"Rule of Inclusion" Confusion

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TABLE OF CONTENTS

I. INTRODUCTION

Some rules of evidence are complex. The federal rules governing the admissibility of hearsay statements,[1] for example, include at least forty different provisions.[2] Numerous judges and scholars have commented on

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1. A hearsay statement is an out of court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c).

2. These include: FED. R. EVID. 801(c) (defining hearsay); FED. R. EVID. 801(d)(1)(A) (establishing exemption from the definition of hearsay for a declarant-witness's prior inconsistent statement); FED. R. EVID. 801(d)(1)(B) (establishing exemption from the definition of hearsay for a declarant-witness's prior consistent statement); FED. R. EVID. 801(d)(1)(C) (establishing exemption from the definition of hearsay for a declarant-witness's statement of identification); FED. R. EVID. 801(d)(2)(A)–(E) (establishing five

the complexity of the hearsay rules.[3] Not all rules of evidence are complex, however. For example, the federal rules governing the admissibility of character evidence[4] are relatively straightforward[5]: evidence that is offered for the purpose of proving character is inadmissible,[6] subject to a few

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exemptions from the definition of hearsay for party-opponent statements); FED. R. EVID. 802 (stating that hearsay is generally not admissible); FED. R. EVID. 803(1)–(23) (setting forth twenty-three exceptions); FED. R. EVID. 804(b) (setting forth four exceptions when declarant is unavailable); FED. R. EVID. 805 (addressing hearsay within hearsay); FED. R. EVID. 806 (addressing challenges to a hearsay declarant's credibility); FED. R. EVID. 807 (defining the residual exception).

3. *See, e.g.*, United States v. Simms, 757 F.3d 728, 731 (8th Cir. 2014) ("[T]he rules of evidence regarding hearsay are complex . . . ."); United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring) ("The 'hearsay rule' is too complex, as well as being archaic."); Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191, 1193 (2006) ("[T]he very complex theoretical issue of what constitutes hearsay" is one of two "difficult parts of the law of evidence."); W. Bradley Wendel, *Conflicts of Interest Under the Revised* Model Rules, 81 NEB. L. REV. 1363, 1364 (2003) (citing the hearsay rule and the rule against perpetuities as examples of rules that are "notoriously complex and subtle"). *But see* R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 737 (2000) ("Certainly, the evidentiary hearsay rule, along with its many exceptions, is commonly thought of as relatively complex. But even the hearsay rule cannot be complex in every respect." (footnote omitted)).

4. Character evidence is evidence that "refers to elements of one's disposition, 'such as honesty, temperance, or peacefulness,'" which shows "a propensity for acting in certain ways under certain conditions." United States v. Doe, 149 F.3d 634, 638 (7th Cir. 1998) (quoting United States v. West, 670 F.2d 675, 682 (7th Cir. 1982), *overruled on other grounds by* United States v. Green, 258 F.3d 683 (7th Cir. 2001)).

5. In certain cases, the application of Rule 404(b) can be legitimately complex. For example, in some cases it can be unclear whether other acts evidence is being offered for the purpose of proving character, and is therefore inadmissible under Rule 404(b), or whether the evidence is being offered for a non-character purpose, and is therefore not inadmissible under Rule 404(b). *See* United States v. Gomez, 763 F.3d 845, 855 (7th Cir. 2014) (en banc) ("The rule is straightforward enough, but confusion arises because admissibility is keyed to the *purpose* for which the evidence is offered, and other-act evidence is usually capable of being used for multiple purposes, one of which is propensity." (emphasis in original)). Additionally, whether evidence is "other acts" evidence is not always an easy question to answer. For example, courts have sometimes struggled to determine whether "background" evidence or "intertwined" evidence qualifies as evidence of "other acts" or is instead evidence of the currently charged act. *See, e.g.*, United States v. Holmes, 111 F.3d 463, 468 (6th Cir. 1997) ("In this case, it was not clear that the testimony involved other acts within the meaning of Rule 404(b)."). Although application of Rule 404(b) to the facts of some cases results in difficult questions, what the rule requires—exclusion of all other acts evidence offered for the purpose of proving character—is perfectly clear.

6. FED. R. EVID. 404(a)(1) ("Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); FED. R. EVID. 404(b)(1) ("Prohibited Uses. Evidence of a crime, wrong, or other 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."). Both of these provisions clearly state that character evidence is inadmissible.

well-defined exceptions.[7]

Despite this relative straightforwardness, many of the federal circuit courts of appeals have overlaid the rules regarding character evidence—particularly Rule 404(b)—with unnecessary interpretive heuristics, leading to evidentiary decisions that are contrary to the purpose of the rules. For example, many of the federal circuit courts of appeals have issued opinions implying or even explicitly asserting that the "inclusive" structure of Rule 404(b)[8] creates a "presumption of admissibility"[9]—when in fact the rule should be applied as "a rule of general exclusion."[10] As is discussed in more detail in Part II, the structure of Rule 404(b) is properly described as inclusive, meaning that the rule prohibits a specific kind of evidence if offered for one purpose but does not prohibit the evidence if offered for any other purpose.[11] In contrast, rules with an exclusive structure prohibit a specific kind of evidence except if offered for a permitted purpose.[12] The inclusive structure of Rule 404(b) has inspired numerous courts to engage in discussions about the rule being one of "inclusion" rather than "exclusion."[13] Although there is no real dispute that the structure of Rule 404(b) is properly considered inclusive, problems arise because courts use the inclusive structure of Rule 404(b) to create unwarranted and erroneous presumptions about the admissibility of other acts evidence.[14]

The focus of this Article is Rule 404(b) of the Federal Rules of Evidence, which prohibits the use of evidence of "crimes, wrongs, or other acts"—that is, evidence of "acts that are not part of the events giving rise to the present charges"[15]—for the purpose of proving that someone, usually

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7. *See, e.g.*, FED. R. EVID. 404(a)(2) ("Exceptions for a Defendant or Victim in a Criminal Case"); FED. R. EVID. 404(a)(3) ("Exceptions for a Witness"); FED. R. EVID. 413–15 (providing rules that allow for the use of character evidence in sexual assault cases).

8. These courts are correct in describing the structure of Rule 404(b) as inclusive, but the implications they draw from this structure are misleading. *See infra* Part II.

9. *See infra* Part III.

10. *See* United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014) ("Rule 404(b) is a rule of general exclusion . . . ."). Rule 404(b) is properly described as a rule of general exclusion, despite its inclusive structure, because the purpose of the rule is the exclusion of other acts evidence when offered to prove character.

11. *See infra* Part II.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. United States v. Gorman, 312 F.3d 1159, 1162 (10th Cir. 2002) (citing United States v. Record, 873 F.2d 1363, 1372 n.5 (10th Cir. 1989)).

a criminal defendant,[16] has a particular kind of character and was therefore likely to have acted in a particular way consistent with that character.[17] For example, the rule would prohibit the use of a criminal defendant's prior conviction for assault to prove that he is a violent person who likely committed a presently charged assault.[18] Rule 404(b) is an exceptionally important rule of evidence, especially for criminal defendants, because it is one of the rules that determines whether a criminal defendant's prior conviction is admissible.[19] The extreme and inherent unfair prejudice to criminal defendants that results from the admission of evidence of prior convictions is arguably the most problematic consequence of viewing

16. *See* United States v. Daniels, 932 F.3d 1120, 1124 (8th Cir. 2019) ("Rule 404(b) usually applies to the government's introduction of evidence against a defendant; however, it can also apply in the opposite direction where a defendant wishes to introduce evidence against a third party to exculpate himself." (citing United States v. Battle, 774 F.3d 504, 512 (8th Cir. 2014))); United States v. Alayeto, 628 F.3d 917, 921 (7th Cir. 2010) ("Rule 404(b) is most often used by prosecutors to introduce evidence of a criminal defendant's conduct that is not part of the charged crimes, but which is probative of the defendant's motive, intent, or identity with regard to the charged crime." (citing United States v. Reed, 259 F.3d 631, 634 (7th Cir. 2001))); United States v. Clark, 377 F. App'x 451, 458 (6th Cir. 2010) ("Disputes over the admissibility of evidence under Rule 404(b) usually concern evidence of a criminal defendant's past acts introduced by the prosecution."); United States v. Hayes, 219 F. App'x 114, 116 (3d Cir. 2007) ("The rule is usually applied in the context of prosecution attempts to introduce 'bad act' evidence against a defendant.").

Appellate courts have occasionally criticized prosecutors' overuse of other acts evidence. For example, the First Circuit has stated:

> Despite the fairness implications of the prosecution's use of prior bad act evidence, the prosecution too often pushes the limits of admissibility of this evidence, knowing its propensity power and gambling that the time constraints on the trial court, the court's broad discretion, the elasticity of Rule 404(b), and the harmless error rule of the appellate court, will save it from the consequences of overreaching.

United States v. Varoudakis, 233 F.3d 113, 125 (1st Cir. 2000).

17. Rule 404(b) states that "[e]vidence of any other crime, wrong, or other 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." FED. R. EVID. 404(b)(1).

18. *See, e.g.*, United States v. Sanders, 964 F.2d 295, 298–99 (4th Cir. 1992) (finding evidence of prior convictions for assault was inadmissible under Rule 404(b) to prove the defendant committed a different assault).

19. *See, e.g.*, United States v. Bowie, 142 F.3d 1301, 1305 (D.C. Cir. 1998) ("This circuit has long noted that the introduction of evidence of a prior conviction has the potential for grave mischief because of its tendency to divert 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." (internal quotation marks and alteration omitted) (quoting United States v. Jones, 67 F.3d 320, 322 (D.C. Cir. 1995))); 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.").

Rule 404(b) as a "rule of inclusion" that "presumes" the admission of other acts evidence.[20]

Rule 404(b) is currently the subject of much discussion among federal judges and academic commentators, as well as members of the federal rules of evidence advisory committee.[21] The current controversy about the rule stems from the perception that the federal circuit courts of appeals have set forth in their opinions approaches to Rule 404(b) that allow, if not encourage, federal district court judges to erroneously admit other acts evidence.[22] For example, the Seventh Circuit Court of Appeals recently issued an en banc opinion declaring that its previous approach to Rule 404(b) had been too permissive, and that it was henceforth requiring a more serious inquiry into the admissibility of other acts evidence.[23] The Third and Fourth Circuits have issued similar, if less definitive, panel opinions.[24] These circuit court opinions are joined by numerous law review articles observing that the admission of other acts evidence has become "routine" and "commonplace" and arguing for some sort of reform of Rule 404(b).[25]

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20. *See infra* Part III. Although the risk of unfair prejudice is the most important reason why admission of other acts evidence is disfavored, two other reasons are that the relevance of the other acts evidence is usually weak, because evidence that a person acted violently once in the past does little to prove that the person acted violently on any particular subsequent occasion, and that introduction of other acts evidence adds time and risks distracting the jury. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777–78 (1981).

21. Meeting Minutes from Advisory Comm. on Rules of Evidence 24 (May 3, 2019), https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf [https://perma.cc/Y9CE-KZ7S].

22. *See infra* Part IV.

23. United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014) (en banc) ("We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence."). For more discussion on *Gomez*, see *infra* Section IV.C.

24. *See* United States v. Repak, 852 F.3d 230, 241 (3d Cir. 2017); United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014); United States v. Hall, 858 F.3d 254, 277 (4th Cir. 2017). These cases are discussed *infra* Sections IV.A–B.

