opinions continue to regard Rule 404(b) as imposing minimal restraints on the admissibility of other-acts evidence, erroneously relying on the rule's examples of permitted purposes as well as the inclusive structure to justify the admission of other-acts evidence without careful analysis. The Ninth Circuit's recent opinion in *United States v. Lague* is one such example.

David Lague, a former physician's assistant, was charged with unlawfully distributing controlled substances to five former patients.[106] Lague was authorized to write prescriptions for controlled substances; however, his prescriptions for controlled substances were lawful only if they were written "for a legitimate medical purpose in the usual course of professional practice."[107] Lague was also charged with healthcare fraud and conspiracy to commit healthcare fraud based on the prescriptions he provided to one of these five patients.[108] A jury convicted Lague of unlawfully prescribing drugs to the five patients but acquitted him of the fraud charges.[109]

At trial, the government presented the facts relating to the drugs Lague prescribed to the five patients identified in the indictments but also presented "practice-wide" evidence of Lague's prescriptions to more than four hundred other patients.[110] Despite Lague's objections, the district court allowed the prosecution to use the practice-wide evidence on the ground that it was "probative of Lague's intent and knowledge to write the charged prescriptions without a legitimate medical purpose."[111] The Ninth Circuit affirmed, reasoning that "[i]f Lague's aberrational prescription data is probative of his intent to prescribe the underlying, uncharged prescriptions without a legitimate

106. United States v. Lague, 971 F.3d 1032, 1035 (9th Cir. 2020).
107. *Id.* at 1035, 1037; 21 U.S.C. § 841 (2018).
108. *Lague*, 971 F.3d at 1035.
109. *Id.* at 1037.
110. *Id.* at 1036.
111. *Id.* at 1036 n.4.

medical purpose, there is a logical connection between the 'other' prescriptions and the charged prescriptions."[112]

The Ninth Circuit's opinion suffers from several flaws. First, the court began its discussion of why Rule 404(b) allows this evidence by invoking both the rule's inclusive structure and its examples of permitted purposes, stating: "Rule 404(b) is a rule of inclusion—not exclusion—which references at least three categories of other 'acts' encompassing the inner workings of the mind: motive, intent, and knowledge."[113] This single statement contains three important mistakes: Rule 404(b) is not a general "rule of inclusion" but is a "rule of inclusion" only with respect to its structure; Rule 404(b) *is* a rule of exclusion with respect to its purpose;[114] and the Rule 404(b)(2) references to motive, intent, and knowledge are only examples of permitted purposes, not specially admissible exceptions to the Rule 404(b)(1) general prohibition of character evidence.[115]

Following this misleading introductory statement, the court reasoned that the other-acts evidence was admissible so long as it was relevant. Here the court stressed the "low threshold test of sufficien[cy]" that creates a "relaxed standard" for questions of relevance—but relevance, as the court itself suggested with a "see also" reference to Rule 104(b), is not about determining whether the other-acts evidence was admitted for a proper, non-character purpose.[116] Satisfied that the evidence was relevant to intent, the court concluded that the evidence was properly admitted under Rule 404(b): "Because the prescription data made the intent element of the section 841 charges more probable, the district court properly admitted Lague's uncharged prescriptions under Rule 404(b)."[117] Wholly absent from the court's discussion is any consideration of *how* the other-acts evidence was relevant to proving intent, or anything else other than character.[118]

The court's reasoning—that relevance to a non-character purpose is sufficient to establish the admissibility of other-acts evidence—fails

112. *Id.* at 1038.

113. *Id.* at 1040 (quoting United States v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007) (en banc)).

114. *See supra* Section II.A (discussing the purpose of Rule 404(b)).

115. *See supra* Section I.B.2 (discussing Rule 404(b)(2)).

116. *Lague*, 971 F.3d at 1040 (alteration in original) (quoting United States v. Dhingra, 371 F.3d 557, 566 (9th Cir. 2004)).

117. *Id.*

118. In fact, the opinion includes the word "character" only twice, both times quoting Rule 404(b).

to properly effectuate Rule 404(b)'s exclusionary purpose. To properly protect against the unfairness of character inferences, the other-acts evidence must be relevant in a way that does not involve inferences about character. In *Lague*, the court allowed the mere recitation of a permissible purpose to suffice.[119] Neither the appellate court nor (apparently) the district court[120] asked how the practice-wide prescribing evidence was relevant to proving Lague's intent regarding the prescriptions provided to the five patients identified in the indictment, and neither court addressed the possibility that the practice-wide evidence was relevant only because it suggested to the jury that Lague was the kind of person who intended to write unlawful prescriptions.[121]

In its failure to analyze how the practice-wide evidence was relevant to proving intent to unlawfully prescribe drugs to five particular patients, the *Lague* opinion admittedly is no worse—although certainly no better—than many other circuit court opinions.[122] But *Lague* is an especially unfortunate opinion for at least two reasons. First, the appellate court chose to publish this part of its opinion.[123] Published opinions have become the exception rather than the norm in the federal courts of appeals.[124] Published opinions are important because they are "precedential," meaning that the court must follow them in future

119. *Id.* at 1038–39.