25. *See, e.g.*, Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 352 (2018) ("[T]he use of other-acts evidence has become incredibly common, if not the norm."); Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 1, 3 (2016) ("[C]ourt decisions resolving Rule 404(b) issues have been quite liberal in sustaining theories of admissibility advanced by prosecutors, despite the fact that such admission often violates the prohibition on the use of character evidence to prove conforming conduct."); Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application*

In 2017, the advisory committee considered several possible revisions to Rule 404(b) that would require greater scrutiny of other acts evidence to help ensure that district court judges exclude other acts evidence if offered to prove character.[26]

The purpose of this Article is to examine how federal circuit courts of appeals' references to the inclusive structure of Rule 404(b) have become counterproductive to a faithful application of the rule. Specifically, characterizing Rule 404(b) as a "rule of inclusion" has led courts to imply that the rule creates a presumption in favor of admissibility. As is discussed in Part II, the structure of Rule 404(b) is inclusive, to the extent that the rule prohibits other acts evidence for the purpose of proving propensity but does not prohibit other acts evidence if offered for another purpose. But as Part III demonstrates, many recent opinions of the federal circuit courts of appeals contain references to Rule 404(b)'s inclusive structure that are misleading because they suggest that "inclusive" means "presumed admissible." Part IV discusses recent cases from several federal circuit courts of appeals that recognize both the general problem of over-admitting other acts evidence, as well as the specific problem of referring to Rule 404(b) as a "rule of inclusion." Part V proposes that one way to improve the federal courts' application of Rule 404(b) is for the courts to shift their focus from the inclusive structure of the rule and instead focus on the exclusionary purpose of the rule.

II. RULE 404(B): A RULE OF INCLUSION OR EXCLUSION?

Prior to the adoption of the Federal Rules of Evidence in 1975, most jurisdictions had developed, either through legislation or judicial decision-making, rules of evidence that prohibited the admission of other acts

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of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent, 45 HOFSTRA L. REV. 851, 854 (2017) ("Most courts take a lenient attitude toward the admission of such [uncharged misconduct] evidence to prove intent."); Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 779 (2013) ("[E]vidence that reveals the defendant's criminal past is frequently admitted."); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 137 (1989) ("The thesis of this Article is that extrinsic crime evidence has become so overused that cases in which it is introduced have the ethos of a presumption of guilt rather than innocence."). The occasional judicial opinion also makes the point that district court judges are too lenient in applying Rule 404(b), allowing the admission of other acts evidence without sufficiently scrutinizing the proffered purpose. *See, e.g.*, *Gomez*, 763 F.3d at 853 ("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.'" (quoting United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012))).

26. *See Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 FORDHAM L. REV. 1517, 1522–50 (2017).

evidence except if offered for specifically permitted, non-character purposes.[27] Other acts evidence has long been recognized as harmful because of the risk that such evidence allows the government to prosecute—and juries to convict—people on the basis of "who they are rather than what they have done."[28] When offered against a criminal defendant, other acts evidence —especially evidence of a prior conviction—risks two kinds of unfair prejudice: first, that a jury will think that the defendant is the kind of person who engages in criminal conduct, and second, that a jury will think that the defendant is generally a bad person who deserves to be found guilty.[29]

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27. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1557 (1998); *see also* Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 303–04 (1982) ("The simple exclusionary rule persisted in this pristine form in most federal decisions until the adoption of the Federal Rules of Evidence."). As one scholar has explained:

> This inclusionary approach stands in contrast to the "traditional," exclusionary rule that would only admit what would otherwise be character evidence if its logical relevance fell within a list of well-defined exceptions. It has been argued that the exclusionary formulation of the character evidence rule is the only approach that is faithful to the origins of the rule, both in the common law of the United States and, even earlier, in the common law of England.

Melilli, *supra*, at 1557 (footnotes omitted).

28. *See Caldwell*, 760 F.3d at 276 ("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."); Wynne v. Renico, 606 F.3d 867, 873 (6th Cir. 2010) ("Rule 404(b) was born of the common law in an effort to protect parties from wrongful inferences derived from character evidence."); United States v. Curtin, 489 F.3d 935, 957 (9th Cir. 2007) (en banc) ("Because evidence of other crimes, wrongs, or acts carries with it the inherent potential to see the defendant simply as a bad person and then to convict because of who he is rather than what he did, a trial court must take appropriate care to see that this does not happen."); United States v. Linares, 367 F.3d 941, 945 (D.C. Cir. 2004) ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (quoting United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985))); United States v. Cruz-Garcia, 344 F.3d 951, 955 n.3 (9th Cir. 2003) ("404(b) is often thought to protect a defendant from being tried 'for who he is,' not for 'what he did.'" (quoting United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993))); United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972) ("Showing that a man is generally bad has never been under our system allowable. The defendant has a right to be tried on the truth of the specific charge contained in the indictment."); *see also* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 763 (1961) ("Evidence of the accused's past criminal history—prior convictions at trial, pleas of guilty, acquittals for technical reasons, arrests, and police or private suspicions—have traditionally been viewed with distrust in Anglo-American law.").

29. *See* United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) ("This rule codifies the common law doctrine forbidding the prosecution from asking the jury to infer from the fact that the defendant has committed a bad act in the past, that he has a bad character and

The historical approach to other acts evidence recognized these risks and limited admission of this evidence to specific non-character purposes.[30]

Rather than codifying the historical approach to character evidence and allowing other acts evidence to be admitted only for specific purposes, the Federal Rules of Evidence instead adopted a rule that makes other acts evidence inadmissible only for the purpose of proving action in accordance with character.[31] This change from an "exclusive" to an "inclusive" structure has been interpreted by many scholars as intended to make other acts evidence more broadly admissible—*but only* to the extent that under the "inclusive" rule, the proponent of other acts evidence need not "pigeonhole" the evidence into one of a limited number of permitted purposes but may seek admission of the evidence for the purpose of proving anything other than propensity.[32]

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therefore is more likely to have committed the bad act now charged. Although this 'propensity evidence' is relevant, 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—creates a prejudicial effect that outweighs ordinary relevance."); *see also* United States v. Phillips, 599 F.2d 134, 136 (6th Cir. 1979) ("Two concerns are expressed by the first sentence of Rule 404(b): (1) that the jury may convict a 'bad man' who deserves to be punished—not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged.").

30. *See* Melilli, *supra* note 27, at 1557.

31. *See id.*

32. *See* United States v. Green, 617 F.3d 233, 244 (3d Cir. 2010); Huddleston v. United States, 485 U.S. 681, 688–89 (1988); *see also* Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV. 271, 284 (1995) ("The legislative history . . . amply demonstrates that the intent of this rule is to admit more uncharged misconduct evidence than the old exclusionary approach." (citing EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:30 (1984). The Third Circuit has explained:

> In 1975, Congress adopted the Federal Rules of Evidence. . . . The rule codified the common law bar against the use of uncharged crimes to prove criminal propensity —albeit in a modified form. The common law rule was widely, though not universally, stated in "exclusionary" terms. That is, it set forth a general rule of inadmissibility, subject to exceptions, such as res gestae. By contrast, Rule 404(b) was "inclusionary." It stated a general rule of admissibility, subject to a single exception—evidence of other wrongful acts was admissible so long as it was not introduced *solely* to prove criminal propensity. Thus, the proponent no longer had to pigeonhole his evidence into one of the established common-law exceptions, on pain of exclusion. If he could identify *any* non-propensity purpose for introducing the evidence, it was admissible.

Green, 617 F.3d at 244 (citations omitted). Additionally, the Supreme Court has stated:

> The House made clear that the version of Rule 404(b) which became law was intended to "place greater emphasis on admissibility than did the final Court version." The Senate echoed this theme: "The use of the discretionary word 'may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." Thus,

Given the multitude of federal circuit court opinions that use the inclusive structure of Rule 404(b) to make unwarranted inferences about admissibility,[33] it cannot be stressed too strongly that even though the framework of the current rule was meant to make other acts evidence more readily admissible by allowing the evidence to be admitted for any non-prohibited purpose, the inclusive structure of the rule says nothing else about whether evidence in any particular case should be admitted.[34] As reflected in the opinions of the federal circuit courts of appeals, the current understanding of the rule as "inclusive" has expanded far beyond broadening the potential non-prohibited purposes, such that federal courts currently are using references to the inclusive structure of Rule 404(b) to suggest—or even, as in the Eighth Circuit, to assert explicitly—that this structure creates a presumption in favor of admitting other acts evidence.[35]

This Article accepts the premise that the inclusive structure of Rule 404(b) was meant to make other acts evidence more readily admissible, to the extent that evidence is not excluded by the rule so long as it is not offered for the single prohibited purpose of proving action in accordance with character. However, this structure should not be interpreted as any sort of presumption in favor of admissibility. Neither an inclusive structure nor an exclusive structure creates any presumption regarding admissibility. Regardless of structure, a trial judge should begin a 404(b) inquiry from the neutral position that if the evidence is offered for the purpose of proving propensity, it is inadmissible,[36] but if the evidence is offered for another purpose, it is not inadmissible under Rule 404(b)[37]—but of course could still be inadmissible under another rule, such as Rule 403.[38] The

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> Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence.

Huddleston, 485 U.S. at 688–89 (first citing H.R. REP. NO. 93-650, at 7 (1973); then citing S. REP. NO. 93-1277, at 24 (1974)).

33. *See infra* Part III.
34. *See generally* FED R. EVID. 404(b).
35. *See infra* Part III.
36. FED R. EVID. 404(b)(1).
37. FED R. EVID. 404(b)(2).
38. *See, e.g.*, FED R. EVID. 403. Rule 404(b) does not include consideration of unfair prejudice. *See* FED R. EVID. 404(b). Instead, whether other acts evidence is too unfairly prejudicial to be admitted depends on the application of Rule 403, which excludes evidence only when the probative value is substantially outweighed by the risk of unfair prejudice. FED. R. EVID. 403. The argument that the balancing test that Rule 403 provides is inadequate to protect against the unfair prejudice of other acts evidence has been

decision whether other acts evidence is admissible does not properly include any presumption that the evidence is offered for a permitted, non-propensity purpose. If any presumption were to properly apply, that presumption arguably should be that the evidence is inadmissible, given the inherent prejudice of all other acts evidence.[39]

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advanced by several scholars. *See, e.g.*, Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 820–21 (2018) (proposing a Rule 404(b)-specific revision that would require "the probative value of other acts offered against a criminal defendant to outweigh the potential for prejudice"); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1497 (1985) ("Before the judge admits evidence for such a purpose, the proponent of the evidence must persuade the judge that the probative value of the evidence outweighs the danger of unfair prejudice."); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 807 (1981) ("[T]his proposed balancing test would permit the admission of specific acts evidence only if its probative value outweighs the countervailing factors."); D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 356 (1989) (noting the "pro-admission bias of the present Rule 403" and proposing a general revision to Rule 403).

39. All other acts evidence is inherently prejudicial because even when admitted for a proper, non-propensity purpose, the risk is always present that a jury will make the prohibited propensity inference on its own. *See* United States v. Powell, 652 F.3d 702, 707 (7th Cir. 2011). As the Seventh Circuit explained: "The prior acts used to show intent to distribute narcotics are often prior drug dealings, and it can be easy for jurors to slide across Rule 404(b)'s slippery boundary between proper consideration of intent and improper consideration of propensity." *Id.* Many courts have recognized this inherent prejudice. *See, e.g.*, United States v. Nerey, 877 F.3d 956, 974 (11th Cir. 2017) ("Extrinsic evidence of a crime, wrong, or other act is inherently prejudicial to the defendant because it risks a jury's convicting the defendant for the extrinsic offense or conduct rather than the charged one."); United States v. Pierson, 544 F.3d 933, 940 (8th Cir. 2008) ("[A]ll Rule 404(b) evidence is inherently prejudicial . . . ." (quoting United States v. Cook, 454 F.3d 938, 941 (8th Cir. 2006))); United States v. Lucero, 601 F.2d 1147, 1149 (10th Cir. 1979) (referring to "the potential prejudice that is always inherent in evidence of a defendant's prior uncharged crimes or wrongs" (citing United States v. Carleo, 576 F.2d 846, 849 (10th Cir. 1978))); United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978) ("Even though such [other acts] evidence is relevant, because a man of bad character is more likely to commit a crime than one not, the principle prohibits such evidence because it is inherently prejudicial.").

Limiting instructions can potentially reduce this risk, but the efficacy of limiting instructions is uncertain. *See* United States v. Gomez, 712 F.3d 1146, 1162 (7th Cir. 2013) (Hamilton, J., dissenting) ("As a general matter, one can question how useful such limiting instructions are when a jury might easily slide toward the forbidden propensity inference in its use of Rule 404(b) evidence."); *see also* FED. R. EVID. 403 advisory committee's note to 1972 proposed rules (suggesting that courts consider "the probable effectiveness or lack of effectiveness of a limiting instruction").

When discussing other acts evidence, circuit court opinions occasionally misstate the Rule 403 balancing test as requiring that the probative value of other acts evidence outweigh the risk of unfair prejudice; these misstatements might be considered Freudian slips, betraying an unconscious recognition that the correct Rule 403 balancing test is inadequate as applied to other acts evidence. *See, e.g.*, United States v. Lin, 131 F. App'x 884, 887

The current approach of most federal circuit courts of appeals to the application of Rule 404(b) is flawed because these courts have used the inclusive structure of the rule as a basis for creating a presumption that other acts evidence is admissible.[40] The following sections examine this flawed approach.

III. MISCONSTRUING THE MEANING OF INCLUSION

A. Explicit Assertion of a Presumption

The most obviously incorrect use of Rule 404(b)'s inclusive structure to create a presumption of admissibility is found in the opinions of the Eighth Circuit Court of Appeals. These opinions explicitly assert that the inclusive structure of the rule creates a presumption in favor of the admissibility of other acts evidence. For example, one recent opinion states: "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.'"[41] Identical or nearly identical statements are found in numerous recent opinions.[42]

(3d Cir. 2005) ("Evidence that is properly admitted under Rule 404(b) must therefore be relevant to a proper purpose, and its probative value must outweigh the prejudice that is inherent in this kind of evidence." (citing United States v. Mastrangelo, 172 F.3d 288, 294 (3d Cir. 1999))); United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir. 1993) ("In determining whether evidence of Arambula's prior conviction was properly admitted under Rule 404(b), . . . we must analyze the evidence pursuant to Rule 403 and determine whether its probative value outweighs its prejudicial effect." (citing United States v. Houser, 929 F.2d 1369, 1373 (9th Cir. 1990))); United States v. Ismail, 756 F.2d 1253, 1259 (6th Cir. 1985) ("Before admitting prior acts evidence, the district court must determine that the evidence is admissible for a proper purpose and that the probative value of the evidence outweighs its potential prejudicial effects.").

40. *See* Capra & Richter, *supra* note 38, at 786 ("Appellate courts routinely start from a faulty premise that Rule 404(b) is a 'rule of inclusion,' which presumes admissibility of other-acts evidence.").

41. United States v. Johnson, 860 F.3d 1133, 1142 (8th Cir. 2017) (quoting United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005)).

42. *See, e.g.*, United States v. Davis, 867 F.3d 1021, 1029 (8th Cir. 2017) ("Rule 404(b) is a rule of inclusion, and, as such, if 'evidence is offered for permissible purposes it is presumed admissible absent a contrary determination.'" (quoting United States v. Horton, 756 F.3d 569, 579 (8th Cir. 2014))); United States v. Contreras, 816 F.3d 502, 511 (8th Cir. 2016) ("Rule 404(b) is one of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination." (quoting United States v. Williams, 796 F.3d 951, 958 (8th Cir. 2015))). District courts in the Eighth Circuit repeat this "presumption" language in their written rulings on motions *in limine*. *See, e.g.*, United States v. Lussier, No. 18-CR-281 (NEB/LIB), 2019 WL 2489906, at *1 (D. Minn. June 15,

The Eighth Circuit's often-repeated language connecting Rule 404(b)'s inclusive structure with a presumption of admissibility is an objectively incorrect interpretation of Rule 404(b). If other acts evidence is "offered for permissible purposes," then the evidence is not excluded by Rule 404(b)—but just because the evidence is not excluded by this rule does not mean that the evidence is "presumed admissible."[43] Rule 404(b) does not create any presumptions about admissibility; the rule simply excludes other acts evidence if offered to prove action in accordance with character while not excluding the evidence if offered for another purpose.[44]

The Eighth Circuit does perhaps try to qualify its assertion that Rule 404(b)'s inclusive structure creates a presumption of admissibility by adding the words "absent a contrary determination,"[45] but the intended effect of those words is unclear. A presumption generally can be overcome by a "contrary determination,"[46] so the court's failure to explain what it means by a "contrary determination" in this context leaves the reader with an essentially unqualified assertion that other acts evidence is "presumed admissible."[47]

The "presumed admissible" language in the Eighth Circuit's recent opinions is not accompanied by any further analysis of the rule to explain how or why this asserted presumption arises. The case in which the presumption language first appears, and which is still cited in support of current assertions of a presumption of admissibility, is the 2004 case *United States v. Smith*.[48] In this case, the court offered only a slightly more detailed explanation for its assertion that the inclusive structure of Rule 404(b)

2019) ("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. Johnson, 439 F.3d 947, 952 (8th Cir. 2006))); United States v. Vaca, No. 4:18-CR-00140-01-DGK, 2018 WL 6069171, at *1 (W.D. Mo. Nov. 20, 2018) ("Rule 404(b) is a rule of inclusion, and, as such, if evidence is offered for permissible purposes it is presumed admissible absent a contrary determination." (quoting *Davis*, 867 F.3d at 1029)); United States v. Monds, No. 4:17-cr-00170 – JEG, 2018 WL 9945328, at *2 (S.D. Iowa July 5, 2018) ("Rule 404(b) is a rule of inclusion, and, as such, if evidence is offered for permissible purposes it is presumed admissible absent a contrary determination." (alterations omitted) (quoting *Davis*, 867 F.3d at 1029)).

43. *Davis*, 867 F.3d at 1029.

44. *See* United States v. Gomez, 763 F.3d 845, 855 (7th Cir. 2014) (en banc) ("Rule 404(b) excludes relevant evidence of other crimes, wrongs, or acts if the purpose is to show a person's propensity to behave in a certain way, but other-act evidence may be admitted for 'another purpose' including, but not limited to, 'proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" (quoting FED. R. EVID. 404(b))).

45. *Davis*, 867 F.3d at 1029.

46. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 837 (2001) ("Presumptions, by their very nature, can be overcome by contrary evidence.").

47. *Davis*, 867 F.3d at 1029.

48. 383 F.3d 700 (8th Cir. 2004).

creates a presumption of admissibility.[49] In addressing the argument of Smith, who was appealing his conviction for possession of cocaine with intent to distribute, that the district court had erroneously allowed the government to present evidence that Smith had been involved in other uncharged drug transactions, the court stated:

> Because Rule 404(b) is a rule of inclusion, we presume that evidence of "other crimes, acts, or wrongs" is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the party seeking its exclusion can demonstrate that it serves only to prove the defendant's criminal disposition. Other crimes evidence is admissible if it is relevant to a material issue, the other crimes are similar and reasonably close in time to the charged crime, the evidence is sufficient to support a jury's finding that the defendant committed the other crimes, and the probative value of the evidence is not substantially outweighed by unfair prejudice.[50]

The court then proceeded to summarily reject Smith's argument that the district court erred in admitting the other acts evidence. Critically, the court failed to consider that the uncharged drug offenses might be relevant to the question whether Smith was guilty of the presently charged drug offense only because the evidence invited the jury to conclude that Smith was the kind of person who engaged in dealing drugs.[51] The *Smith* case thus suggests to district court judges in the Eighth Circuit that they should look only at the surface of other acts evidence and rely on the inclusive structure of Rule 404(b) to find that the evidence is admissible.[52] The district courts in the Eighth Circuit often repeat the "presumed admissible" language in their decisions regarding 404(b) evidence.[53] And underscoring the suggestion

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49. *Id.* at 706.

50. *Id.* (first citing United States v. Campa-Fabela, 210 F.3d 837, 840 (8th Cir. 2000); and then citing United States v. Carroll, 207 F.3d 465, 469 n.2 (8th Cir. 2000)). This case misstates the proper application of Rule 404(b) in an additional way: by asserting that the "party seeking exclusion" bears the burden of proving that the evidence is offered for a prohibited purpose. *Id.*; *see infra* notes 74–76 and accompanying text for discussion of similar burden shifting.

51. *See Smith*, 383 F.3d at 706 (asserting that the other acts evidence "was clearly relevant to a material issue (Smith's knowledge of drug dealing)").

52. *See infra* notes 74–76 and accompanying text.

53. *See, e.g.*, United States v. Lussier, No. 18-CR-281 (NEB/LIB), 2019 WL 2489906, at *1 (D. Minn. June 15, 2019) ("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. Johnson, 439 F.3d 947, 952 (8th Cir. 2006))); United States v. Vaca, No. 4:18-CR-00140-01-DGK, 2018 WL 6069171, at *1 (W.D. Mo. Nov. 20, 2018) ("Rule 404(b) is a rule of inclusion, and, as such, if evidence is offered for

that other acts evidence should be presumed admissible is the fact that the Eighth Circuit—like all of the federal circuit courts of appeals—rarely finds that a district court erred in admitting other acts evidence.[54]

B. Almost Explicit Assertions of a Presumption

Although the Eighth Circuit's "presumed admissible" language is the most obviously incorrect way that the federal circuit courts have misused Rule 404(b)'s inclusive structure to create a presumption of admissibility, several other federal circuit courts of appeals have come as close as possible to an explicit assertion of a presumption of admissibility without using the word "presumed." Instead, these courts have said that Rule 404(b) "favors the admission" or "emphasizes the admissibility" of other acts evidence.[55] The Third and Eleventh Circuits have used the "favors

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permissible purposes it is presumed admissible absent a contrary determination." (quoting United States v. Davis, 867 F.3d 1021, 1029 (8th Cir. 2017))).

54. Given the exceedingly deferential "abuse of discretion" standard of review that applies to trial judges' decisions to admit or exclude evidence, the appellate courts often decline to even engage in any meaningful analysis of these decisions. *See, e.g.*, United States v. Glecier, 923 F.2d 496, 503 (7th Cir. 1991) ("Appellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle."); United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982) ("Given the wide discretion permitted the district judge, it is fruitless to contend that the evidence was improperly admitted."); *see also* Lewis, *supra* note 38, at 343 ("The defendant aggrieved by the admission of unfairly prejudicial evidence has, of course, the right to appeal the ruling. However, the chance of success on the issue is remote."); Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1191, 1223–24 ("Because of the intensely factual nature of Rule 404(b) determinations, appellate review of such rulings is highly deferential to the trial court; appellate courts have variously characterized the trial court action needed to warrant a reversal as 'an abuse of discretion,' 'a clear abuse of discretion,' 'arbitrary,' or 'irrational;' admitting other acts evidence that 'has no bearing on any issue in the case' also warrants reversal.") (citing 2 EDWARD IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE § 9:81, at 9-232 to 9-234 (2003)).