120. As reported by the appellate court: "Before trial, the government moved in limine seeking the admission of Lague's practice-wide prescription data during trial. The district court granted the motion, holding that the practice-wide evidence was probative of Lague's intent and knowledge to write the charged prescriptions without a legitimate medical purpose." *Id.* at 1036 n.4.

121. Although the purpose of this Article is to discuss how the *Lague* opinion's reasoning is deficient, the conclusion that the practice-wide evidence was properly admitted also seems incorrect. The practice-wide evidence does not seem to provide any information about whether the prescriptions Lague wrote for the five patients specified in the indictment were for a legitimate medical purpose, except to the extent that the practice-wide evidence presents Lague as having a propensity to write prescriptions without a legitimate medical purpose.

122. *See* cases cited *supra* notes 42–46.

123. The court addressed additional questions in an unpublished memorandum opinion. *See* United States v. Lague, 817 F. App'x 496 (9th Cir. 2020).

124. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020) ("Nearly 90% of merits decisions from the federal courts of appeals look nothing like what law students read in casebooks.").

cases, whereas unpublished opinions need not be followed.[125] Thus, the *Lague* opinion sets up a framework for future cases.[126]

Additionally, *Lague* weighed in on something of a circuit split regarding the admissibility of practice-wide evidence in prosecutions for unlawfully prescribing controlled substances.[127] In support of his argument that the practice-wide evidence should have been excluded, Lague cited *United States v. Jones*,[128] a 1978 case from the Eighth Circuit, which had found the admission of practice-wide data to be reversible error.[129] The government cited *United States v. Merrill*,[130] a 2008 case from the Eleventh Circuit, which had affirmed the admission of practice-wide data.[131] Although the parties suggested that the court could distinguish the cases,[132] the court disagreed, proclaiming that, "Simply put, *Merrill* and *Jones* are irreconcilable,"[133] and that "the Eleventh Circuit's opinion in *Merrill* better comports with the text and purpose of Rule 404(b)."[134]

However, the *Lague* opinion misconstrued the opinion it claimed to be following. The *Merrill* opinion stated that practice-wide evidence was properly admitted to prove a "plan, design, or scheme."[135] This makes sense because Merrill was charged with committing healthcare fraud involving multiple patients,[136] requiring the government to prove that Merrill had engaged in a fraudulent plan, design, or

125. *See* 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion."). Technically, in the Ninth Circuit unpublished opinions are called memoranda. *See* 9TH CIR. R. 36-1 ("A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM.").

126. The precedential value is presumably why the Ninth Circuit panel chose to publish the Rule 404(b) part of its opinion, while relegating its consideration of other issues to an unpublished memorandum. The court does not offer any explanation, stating only, "We resolve Lague's remaining evidentiary objections in a concurrently-filed memorandum disposition." United States v. Lague, 971 F.3d 1032, 1035 n.1 (9th Cir. 2020); *see* 9TH CIR. R. 36-3.

127. *Lague*, 971 F.3d at 1040.

128. 570 F.2d 765 (8th Cir. 1978).

129. *Id.* at 765.

130. 513 F.3d 1293 (11th Cir. 2008).

131. *Id.* at 1293.

132. *Lague*, 971 F.3d at 1039 ("Lague and the government ask us to distinguish the case before us from *Merrill* and *Jones* respectively.").

133. *Id.* at 1040.

134. *Id.*

135. *Merrill*, 513 F.3d at 1303.

136. *Id.* at 1301 ("The Government indicted Merrill for devising a scheme to defraud Medicaid and other insurance providers.").

scheme,[137] whereas Lague was charged with committing healthcare fraud regarding only a single patient.[138] But the Ninth Circuit wrote that *Merrill* decided that "the physician's practice-wide prescription data was admissible under Rule 404(b) because it tended to prove the intent element of the section 841(a) charges."[139] On this point, the *Lague* opinion is simply wrong—the *Merrill* opinion does not discuss "intent" as a possible permitted purpose for admitting the practice-wide evidence.[140] Moreover, the appellate court rejected Merrill's argument that the jury instructions had inadequately explained the intent and knowledge required for a conviction,[141] reasoning that because the standard for determining "the usual course of professional medical practice" is objective, the jury did not need to be instructed regarding Merrill's subjective knowledge or intent.[142]

Additionally, *Lague* determined that *Merrill* is irreconcilable with the decision of the Eighth Circuit in *United States v. Jones*.[143] In *Jones*, the government had argued that practice-wide evidence was admissible to prove the defendant's knowledge, but the appellate court recognized that proving knowledge was not really the government's purpose in admitting the evidence: "That Dr. Jones issued a great number of prescriptions for Schedule II drugs demonstrates familiarity, *i.e.*,