Occasionally the appellate courts have referred to the inclusive structure of Rule 404(b) as linked to the abuse of discretion standard. *See, e.g.*, United States v. Stefanyuk, 944 F.3d 761, 764 (8th Cir. 2019) ("Rule 404(b) is a rule of inclusion; the district court has broad discretion to admit Rule 404(b) evidence."); United States v. Walker, 789 F. App'x 241, 244 (2d Cir. 2019) ("Trial courts have broad discretion in admitting evidence under this Court's inclusionary approach to Rule 404(b)." (citing United States v. Mercado, 573 F.3d 138, 141 (2d Cir. 2009))). Although such statements are correct to the extent that the district court almost always has "broad discretion" to admit evidence, this discretion has nothing to do with the inclusive structure of Rule 404(b).

55. *See* United States v. Carswell, 178 F. App'x 1009, 1013 (11th Cir. 2006) ("Rule 404(b) 'is a rule of inclusion.' Both the 'rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all.'" (citation omitted) (first quoting United States v. Baker, 432 F.3d 1189, 1204–05 (11th Cir. 2005); and then quoting Young v. Ill. Cent. Gulf R.R. Co., 618 F.2d 332, 337 (5th Cir. 1980))); United States v. DeMuro, 677 F.3d 550, 563 (3d Cir. 2012) ("Rule 404(b) is inclusive, not exclusive, and

admissibility" language in connection with Rule 404(b)'s structure to imply a presumption of admissibility.[56] For example, the Eleventh Circuit has stated: "Rule 404(b) 'is a rule of inclusion.' Both the 'rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all.'"[57] Similarly, the Third Circuit has stated:

> "We have recognized that Rule 404(b) is a rule of inclusion rather than of exclusion." And we favor the admission of other criminal conduct if such evidence is "relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."[58]

The Third Circuit is also the primary user of the "emphasizes admissibility" language.[59] For example, the court has stated: "Rule 404(b) is a rule of inclusion, not exclusion, which emphasizes the admissibility of other crimes evidence."[60]

As used most recently,[61] the "favors" and "emphasizes" language is disconnected from any historical context. However, these statements

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emphasizes admissibility." (quoting United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992))).

56. *See Carswell*, 178 F. App'x at 1013; *DeMuro*, 677 F.3d at 563.

57. *Carswell*, 178 F. App'x at 1013 (citations omitted) (first quoting *Baker*, 432 F.3d at 1204–05; and then quoting *Young*, 618 F.2d at 337).

58. United States v. Wiktorchik, 525 F. App'x 201, 204 (3d Cir. 2013) (citations omitted) (first quoting United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994); and then quoting United States v. Long, 574 F.2d 761, 765 (3d Cir. 1978)); *accord* United States v. Daraio, 445 F.3d 253, 263 (3d Cir. 2006) ("We have recognized that 'Rule 404(b) is a rule of inclusion rather than exclusion.' In general, we favor the admission of Rule 404(b) evidence when it is relevant for any other purpose than to show the defendant's propensity to commit the charged offense." (citations omitted) (quoting and citing United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003))); United States v. Cruz, 326 F.3d 392, 395 (3d Cir. 2003) ("We have recognized that Rule 404(b) is a rule of inclusion rather than exclusion. We favor the admission of evidence of other crimes, wrongs, or acts if such evidence is 'relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.'" (citations omitted) (quoting *Long*, 574 F.2d at 765)).

59. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 728 (3d Cir. 2013)

60. *Id.* (quoting Gov't of V.I. v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990)); *accord DeMuro*, 677 F.3d at 563 ("Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility.'" (quoting *Sampson*, 980 F.2d at 886)); United States v. Lee, 612 F.3d 170, 186 (3d Cir. 2010) ("Nevertheless, Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility.'" (quoting *Sampson*, 980 F.2d at 886)).

61. Both of these courts seem to have stopped using the "favors" and "emphasizes" language in recent opinions. Although the federal circuit courts have not used this language in recent cases, some district courts within these circuits have continued to use this language. *See, e.g.*, Naranjo v. Lowden, No. 17-1291, 2019 WL 2327708, at *2 (W.D. Pa. May 31,

about the implications of Rule 404(b)'s inclusive structure appear to have originated as part of extended discussions about the enactment of the rule in 1975,[62] and as presented within this context did not necessarily imply a presumption about the admissibility of other acts evidence. For example, the case that appears to have first used the inclusive structure of Rule 404(b) in connection with the "emphasizes admissibility" language is the 1978 case *United States v. Long*, decided by the Third Circuit.[63] In this case, the court wrote: "The draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion,' and not 'exclusion.' They intended to emphasize admissibility of 'other crime' evidence. This emerges from the legislative history which saw the 'exclusionary' approach of the Supreme Court version of Rule 404(b) modified."[64] In this context, it is possible to interpret the connection the court makes between the rule's inclusive structure and the emphasis on admissibility to mean that under the then-newly enacted rule, the proponent of the other acts evidence did not need to "pigeonhole" the evidence into a specific exception in order for the evidence to be admissible. In later cases, however, courts have used the "inclusive" and "emphasizes admissibility" language without providing any historical context,[65] with a resulting implication that the rule's inclusive structure means that other acts evidence should be presumed admissible. Examples of cases that illustrate the progression of the Third Circuit's use of this language include:

- From 1988: "The drafters contemplated that Rule 404(b) would be construed as a rule of 'inclusion' rather than 'exclusion.' 'They intended to emphasize admissibility of "other crime" evidence.' The possible uses of other crimes evidence listed in the Rule—motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake—are not the only proper ones."[66]
- From 1991: "The drafters intended that Fed. R. Evid. 404(b) be construed as a rule of 'inclusion' rather than one of 'exclusion' in order to emphasize the admissibility of other-acts evidence."[67]

2019) ("Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility.'" (quoting *DeMuro*, 677 F.3d at 563)).

62. *See Long*, 574 F.2d at 765–66.

63. 574 F.2d 761.

64. *Id.* at 766.

65. *See, e.g.*, *Ciavarella*, 716 F.3d at 728; *DeMuro*, 677 F.3d at 563.

66. United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988) (citations omitted) (first quoting *Long*, 574 F.3d at 766; and then quoting United States v. Simmons, 679 F.2d 1042, 1050 (3d Cir. 1982)).

67. Gov't of V.I. v. Harris, 938 F.2d 401, 419 (3d Cir. 1991) (citing *Long*, 574 F.3d at 766).

- From 2013: "Rule 404(b) is a rule of inclusion, not exclusion, which emphasizes the admissibility of other crimes evidence."[68]

C. Implicit Assertions of a Presumption

While the assertions that Rule 404(b) "presumes" or "favors" or "emphasizes" the admissibility of other acts evidence are the most directly misleading statements that the federal circuit courts of appeals have made about the rule's inclusive structure, the courts have also used other language in connection with "inclusive" to create a more subtle implication of admissibility. For example, opinions from most of the federal circuit courts of appeals have included statements that other acts evidence is admissible "unless" or "so long as" the "only" or "sole" purpose is not to prove propensity.[69] Such statements are potentially misleading because they imply that the starting point of a Rule 404(b) analysis is to assume that the evidence is admissible.[70]

One linguistic formulation that some of the federal circuit courts use that implies a presumption of admissibility is to state that other acts evidence is admissible "unless" propensity is the "only" purpose for which the evidence could have been admitted.[71] For example, the Eleventh Circuit recently stated: "We have explained that Rule 404(b) is a rule 'of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity.'"[72] The problem with this "unless . . . only" language is that it suggests that other acts evidence should be regarded as admissible unless the opponent of the evidence has proven that the evidence is relevant only for the prohibited purpose of proving propensity. Instead, the correct approach to Rule 404(b) should begin with the words of 404(b)(1) that "other acts evidence is inadmissible."[73] This evidence should remain inadmissible

68. *Ciavarella*, 716 F.3d at 728 (quoting Gov't of V.I. v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990)).

69. *See, e.g.*, United States v. Hano, 922 F.3d 1272, 1291 (11th Cir. 2019).

70. This implication is wrong because the starting point of a Rule 404(b) analysis should be that the other acts evidence is inadmissible and remains inadmissible unless the proponent can explain how the evidence is relevant to a non-propensity purpose, in a way that does not involve any inferences about character.

71. *See, e.g.*, *Hano*, 922 F.3d at 1291.

72. *Id.* (quoting United States v. Sanders, 668 F.3d 1298, 1314 (11th Cir. 2012)).

73. Rule 404(b)(1) states: "Prohibited Uses. Evidence of a crime, wrong, or other 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." FED. R. EVID. 404(b)(1).

unless the proponent can explain how the evidence is relevant to a non-propensity purpose, in a way that does not involve any inferences about character.

A statement that other acts evidence is admissible "unless" the opposing party persuades the district court judge that the evidence is being offered "only" for the prohibited purpose of proving character is problematic not only because it erroneously implies a presumption of admissibility but also because it reverses the burden of proof under Rule 404(b). It is generally agreed that under the Federal Rules of Evidence, the proponent of the evidence has the burden of proving that the requirements of admissibility are met.[74] With respect to Rule 404(b), this means that the proponent of other acts evidence has the burden of persuading the district court judge that the evidence is being offered for a non-propensity purpose.[75] The "admissible unless" language implicitly places the burden on the opponent of the evidence to persuade the district court judge that the evidence is being offered "only" for the prohibited purpose.[76]

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74. *See* DANIEL J. CAPRA, CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE 18–19 (2000), https://www.uscourts.gov/sites/default/files/caselawd_1.pdf [https://perma.cc/DP8T-EK6K] ("[I]n *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court held that the party seeking to admit the evidence—the proponent—generally has the burden of proving that the admissibility requirements set forth in the Federal Rules of Evidence are met."); United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014) ("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."); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.23(5)(b) (Mark S. Brodin, ed., 2d ed. 1997) ("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.").

75. Outside of the "unless . . . only" context, the federal circuit courts appear to agree that the proponent of the evidence has the burden to persuade the trial judge that the evidence is offered for a non-propensity purpose. *See, e.g.*, United States v. Jones, 930 F.3d 366, 373 (5th Cir. 2019) ("The burden is on the government to demonstrate that a 'prior conviction is relevant and admissible under 404(b).'" (quoting United States v. Wallace, 759 F.3d 486, 494 (5th Cir. 2014))); United States v. Fattah, 914 F.3d 112, 176 (3d Cir. 2019) ("As the party seeking admission of evidence under Rule 404(b), Vederman bore 'the burden of demonstrating its applicability' and 'identifying a proper purpose.'" (quoting *Caldwell*, 760 F.3d at 276)); United States v. Hall, 858 F.3d 254, 266 (4th Cir. 2017) ("The government bears the burden of establishing that evidence of a defendant's prior bad acts is admissible for a proper purpose." (citing United States v. Youts, 229 F.3d 1312, 1317 (10th Cir. 2000); United States v. Arambula-Ruiz, 987 F.2d 599, 602–03 (9th Cir. 1993))).

76. Courts referring to Rule 404(b) as inclusive occasionally explicitly switch the burden. *See, e.g.*, United States v. Roberson, 439 F.3d 934, 941 (8th Cir. 2006) ("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." (citing United States v. Hill, 410 F.3d 468, 471 (8th Cir. 2005))); United States v. Plumman, 409 F.3d 919, 928 (8th Cir. 2005) ("Because Rule 404(b) is a rule of inclusion, we presume that evidence of 'other

The risk that using the language of "admissible unless . . . only" will cause courts to place the burden of proving inadmissibility on the opponent of other acts evidence is illustrated by a statement of the Tenth Circuit, which wrongly reasoned that the adoption of Rule 404(b) changed the starting point for determining the admissibility of other acts evidence from "exclusion unless" proven admissible by the government to "admission unless" proven inadmissible by the defendant:

> We have commented before on the changes brought about by Rule 404 of the Federal Rules of Evidence, and noted the change from the starting position of exclusion "unless" to admission "unless." This is a significant change and is important in the examination of cases decided before the change in the Rules. The defendants have not demonstrated that any "unless" element is present to overcome the "admission."[77]

Of course, contrary to the Tenth Circuit's statement, the starting point remains "exclusion unless"; other acts evidence should be excluded unless the proponent of the evidence demonstrates that it is being offered for a non-propensity purpose. Or in the exact words of Rule 404(b)(1): "Prohibited Uses. Evidence of a crime, wrong, or other 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."[78] It is hard to imagine how the rule could be clearer that the starting point is "not admissible" than by starting with the words "prohibited uses."

An additional problem with the "unless . . . only" formulation is that the use of the word "only" implies that it will be the rare or exceptional case in which other acts evidence is being offered for the prohibited purpose.[79]

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crimes, acts, or wrongs' is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the party seeking its exclusion can demonstrate that it serves only to prove the defendant's criminal disposition." (quoting United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004))).

77. United States v. Naranjo, 710 F.2d 1465, 1467 (10th Cir. 1983) (quoting United States v. Tisdale, 647 F.2d 91, 93 (10th Cir. 1981)). The court additionally tied its perception that under the current rule, other acts evidence is "admissible unless" to the rule's inclusive structure: "Thus, Rule 404(b) is not exclusionary, and allows admission of uncharged wrongs unless they are introduced solely to prove a defendant's criminal disposition." *Id.* (citing United States v. Nolan, 551 F.2d 266, 271 (10th Cir. 1977)).

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

79. *See, e.g.*, United States v. Castiello, 915 F.2d 1, 4–5 (1st Cir. 1990) ("The most striking aspect of Evidence Rule 404(b) is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403." (quoting United States v. Zeuli, 725 F.2d 813,

This implication is inconsistent with the purpose of Rule 404(b), which is to broadly exclude evidence that risks jury verdicts that are based on assumptions about character.[80]

Statements that suggest to district court judges that because Rule 404(b) is "inclusive," they should presume that other acts evidence is admissible "unless" the "only" purpose for admitting the evidence is to prove character are found in the opinions of many federal circuit courts of appeals. The following list provides recent examples from the circuit courts of appeals that use this formulation most often:[81]

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816 (1st Cir. 1984))); United States v. Donovan, 984 F.2d 507, 512 (1st Cir. 1993) (referring to "the well-settled concept that Rule 404(b) is not to be read grudgingly").

80. *See* Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 678 (1993) ("Rule 404(b)'s high barriers to the admissibility of specific acts evidence were designed in order to protect the defendant from the grave 'risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad man deserves punishment.'" (quoting United States v. Shomo, 786 F.2d 981, 986 (10th Cir. 1986))).

81. The First Circuit has largely avoided the temptation to characterize Rule 404(b) as "inclusive," and indeed has recognized that whether the rule is "inclusive" or "exclusive" is essentially irrelevant. *See* United States v. Varoudakis, 233 F.3d 113, 125 n.11 (1st Cir. 2000) ("Because of its many exceptions to the general statement that prior bad act evidence should not be admitted, Rule 404(b) is sometimes understood as one of inclusion, and sometimes as one of exclusion. Whatever the proper formulation, the exceptions must not swallow the rule." (citations omitted)).

The Fourth Circuit has generally avoided using the "unless . . . only" language, although it has used other language to imply that Rule 404(b)'s inclusive structure creates a presumption of admissibility. *See* United States v. Briley, 770 F.3d 267, 275–76 (4th Cir. 2014).

The Fifth Circuit has largely avoided making the inclusive structure of Rule 404(b) a factor in its application of the rule, especially in recent cases. Some older cases do, though, use the inclusive structure of Rule 404(b) to suggest a presumption in favor of admissibility. *See, e.g.*, United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983) ("Rule 404 is a rule of inclusion, which admits evidence of other acts relevant to a trial issue except where such evidence tends to prove only criminal disposition. The rule is exclusionary only as to evidence admitted to establish bad character as such; it very broadly recognizes admissibility of prior crimes for other purposes." (citations omitted) (first citing United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978); and then citing United States v. Brown, 562 F.2d 1144, 1147 (9th Cir. 1977); United States v. Boyd, 595 F.2d 120, 126 (3d Cir. 1978))).

The Sixth Circuit has occasionally observed that 404(b) is a "rule of inclusion" but has not used that structure as a basis for implying a presumption in favor of admitting other acts evidence. *See, e.g.*, United States v. LaVictor, 848 F.3d 428, 446 (6th Cir. 2017) ("Rule 404(b) is a 'rule of inclusion rather than exclusion.'" (quoting United States v. Carney, 387 F.3d 436, 450 n.11 (6th Cir. 2004))).

The Seventh Circuit has avoided references to the structure of Rule 404(b).

The D.C. Circuit has avoided using the inclusive structure of 404(b) in its recent opinions, although some older opinions do use the structure to suggest a sort of presumption in favor of admissibility. *See, e.g.*, United States v. Linares, 367 F.3d 941, 946 (D.C. Cir. 2004) ("[W]e have described the rule as one 'of inclusion rather than exclusion,' and explained that it excludes only evidence that 'is offered for the sole purpose of proving that a person's actions conformed to his or her character.'" (first quoting United States v. Bowie, 232 F.3d

- Second Circuit: "Under our 'inclusionary' approach, all 'other act' evidence is generally admissible unless it serves the sole purpose of showing a defendant's bad character."[82]
- Third Circuit: "Rule 404 is a rule of inclusion rather than exclusion, and evidence should be admitted unless used merely to show propensity or disposition of the defendant to commit the crime."[83]
- Eighth Circuit: Rule 404(b) "is one 'of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition.'"[84]

923, 929 (D.C. Cir. 2000); and then quoting Unites States v. Long, 328 F.3d 655, 661 (D.C. Cir. 2003))); *Long*, 328 F.3d at 660–61 ("'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 *Bowie*, 232 F.3d at 929–30)).

82. United States v. Siddiqui, 699 F.3d 690, 702 (2d Cir. 2012) (citing United States v. Curley, 639 F.3d 50, 56 (2d Cir. 2011)); *see also* United States v. Flom, 763 F. App'x 27, 30 (2d Cir. 2019) ("This Court 'follows the "inclusionary" approach to "other crimes, wrongs, or acts" evidence, under which such evidence is admissible unless it is introduced for the sole purpose of showing the defendant's bad character, or unless it is overly prejudicial under Fed. R. Evid. 403 or not relevant under Fed. R. Evid. 402.'" (quoting United States v. Pascarella, 84 F.3d 61, 69 (2d Cir. 1996))); United States v. Memoli, 648 F. App'x 91, 93 (2d Cir. 2016) ("This Circuit has adopted an inclusionary approach to other act evidence under Rule 404(b), which allows such evidence to be admitted for any purpose other than to demonstrate criminal propensity." (quoting United States v. Scott, 677 F.3d 72, 79 (2d Cir. 2012))); United States v. Lasher, 661 F. App'x 25, 28 (2d Cir. 2016) ("This Circuit has adopted an inclusionary approach to other act evidence under Rule 404(b), which allows such evidence to be admitted for any purpose other than to demonstrate criminal propensity." (quoting *Scott*, 677 F.3d at 79); United States v. Graham, 504 F. App'x 63, 66 (2d Cir. 2012) ("Generally, 'we have adopted an inclusionary approach to evaluating Rule 404(b) evidence, which allows evidence to be received at trial for any purpose other than to attempt to demonstrate the defendant's criminal propensity.'" (quoting United States v. Edwards 342 F.3d 168, 176 (2d Cir. 2003))).

83. United States v. Smith, 505 F. App'x 149, 152–53 (3d Cir. 2012) (citing United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003); United States v. Moore, 375 F.3d 259, 264 (3d Cir. 2004)); *see also* United States v. Green, 617 F.3d 233, 244 (3d Cir. 2010) ("Rule 404(b) was 'inclusionary.' It stated a general rule of admissibility, subject to a single exception—evidence of other wrongful acts was admissible so long as it was not introduced *solely* to prove criminal propensity.").

84. United States v. Geddes, 844 F.3d 983, 989 (8th Cir. 2017) (quoting United States v. Oaks, 606 F.3d 530, 538 (8th Cir. 2010); *accord* United States v. Simon, 767 F.2d 524, 526 (8th Cir. 1985).

- Ninth Circuit: "As we have indicated in prior cases, Rule 404(b) is 'a rule of inclusion; unless the evidence of other crimes tends only to prove propensity, it is admissible.'"[85]
- Tenth Circuit: "We have held that Rule 404(b) is a rule of inclusion, and we regularly affirm the admission of other-acts evidence unless it tends to prove only a criminal propensity."[86]
- Eleventh Circuit: "Rule 404(b) is one of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity."[87]

Although the "unless . . . only" formulation is perhaps the most common way that the federal circuit courts have implied that the inclusive structure of Rule 404(b) creates a presumption of admissibility, the federal circuit courts have also offered other linguistic constructions that imply that the starting point of a Rule 404(b) analysis is a presumption that the evidence is admissible. The Tenth Circuit's most typical language is "all," "except," and "only."[88] For example, the court recently stated: "Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition."[89] The

85. Boyd v. City & County of San Francisco, 576 F.3d 938, 947 (9th Cir. 2009) (quoting United States v. Jackson, 84 F.3d 1154, 1159 (9th Cir. 1996)); *accord* United States v. Major, 676 F.3d 803, 808 (9th Cir. 2012) ("Rule 404(b) 'is a rule of inclusion—not exclusion.' 'Once it has been established that the evidence offered serves one of' the purposes authorized by Rule 404(b)(2), 'the only conditions justifying the exclusion of the evidence are those described in Rule 403.'" (quoting United States v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007) (en banc))); United States v. Fierro, 450 F. App'x 586, 587 (9th Cir. 2011) ("Rule 404(b) is a 'rule of inclusion' and 'unless the evidence of other crimes tends only to prove propensity, it is admissible.'" (quoting United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999))).

86. United States v. Williston, 862 F.3d 1023, 1035 (10th Cir. 2017) (citing United States v. Watson, 766 F.3d 1219, 1235 (10th Cir. 2014)); *see also* United States v. Smalls, 752 F.3d 1227, 1237 (10th Cir. 2014) ("This rule 'is one of inclusion, rather than exclusion, unless the evidence is introduced for the impermissible purpose or is unduly prejudicial.'" (quoting United States v. Segien, 114 F.3d 1014, 1022 (10th Cir. 1997), *overruled on other grounds as recognized in* United States v. Hathaway, 318 F.3d 1001, 1006 (10th Cir. 2003))).

87. United States v. Donelson, 797 F. App'x 496, 497 (11th Cir. 2019) (quoting United States v. Sanders, 668 F.3d 1298, 1314 (11th Cir. 2012)); *accord* United States v. Ruiz, 701 F. App'x 871, 874 (11th Cir. 2017) ("We have explained that 'Rule 404(b) is one of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity.'" (quoting *Sanders*, 668 F.3d at 1314)); United States v. Johnson, 615 F. App'x 582, 586 (11th Cir. 2015) ("Rule 404(b) is a rule of inclusion that 'allows extrinsic evidence unless it tends to prove only criminal propensity.'" (quoting *Sanders*, 668 F.3d at 1314)).

88. *See* cases cited *infra* note 89 and accompanying text.