137. In its discussion of the practice-wide evidence, the *Merrill* court specifically references the fraud charges. *Id.* at 1303 ("[E]vidence of the quantity and combination of prescriptions Merrill wrote during the relevant period is directly related to the issue of whether Merrill committed health care fraud . . . ."). Moreover, the *Lague* court noted but summarily dismissed a decision of the Tenth Circuit, which had viewed the *Merrill* opinion's discussion of practice-wide evidence as limited to fraud cases: "We are similarly unpersuaded by the Tenth Circuit's suggestion that the holding in *Merrill* was limited to the fraud charges. *See United States v. MacKay*, 715 F.3d 807, 841 (10th Cir. 2013)." *Lague*, 971 F.3d at 1039 n.6, 1040. In *MacKay*, the Tenth Circuit concluded, "Because, in this case, the Government did not have to prove a scheme to defraud involving excessive amounts of drugs, *Merrill* is inapposite." *MacKay*, 715 F.3d at 841.

138. *Lague*, 971 F.3d at 1035 ("The government also charged Lague with seven counts of healthcare fraud and conspiracy to commit healthcare fraud for unlawfully prescribing fentanyl to MCM.").

139. *Id.* at 1039.

140. The *Merrill* opinion incudes the word "intent" only five times, only once with respect to Rule 404(b), and this one reference is simply quoting Rule 404(b)(2).

141. *Merrill*, 513 F.3d at 1305 ("Merrill argues that the court did not properly instruct the jury by failing to state that the Government must prove that Merrill knew and intended to act outside the course of professional medical practice.").

142. *Id.* at 1305–06 ("We find that the court did not commit plain error by not instructing the jury that the Government must prove that Merrill knew and intended to act outside the course of professional medical practice. . . . The appropriate focus is not on the subjective intent of the doctor, but rather it rests upon whether the physician prescribes medicine 'in accordance with a standard of medical practice generally recognized and accepted in the United States.'" (quoting United States v. Williams, 445 F.3d 1302, 1309 (11th Cir. 2006))).

143. *Lague*, 570 F.2d at 1040.

knowledge, concerning the usages of Quaalude. But the Government clearly did not introduce that evidence for such limited and proper purpose."[144] The appellate court concluded that the government had used the practice-wide evidence to improperly focus the jury's attention on the overall quantity of drugs prescribed rather than on the lawfulness of the drugs prescribed to the patients charged in the indictment.[145]

In *Lague*, the appellate court failed to consider whether the government used the practice-wide evidence for the limited and potentially proper purpose of proving intent. Rather than looking critically at the government's purpose for admitting the practice-wide evidence, as the court did in *Jones*, the *Lague* opinion asked only whether the evidence was "probative" of intent.[146] But probativeness of a non-character purpose is insufficient to establish admissibility under Rule 404(b). The purpose of Rule 404(b) is to exclude probative evidence if the evidence is probative because of an inference about character. The Ninth Circuit's opinion failed to consider whether the probative value of the practice-wide evidence depended upon an inference that *Lague* was the kind of person who intended to unlawfully prescribe controlled substances. The perfunctory analysis offered by the *Lague* opinion is far from the careful and precise analysis that some other circuit courts have recognized is required by Rule 404(b).

CONCLUSION

In *Lague*, the Ninth Circuit erred in determining that other-acts evidence was admissible under Rule 404(b) simply because it was probative of a non-propensity purpose. And the *Lague* opinion's misuse of both Rule 404(b)'s inclusive structure and its examples of permitted purposes further reflects a permissive approach that contravenes Rule

144. United States v. Jones, 570 F.2d 765, 768 (8th Cir. 1978).

145. *Id.* at 768–69. Other courts have concluded that evidence of prescriptions written for specific patients not included in the indictment were improperly admitted to prove that the prescriptions written for the patients included in the indictment were outside the bounds of legitimate medical treatment. *See* United States v. Brizuela, 962 F.3d 784, 798 (4th Cir. 2020) ("[T]he testimony about uncharged conduct was neither necessary to complete the story of the charged offenses, nor proper to show mistake or accident under Rule 404(b)(2). Consequently, we conclude that the district court abused its discretion in admitting the testimony of McCabe, Haraczy, Lively and Walker at trial.").

146. *Lague*, 971 F.3d at 1038 ("If Lague's aberrational prescription data is probative of his intent to prescribe the underlying, uncharged prescriptions without a legitimate medical purpose, there is a logical connection between the 'other' prescriptions and the charged prescriptions."); *see also id.* at 1040 ("Because the prescription data made the intent element of the section 841 charges more probable, the district court properly admitted Lague's uncharged prescriptions under Rule 404(b).").

404(b)'s absolute prohibition against the admission of other-acts evidence for the purpose of proving action in accordance with character. Recent decisions of the Third, Fourth, and Seventh Circuits have proven that the federal appellate courts can do better; perhaps with its next decision the Ninth Circuit will join them.