89. *Watson*, 766 F.3d at 1235 (emphasis omitted) (quoting United States v. Burgess, 576 F.3d 1078, 1098 (10th Cir. 2009)); *accord* United States v. Henthorn, 864 F.3d 1241, 1248 (10th Cir. 2017) ("Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." (emphasis omitted) (quoting United States v. Brooks, 736 F.3d 921, 939 (10th Cir. 2013)));

Fourth Circuit has likewise stated: "We have observed generally that 'Rule 404(b) is a rule of inclusion, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.'"[90]

Another way that the federal circuit courts have misused the inclusive structure of Rule 404(b) to create an unwarranted presumption of admissibility is to use language like "permissive" and "admissible whenever." For example, in its 1998 en banc decision in *United States v. Crowder*, the D.C. Circuit wrote dismissively of Rule 404(b)(1)'s broad exclusionary purpose and characterized the rule as "permissive": "We have recognized before that although the first sentence of Rule 404(b) is 'framed restrictively,' the rule itself 'is quite permissive,' prohibiting the admission of other crimes evidence 'in but one circumstance'—for the purpose of proving that a person's actions conformed to his character."[91] Although *Crowder*

United States v. Yanez-Rodriguez, 632 F. App'x 442, 444 (10th Cir. 2015) ("Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." (emphasis omitted) (quoting *Burgess*, 576 F.3d at 1098)); United States v. McGlothin, 705 F.3d 1254, 1263 (10th Cir. 2013) ("Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." (quoting United States v. Tan, 254 F.3d 1204, 1208 (10th Cir. 2001))).

90. United States v. Barefoot, 754 F.3d 226, 236 (4th Cir. 2014) (quoting United States v. Moore, 709 F.3d 287, 295 (4th Cir. 2013); *accord* United States v. Reed, 708 F. App'x 773, 776 (4th Cir. 2017) ("Rule 404(b) is 'an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.'" (quoting United States v. Wilson, 624 F.3d 640, 651 (4th Cir. 2010))); United States v. Smith, 681 F. App'x 205, 208 (4th Cir. 2017) ("Rule 404(b) is a rule of inclusion, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." (quoting United States v. Byers, 649 F.3d 197, 206 (4th Cir. 2011))); United States v. Briley, 770 F.3d 267, 275 (4th Cir. 2014) ("As we have long maintained, the Rule's inclusive nature militates toward 'admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.'" (quoting United States v. Lespier, 725 F.3d 437, 448 (4th Cir. 2013))). It should be noted that these opinions were issued before or at about the same time as the opinion in *United States v. Hall*, which critically examined the issue of Rule 404(b)'s inclusive structure. 858 F.3d 254 (4th Cir. 2017). The *Hall* case is discussed *infra* Section IV.B.

91. 141 F.3d 1202, 1206 (D.C. Cir. 1998) (en banc) (quoting United States v. Jenkins, 928 F.2d 1175, 1180 (D.C. Cir. 1991)). In a 2000 case, the D.C. Circuit more explicitly connected "inclusive" and "permissive," writing:

> Rule 404(b) is a rule of inclusion rather than exclusion. "[A]lthough the first sentence of Rule 404(b) is 'framed restrictively', the rule itself is 'quite permissive,' prohibiting the admission of other crimes evidence 'in but one circumstance'—for the purpose of proving that a person's actions conformed to his character."

United States v. Bowie, 232 F.3d 923, 929–30 (D.C. Cir. 2000) (quoting *Crowder*, 141 F.3d at 1206).

is an older case, district court judges within the D.C. Circuit continue to quote this language in their recent rulings.[92] A variation of "permissive" is the Ninth Circuit's "admissible whenever": "We have uniformly recognized that the rule is one of inclusion and that other acts evidence is admissible whenever relevant to an issue other than the defendant's criminal propensity."[93]

Most of the federal circuit courts have used the inclusive structure of Rule 404(b) to assert or imply a presumption that other acts evidence is admissible. The Eleventh Circuit has used the inclusive structure of Rule 404(b) to additionally suggest a special presumption in favor of admissibility of other acts evidence offered against a criminal defendant.[94] For example, according to one recent opinion: "Rule 404(b) is characterized as a rule of inclusion, and thus, 404(b) evidence should not lightly be excluded when it is central to the prosecution's case."[95] To some extent, this statement

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92. *See, e.g.*, United States v. Zanders, No. 16-197 (RC), 2019 WL 6329400, at *1 (D.D.C. Nov. 26, 2019); United States v. Lieu, No. 17-0050 (RC), 2018 WL 5045335, at *5 (D.D.C. Oct. 17, 2018); United States v. Anderson, 174 F. Supp. 3d 494, 496 (D.D.C. 2016).

93. United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982). Although *Mehrmanesh* is an older case, it is routinely cited in current orders of district courts in the Ninth Circuit. *See, e.g.*, United States v. Rodriguez-Landa, No. 2:13-cr-00484-CAS, 2019 WL 653853, at *2 (C.D. Cal. Feb. 13, 2019); United States v. Brown, No. 2:17-cr-00047(A)-CAS, 2018 WL 739268, at *8 (C.D. Cal. Feb. 5, 2018); United States v. Govey, No. SACR 17-00103-CJC, 2018 WL 472796, at *1 (C.D. Cal. Jan. 17, 2018); United States v. Gaussiran, No. CR 16-00739-CJC, 2018 WL 735976, at *1 (C.D. Cal. Feb. 5, 2018).

94. *See* Capra & Richter, *supra* note 38, at 780.

95. United States v. Dotson, 660 F. App'x 757, 759 (11th Cir. 2016) (citing United States v. Jernigan, 341 F.3d 1273, 1280 (11th Cir. 2003)); *see also* United States v. Hunter, 758 F. App'x 817, 822 (11th Cir. 2018) ("This Court has previously observed that 'Rule 404(b) is a rule of inclusion' and relevant Rule 404(b) evidence 'like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case.'" (quoting *Jernigan*, 341 F.3d at 1280)); United States v. Clay, 700 F. App'x 898, 902 (11th Cir. 2017) ("Rule 404(b) is a 'rule of inclusion,' and so '404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case.'" (quoting *Jernigan*, 341 F.3d at 1280)); United States v. Scanes, 572 F. App'x 899, 901 (11th Cir. 2014) ("Nevertheless, Rule 404(b) is a 'rule of inclusion,' and relevant Rule 404(b) evidence should not lightly be excluded when it is central to the government's case." (quoting *Jernigan*, 341 F.3d at 1280)); United States v. Borja-Antunes, 530 F. App'x 882, 884 (11th Cir. 2013) ("Nevertheless, Rule 404(b) is a 'rule of inclusion', and relevant Rule 404(b) evidence 'should not lightly be excluded' when it is central to the government's case." (quoting *Jernigan*, 341 F.3d at 1280)); United States v. Floyd, 522 F. App'x 463, 465 (11th Cir. 2013) ("Rule 404(b) is a rule of inclusion, thus 404(b) evidence should generally be admitted when essential to establishing a case." (citing *Jernigan*, 341 F.3d at 1280)).

The Tenth Circuit has also occasionally made this same statement. *See, e.g.*, United States v. Roberts, 417 F. App'x 812, 819 (10th Cir. 2011) ("Rule 404(b) is a rule of inclusion, and accordingly 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case." (quoting *Jernigan*, 341 F.3d at 1280)). The origin of this statement seems to be a 1994 Eleventh Circuit case. *See* United States v.

simply reflects that most other acts evidence is offered by prosecutors against criminal defendants. On the other hand, this particular implied presumption is especially problematic because it is inconsistent not only with the general purpose of Rule 404, which is the exclusion of character evidence in all cases,[96] but is also inconsistent with what many commentators consider to be the most important function of the rule: helping to preserve the presumption of innocence for criminal defendants.[97] The presumption that other acts evidence is admissible because it is important to the government's case thus threatens the Rule 404(b) protection against the erroneous admission of other acts evidence in the very cases in which the protection is most needed.

IV. ACKNOWLEDGING THAT "INCLUSIVE" HAS BEEN MISUSED

Recently, several of the federal circuit courts of appeals have recognized that Rule 404(b) has wrongfully come to be viewed as a rule that allows other acts evidence to be freely admitted, in part because of a mistaken understanding of the inclusive structure of the rule. Specifically, both the Third and Fourth Circuit courts of appeals have issued several published opinions stating that the inclusive structure of Rule 404(b) should not be

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Perez-Tosta, 36 F.3d 1552, 1562 (11th Cir. 1994) ("The second sentence of rule 404(b) is a rule of inclusion, and 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case.").

96. FED. R. EVID. 404(a)(1).

97. United States v. McCallum, 584 F.3d 471, 474–75 (2d Cir. 2009) ("Evidence of prior convictions may be admissible under Federal Rule of Evidence 404(b) to show 'intent, knowledge, identity, or absence of mistake or accident,' but not to show character or propensity. Where prior convictions are concerned, the line between intent or knowledge and character or propensity is often a fine one, requiring the thoughtful, focused attention of the district court. The most important reason why this attention is required is that the introduction of prior convictions, unless carefully handled, will undermine the presumption of innocence." (citation omitted) (citing FED. R. EVID. 404(b))); *see also* United States v. Dockery, 955 F.2d 50, 53 (D.C. Cir. 1992) ("The exclusion of other crimes evidence is not simply a 'technicality' designed to prevent law enforcement personnel from doing their job; it reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." (quoting United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985))); United States v. Vance, 871 F.2d 572, 575 (6th Cir. 1989) ("By limiting the admission of bad acts evidence, Rule 404(b) therefore helps secure the presumption of innocence and its corollary 'that a defendant must be tried for what he did, not for who he is.'" (quoting United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977))); United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.").

interpreted as creating any sort of presumption in favor of the admissibility of other acts evidence.[98] Additionally, a Seventh Circuit en banc opinion drew attention to the generally problematic approach to Rule 404(b)'s application and provided a brief but exemplary discussion of the rule's structure.[99] These cases are examined in the following sections.

A. The Third Circuit

In a trilogy of impressive opinions, the Third Circuit recently recognized that its references to Rule 404(b)'s inclusive structure had sent the wrong message regarding the admissibility of other acts evidence. Prior to 2014, the Third Circuit's opinions had created an implicit presumption in favor of admitting other acts evidence based on the inclusive structure of Rule 404(b).[100] For example, the court had stated that "Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility'"[101] and that "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.'"[102]

In the 2014 case *United States v. Caldwell*, a unanimous panel of the Third Circuit ruled that during appellant Caldwell's jury trial on a charge of being a felon in possession of a firearm, the district court judge erroneously allowed the government to introduce evidence of Caldwell's prior convictions

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98. *See, e.g.*, United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014) ("Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'") (quoting 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:28, at 731 (4th ed. 2013)); United States v. Hall, 858 F.3d 254, 266 (4th Cir. 2017) ("[The] characterization of Rule 404(b) as a rule of inclusion does not render prior convictions presumptively admissible." (citing *Caldwell*, 760 F.3d at 276)).

99. United States v. Gomez, 763 F.3d 845, 856, 857 (7th Cir. 2014) (en banc).

100. *See, e.g.*, United States v. Lee, 612 F.3d 170, 182 (3d Cir. 2010); United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992).

101. United States v. DeMuro, 677 F.3d 550, 563 (3d Cir. 2012) (quoting *Sampson*, 980 F.2d at 886); *see also* 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 Gov't of V.I. v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990))); *Lee*, 612 F.3d at 186 ("Nevertheless, Rule 404(b) 'is inclusive, not exclusive, and emphasizes admissibility.'" (quoting *Sampson*, 980 F.2d at 886)).

102. United States v. Pete, 463 F. App'x 113, 116 (3d Cir. 2012) (quoting United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003)); *see also* United States v. Wiktorchik, 525 F. App'x 201, 204 (3d Cir. 2013) ("We have recognized that Rule 404(b) is a rule of inclusion rather than of exclusion. And we favor the admission of other criminal conduct if such evidence is 'relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime.'" (citation omitted) (first quoting United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994); and then quoting United States v. Long, 574 F.2d 761, 765 (3d Cir. 1978))).

for illegally possessing a firearm.[103] The government had argued, and the judge had accepted, that Caldwell's prior convictions were relevant to proving his "knowledge and intent" to possess a gun in the present case, even though in the present case Caldwell did not argue that his possession of a gun was unintentional or unknowing; his defense was that he did not possess a gun at all.[104]

The Third Circuit found that the evidence of the prior convictions should have been excluded under Rule 404(b).[105] In reaching this result, the court engaged in an extended discussion of the history and purpose of Rule 404(b), including the change, with the adoption of the Federal Rules of Evidence in 1975, from an "exclusive" rule, which prohibited other acts evidence for all purposes except those specifically allowed, to an "inclusive" rule, which prohibits other acts evidence for the purpose of proving propensity.[106] In the course of this discussion, the court stressed that the "inclusive" structure of the current rule should not be interpreted as creating any sort of presumption of admissibility: "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."[107]

Not only did the court state that the "inclusive" structure of the rule does not create a presumption of admissibility,[108] the court also stressed that Rule 404(b) is properly considered a rule of general exclusion: "On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'"[109] Finally, the court explained that understanding 404(b) as a rule of general exclusion is important for fulfilling the purpose of the rule, which is to ensure that criminal defendants receive fair trials: "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."[110] The court underscored the seriousness of the erroneous

103. *Caldwell*, 760 F.3d at 271.
104. *Id.* at 273–74.
105. *Id.* at 274.
106. *See id.* at 275–76.
107. *Id.* at 276 (citation omitted).
108. *Id.*
109. *Id.* (quoting 1 MUELLER & KIRKPATRICK, *supra* note 98, at 731).
110. *Id.* (emphasis omitted).

admission of other acts evidence by finding that the error in this case was not harmless.[111]

A few months after the *Caldwell* opinion, another panel of the Third Circuit issued its opinion in *United States v. Brown*,[112] which reinforced the court's commitment to replacing misleading language with careful analysis. In this case, Brown was charged with being a felon in possession of a firearm, and for the ostensible purpose of proving Brown's knowledge of firearms, the prosecutor was allowed to present evidence of Brown's prior conviction for a firearms offense.[113] The Third Circuit reasoned that Brown's general knowledge of firearms was irrelevant in this case because Brown did not claim that he lacked knowledge of firearms, nor was the government required to prove anything about Brown's general knowledge of firearms to obtain a conviction.[114] Further, the prior conviction was inadmissible to prove Brown's knowledge of the firearm in the present case because it relied on a kind of "once a gun dealer, always a gun dealer" inference, which is prohibited by Rule 404(b).[115] And as in *Caldwell*, the court underscored the seriousness of the erroneous admission of other acts evidence by finding that the error was not harmless, explaining: "In this case, the [other acts evidence] suggested to the jury that Brown was a bad actor with a history of gun crimes. This necessarily impugns his character and tends to impermissibly sway the balance in the Government's favor."[116]

In the 2017 case *United States v. Repak*,[117] the Third Circuit again demonstrated that a proper decision regarding the admission of other acts evidence requires attention to Rule 404(b)'s purpose, not its structure. In this case, Repak was charged with bribery and extortion.[118] The prosecutor was allowed to present evidence that Repak solicited additional bribes that were not included in the charged conduct, for the purpose of proving Repak's "corrupt intent" and "knowledge," as well as "background" and "context."[119]

On appeal, the Third Circuit framed its analysis of the Rule 404 question by stressing that the purpose of the rule is the exclusion of propensity evidence, stating: "While generally excluding evidence of an individual's 'other acts' to show that individual's propensity to behave in

111. *Id.* at 285.
112. 765 F.3d 278 (3d Cir. 2014).
113. *Id.* at 291.
114. *Id.* at 292.
115. *See id.* at 293 ("The first logical step in the Government's analysis requires the jury to conclude that because Brown used a straw purchaser in the past, he must therefore have used a straw purchaser here.").
116. *Id.* at 295.
117. 852 F.3d 230 (3d Cir. 2017).
118. *Id.* at 237.
119. *Id.* at 241–42.

a certain manner, Rule 404(b)(2) permits admission of other-acts evidence 'for another purpose . . . .'"[120] The opinion refers the rule as one of "general exclusion" several additional times.[121]

Perhaps the most important part of the court's opinion is its explanation, including the historical context, that Rule 404(b) is inclusive with respect to structure but exclusive with respect to the admissibility of other acts evidence:

> We clarified in *Caldwell* that this Court's past description of Rule 404(b) as "inclusionary," referred to Rule 404(b)(2)'s language allowing other-acts evidence to be used for any purpose other than to show propensity. That is, our 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.[122]

The court also reinforced that the proponent of other acts evidence has the burden of proving that the evidence is being offered for a proper, non-propensity purpose, stating that "the Government failed to articulate a chain of inferences supporting the admission of Repak's uncharged solicitations."[123]

B. The Fourth Circuit

In the 2017 case *United States v. Hall*, two judges of the Fourth Circuit explicitly recognized the potential harmfulness of characterizing Rule 404(b) as "inclusive."[124] In this case, the government was allowed to introduce evidence of Hall's prior possession with intent to distribute

120. *Id.* at 240 (quoting FED. R. EVID. 404(b)(2)).
121. *Id.* at 240 ("Rule 404(b) is a rule of general exclusion." (quoting United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014))); *id.* at 241 ("Because Rule 404(b) is a rule of general exclusion . . . ." (citing *Caldwell*, 760 F.3d at 276)).
122. *Id.* at 240–41 (citations omitted) (first quoting *Caldwell*, 760 F.3d at 276; and then quoting United States v. Green, 617 F.3d 233, 244 (3d Cir. 2010)).
123. *Id.* at 244.
124. 858 F.3d 254, 280 (4th Cir. 2017).

convictions, ostensibly for the purpose of proving Hall's knowledge of and intent to commit the presently charged possession with intent to distribute offenses.[125] On appeal, the government argued that the court should find that the admission of the evidence was not erroneous in part because "under [Fourth Circuit] precedent, Rule 404(b) is a rule of 'inclusion,' rendering the prior convictions presumptively admissible."[126]

The majority opinion rejected this argument, writing that "our characterization of Rule 404(b) as a rule of inclusion does not render prior convictions presumptively admissible."[127] The majority further explained:

> On the contrary, under 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.[128]

Finally, the court highlighted the significant prejudice inherent in other acts evidence by finding that the other acts evidence was admitted in error and that the error was not harmless:

> The district court's admission of Defendant's unrelated prior convictions to establish knowledge and intent . . . allowed the case to become . . . a case about Defendant's character as "a drug dealer." By admitting Defendant's prior convictions, the district court gave rise to the very scenario Rule 404(b) is designed to prevent and deprived Defendant of his right to be "tried for what he did, not who he is."[129]

Despite the powerful reasoning of the majority opinion, Judge Wilkinson wrote a combative dissent,[130] arguing:

> "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." "Consequently, we have construed the exceptions to the inadmissibility of prior bad acts evidence broadly, and characterize Rule 404(b) as an inclusive

125. *Id.* at 259, 260.
126. *Id.* at 276.
127. *Id.* at 277 (citing *Caldwell*, 760 F.3d at 276).
128. *Id.* (citing United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997); United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013)).
129. *Id.* at 288 (emphasis omitted) (quoting *Caldwell*, 760 F.3d at 276).
130. The dissenting opinion begins by stating that the majority opinion "demonstrates the encroachment of overactive appellate judging," *id.* at 288 (Wilkinson, J., dissenting), and ends with calling the two judges in the majority "dukes and earls of the appellate kingdom," *id.* at 294.

> rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition."[131]

This dissent's connection of the inclusive structure of Rule 404(b) with a permissive attitude toward admission of other acts evidence provides further proof that references to Rule 404(b) as "inclusive" can indeed cause jurists to infer that Rule 404(b) allows for other acts evidence to be "generally" or "broadly" admitted.

After *Hall*, the Fourth Circuit has to some extent reined in its misleading language regarding the implications of Rule 404(b) being a rule of inclusion,[132] although the court does continue to describe Rule 404(b) as a rule of inclusion and to follow statements about the rule's inclusive structure with language about other acts evidence being admissible so long as it is offered for a non-propensity purpose. For example, the court recently stated: "Rule 404(b) is a 'rule of inclusion,' and courts should allow the admission of evidence when it is '(1) relevant to an issue other than the general character of the defendant, (2) necessary, and (3) reliable.'"[133] At least one Fourth Circuit judge has noted that the court's use of the word "inclusive" remains potentially misleading; specifically, Judge Wynn—who wrote the majority opinion in *Hall*—wrote in a dissenting opinion in the 2019 case *United States v. Bell*:

> 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

131. *Id.* at 291 (citation and emphasis omitted) (first quoting United States v. Cabrera-Beltran, 660 F.3d 742, 755 (4th Cir. 2011); and then quoting United States v. Powers, 59 F.3d 1460, 1464 (4th Cir. 1995)).

132. *See* United States v. Talley, 767 F. App'x 477, 485 (4th Cir. 2019).

133. *Id.* (quoting United States v. Sterling, 860 F.3d 233, 246 (4th Cir. 2017)); *see also* United States v. Bell, 901 F.3d 455, 465 (4th Cir. 2018) ("It is thus a rule of inclusion because it 'recognizes the admissibility of prior crimes, wrongs, or acts, with only the one stated exception.'" (quoting *Queen*, 132 F.3d at 994)); United States v. Walker-Bey, 800 F. App'x 161, 164 (4th Cir. 2020) ("'Rule 404(b) is an inclusive rule,' and 'allows admission of evidence of the defendant's past wrongs or acts, as long as the evidence is not offered to prove the defendant's predisposition toward criminal behavior.'" (citation omitted) (first quoting United States v. Wilson, 624 F.3d 640, 651 (4th Cir. 2010); and then quoting *Sterling*, 860 F.3d at 246)). Thus, even after *Hall*, the Fourth Circuit opinions continue to describe Rule 404(b) as a rule of inclusion and to imply that the rule's inclusive structure means that the starting point of a Rule 404(b) analysis is that other acts evidence is admissible.

> majority opinion should not—and cannot—be read as holding that other bad acts evidence is presumptively admissible.[134]

Thus, while the *Hall* case was a large step in the right direction, more—such as, perhaps, an en banc opinion—remains to be done to correct the Fourth Circuit's approach to Rule 404(b).

C. The Seventh Circuit

Some of the credit for drawing attention to problems with the federal courts' approach to applying Rule 404(b) should go to the Seventh Circuit's 2014 en banc decision in *United States v. Gomez*.[135] This case was a sweeping reexamination of that court's approach to Rule 404(b), with the unanimous en banc court ruling that henceforth admissibility of other acts evidence requires an examination not only of the ultimate purpose for which the evidence is being admitted but also of whether the relevance of that purpose rests on a prohibited propensity inference.[136] In this case, the prosecutor had argued that Gomez's uncharged possession of a user-quantity of cocaine was relevant to the question whether he participated in the charged conspiracy to distribute cocaine; the prosecutor called this purpose "identity."[137] The Seventh Circuit explained, however, that the only way that the uncharged possession was relevant to the charged conspiracy was because it showed that Gomez was the kind of person who would possess cocaine, which is exactly the reasoning prohibited by Rule 404(b).[138] Under the Seventh Circuit's newly clarified approach to Rule 404(b), admissibility requires that the other acts evidence be relevant to a non-propensity purpose "without

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134. *Bell*, 901 F.3d at 474 n.1 (Wynn, J., dissenting) (citations omitted) (quoting *Hall*, 858 F.3d at 266, 276–77).

135. 763 F.3d 845 (7th Cir. 2014) (en banc).

136. *Id.* at 850, 856 ("We reheard the case en banc to clarify the framework for admitting other-act evidence. We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence. . . . [T]he 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."). Although the Seventh Circuit has received attention for its recognition that a four-factor test is inferior to requiring the articulation of propensity-free inferences, circuit courts have tried to require such inquiry in the past. *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." (citing United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994))).

137. *Gomez*, 763 F.3d at 852.

138. *Id.* at 863 ("In the end, the government offers no theory other than propensity to connect the cocaine found in Gomez's bedroom to his identity as Guero, Romero's coconspirator.").

relying on a propensity inference."[139] Thus, "Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established only through the forbidden propensity inference."[140]

Although the en banc *Gomez* opinion does not directly address the problematic characterization of Rule 404(b) as a "rule of inclusion," the court does briefly discuss the structure of the rule in a way that other courts that feel compelled to comment on the structure of the rule might follow. The opinion's discussion of Rule 404(b)'s structure begins with the observation that "A common misconception about Rule 404(b) is that it establishes a rule of exclusion subject to certain exceptions."[141] The opinion then explains that the rule's structure—which the opinion avoids labelling "inclusive"—makes propensity evidence "categorically inadmissible."[142] The opinion further explains that the examples of non-prohibited purposes listed in 404(b)(2) do not create "exceptions" to this general principle of inadmissibility but instead simply illustrate when Rule 404(b) does not apply.[143] The court's discussion of the structure of Rule 404(b) thus correctly suggests that non-application of Rule 404(b) does not create any presumption in favor of admissibility of other acts evidence even when offered for a non-prohibited purpose;[144] instead, other acts evidence offered for a non-prohibited purpose is simply not excluded by Rule 404(b), and admissibility —far from being "presumed"—is dependent on the operation of the other rules of evidence.

D. Other Circuits

Although none of the other federal circuit courts of appeals have recently engaged in the kind of thorough reassessment of Rule 404(b) that is found in the recent opinions from the Third, Fourth, and Seventh Circuits, some others have cautioned that the inclusive structure of Rule 404(b) should not be considered a reason to admit other acts evidence. For example, the Second Circuit has not explicitly recognized that its references to Rule 404(b) as a "rule of inclusion" have been misleading; however, the court has occasionally followed such references with a caution that Rule 404(b)'s

139. *Id.* at 856.
140. *Id.* (emphasis omitted).
141. *Id.* at 855 n.3.
142. *Id.* (emphasis omitted) (citing FED. R. EVID. 404(b)(1)).
143. *Id.*
144. *See id.* at 856.

inclusive structure "is not a carte blanche" to admit other acts evidence.[145] For example, the court has stated:

> This Circuit has adopted an "inclusionary" approach to other act evidence under Rule 404(b), which allows such evidence to be admitted for any purpose other than to demonstrate criminal propensity. We have, however, emphasized that this inclusionary rule is not a carte blanche to admit prejudicial extrinsic act evidence when, as here, it is offered to prove propensity.[146]

In an older opinion, the Third Circuit similarly stated: "The fact that Rule 404(b) operates as a rule of inclusion as opposed to operating as a rule of exclusion does not open the flood gates to evidence that is relevant only to establish a defendant's bad character."[147] The Fourth Circuit, also in an older opinion, stated: "Manifestly the Rule, even though correctly described as 'inclusionary,' does not permit the automatic admission of any evidence of other 'crimes, wrongs or acts.'"[148]

Such statements suggest that the courts themselves realize that their references to the rule's inclusive structure risk sending the wrong message, which they are trying to correct with these cautions. However, given that the purpose of this rule is to exclude inherently prejudicial evidence, phrases such as "not carte blanche,"[149] "not opening the flood gates,"[150] and "not automatic"[151] seem rather begrudging acknowledgements that despite Rule 404(b)'s inclusive structure, other acts evidence is not admissible unless the proponent of the evidence proves that it is being offered for a non-propensity purpose.

V. SHIFTING THE FOCUS FROM STRUCTURE TO PURPOSE

In 1975, when the Federal Rules of Evidence were enacted, the structure of Rule 404(b) might have been relevant to the question, in any given case,

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145. *See* United States v. Scott, 677 F.3d 72, 79 (2d Cir. 2012).

146. *Id.* (citation omitted) (citing United States v. LaFlam, 369 F.3d 153, 156 (2d Cir. 2004) (per curiam)); *accord* United States v. Gracesqui, 730 F. App'x 25, 29 (2d Cir. 2018) ("We have, however, emphasized that this inclusionary rule is not a carte blanche to admit prejudicial extrinsic act evidence when it is offered to prove propensity." (quoting *Scott*, 677 F.3d at 79)); United States v. Ortiz, 536 F. App'x 127, 128 (2d Cir. 2013) ("We have, however, emphasized that this inclusionary rule is not a carte blanche to admit prejudicial extrinsic act evidence when it is offered to prove propensity." (quoting *Scott*, 677 F.3d at 79)); United States v. McCallum, 584 F.3d 471, 475 (2d Cir. 2009) ("Yet this inclusionary approach does not invite the government 'to offer, carte blanche, any prior act of the defendant in the same category of crime.'" (quoting United States v. Garcia, 291 F.3d 127, 137 (2d Cir. 2002))).

147. United States v. Morley, 199 F.3d 129, 139 (3d Cir. 1999).

148. United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980).

149. *Scott*, 677 F.3d at 79.

150. *See Morley*, 199 F.3d at 139.

151. *Masters*, 622 F.2d at 86.

whether other acts evidence should be admitted.[152] But today, the inclusive structure of Rule 404(b) is well known; district court judges are not excluding other acts evidence under the mistaken impression that the evidence must fit into any particular exception to Rule 404(b). Instead, the mistake that district court judges are making—consistent with the circuit courts' misleading suggestions that because Rule 404(b) is a "rule of inclusion," other acts evidence should be "presumed admissible"—is failing to exclude other acts evidence when the proponent has not established why and how the evidence is relevant to proving an issue other than propensity.

Perhaps the easiest way to avoid implying unwarranted presumptions on the basis of Rule 404(b)'s inclusive structure is simply to avoid any references to that structure. Although courts that were applying Rule 404(b) shortly after its adoption in 1975 might have had a good reason for discussing the rule's structure, there is no good reason why the federal courts should still today be referring to the rule as inclusive. The fact that the rule is inclusive only means that the proponent of other acts evidence need not "pigeonhole" the evidence into any particular non-propensity exception; otherwise, the rule's inclusive structure is meaningless to a proper application of the rule. As the First Circuit once observed: "Rule 404(b) is sometimes understood as one of inclusion, and sometimes as one of exclusion. We ourselves have used both formulations. Whatever the proper formulation, the exceptions must not swallow the rule."[153] As this statement suggests, whether the rule is properly labelled inclusive or exclusive makes no difference to the proper application of the rule. Similarly, a district court judge in the Third Circuit—following the *Caldwell, Brown,* and *Repak* cases—insightfully observed: "Regardless of whether Rule 404(b) is one of 'inclusion' or 'exclusion,' it is clear to me that it is a rule of precision, requiring a proponent to articulate a specific, non-prohibited purpose for the evidence, which in practical terms, means a purpose other than propensity."[154]

Despite the many references to Rule 404(b) as a "rule of inclusion," many other opinions demonstrate that it is quite possible to accurately describe what the rule does and does not prohibit using language that avoids

152. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975).
153. United States v. Varoudakis, 233 F.3d 113, 125 n.11 (1st Cir. 2000) (citations omitted).
154. United States v. York, 165 F. Supp. 3d 267, 269 (E.D. Pa. 2015) (emphasis omitted).

creating an unwarranted presumption of admissibility. Examples of Rule 404(b) descriptions that avoid referring to the rule's structure include:

- The Second Circuit: "Federal Rule of Evidence 404(b) generally excludes evidence of other crimes offered 'to prove the character of a person in order to show that he acted in conformity therewith,' except that such evidence may be admissible for 'other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"[155]
- The Seventh Circuit: "Federal Rule of Evidence 404(b) generally excludes the introduction of bad acts 'to show that a defendant has a propensity to commit a crime and that he acted in accordance with that propensity on the occasion in question.' Bad acts evidence may be admitted, however, for other purposes, such as to show intent, knowledge, lack of mistake, motive, or opportunity."[156]
- The D.C. Circuit: "While Rule 404(b) of the Federal Rules of Evidence generally excludes evidence of 'other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith,' it permits such evidence for such purposes as proving 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"[157]

A reference to the rule's inclusive structure would not add anything helpful to these descriptions and would risk creating the unwarranted inference that "inclusive" means "presumed admissible."

For courts that feel compelled to refer specifically to the "inclusive" structure of Rule 404(b), it is important to also point out how the rule is "exclusive." For example, the Third Circuit has stated: "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."[158]

This approach is somewhat risky in that it requires careful drafting to ensure that the precise meanings of "inclusive" and "exclusive" within the

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155. United States v. Wiley, 846 F.2d 150, 155 (2d Cir. 1988) (quoting FED. R. EVID. 404(b)).

156. United States v. Leahy, 464 F.3d 773, 797 (7th Cir. 2006) (citation omitted) (quoting United States v. Chavis, 429 F.3d 662, 667 (7th Cir. 2005)).

157. United States v. Garces, 133 F.3d 70, 76 (D.C. Cir. 1998) (quoting FED. R. EVID. 404(b)).

158. United States v. Repak, 852 F.3d 230, 241 (3d Cir. 2017).

context of Rule 404(b) are stated accurately. For example, this statement from a Ninth Circuit opinion is somewhat inaccurate, to the extent that Rule 404(b)'s subsections are not separate rules:

> Subsection (1) is a rule of exclusion, establishing that "evidence of a crime, wrong, or other 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." Subsection (2) is a rule of inclusion, allowing discretionary admission of evidence of acts extrinsic to the crime charged for a purpose other than to prove character, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[159]

This statement could be revised to more accurately say that "subsection (1) reflects Rule 404(b)'s exclusionary purpose" and "subsection (2) reflects the rule's inclusionary structure." However, the technical inaccuracy of this statement is preferable to the substantively misleading characterization of the whole of Rule 404(b) as "a rule of inclusion."

VI. CONCLUSION

Many observers of the federal courts believe that in too many cases, other acts evidence is being admitted for the improper purpose of proving propensity. There are likely several reasons for this failure of federal district court judges to exclude other acts evidence that lacks a proper purpose; this Article has argued that one reason is that the federal circuit courts of appeals are referring to the inclusive structure of Rule 404(b) in ways that imply a presumption of admissibility.

Because of the likelihood that circuit courts' references to the inclusive structure of Rule 404(b) are contributing to the unwarranted admission of other acts evidence, this Article has proposed that courts stop referring to the rule as inclusive, or if they cannot give up such references, that they make clear that the rule is inclusive only with respect to structure but not with respect to purpose. With respect to purpose, Rule 404(b) is a rule of absolute exclusion; it exists to exclude all other acts evidence that is offered for a propensity purpose. Regarding Rule 404(b) as a rule of exclusion might help turn the tide against the unwarranted admission of other acts evidence when such evidence lacks a proper non-propensity purpose.

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159. United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015) (footnote omitted) (quoting FED. R. EVID. 404(b)(1)–(2)).