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2018

## Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants

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# CHARACTER ASSASSINATION: AMENDING FEDERAL RULE OF EVIDENCE 404(B) TO PROTECT CRIMINAL DEFENDANTS

*Daniel J. Capra\* & Liesa L. Richter\*\**

*There is a war raging over the admissibility of the prior bad acts of criminal defendants in federal trials. While many circuits treat Federal Rule of Evidence 404(b) as a rule of “inclusion” and liberally admit such prior bad-acts evidence with predictably explosive effects on criminal juries, a few circuits are developing rigorous standards designed to foreclose prosecutorial use of such bad-acts evidence. This Article chronicles the well-documented permissive admission of the prior bad acts of criminal defendants notwithstanding the prohibition on such evidence by Federal Rule of Evidence 404(b)(1), as well as recent efforts by some federal circuits to restrict such evidence. In light of these contemporary developments, the Judicial Conference Advisory Committee on Evidence Rules is currently considering amendments to Federal Rule of Evidence 404(b) to restore the intended exclusionary purpose of the Rule. This Article details several drafting alternatives being considered by the Committee, as well as the likely costs and benefits of each, and proposes a simple and elegant fix for what ails Rule 404(b)—a more protective balancing test that admits the prior bad acts of criminal defendants only when their probative value outweighs any unfair prejudice to the defendant. Tipping the scale in favor of exclusion of prior bad-acts evidence would restore the protective purpose of Rule 404(b), while continuing to permit the government to admit such evidence in appropriate and necessary circumstances. This balance would bring Rule 404(b) into alignment with existing Federal Rule of Evidence 609, which allows the felony convictions of testifying criminal defendants to be admitted for impeachment purposes only when their probative value outweighs unfair prejudice. This Article takes on the thorny contemporary issues surrounding the admissibility of prior bad-acts evidence and identifies the optimal amendment to Federal Rule of Evidence 404(b). This amendment would resolve the current conflict among the federal circuits and restore the prohibition on trial by character, which is a cornerstone of the American criminal process.*

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## INTRODUCTION

"[E]very man is entitled to be valued by his best moment."<sup>1</sup>

Ralph Waldo Emerson

Imagine a routine traffic stop in which officers decide to search the vehicle due to suspected drug activity. Rather than submitting to the search, the occupant of the vehicle drives off, leading officers on a high-speed chase. Brought to a stop by a tactical maneuver, the suspect flees on foot into the woods and evades capture. A subsequent search reveals distribution quantities of cocaine, large amounts of cash, and loaded weapons in the vehicle. Almost two years later, a suspect is arrested and charged with drug offenses resulting from the cocaine found in the car. His sole defense at trial is that the prosecutor has the wrong man and that he was not the occupant of the vehicle. In response, the prosecutor seeks to introduce the defendant's dissimilar, unrelated ten-year-old prior conviction for possession of cocaine with intent to distribute. The

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1. 6 Ralph Waldo Emerson, *Conduct of Life*, in *The Complete Works of Ralph Waldo Emerson* 1, 287 (1904).

defense objects: “You can’t use his prior offenses to prove he is a drug-dealing sort—nothing about this prior conviction helps resolve the only real dispute in this case, which is about the identity of the perpetrator.” The trial judge overrules the objection and the defendant is convicted in connection with the traffic-stop incident. Of course he is—because what jury could ignore the fact that he had “done it before”? On appeal, the defendant’s conviction is affirmed by the appellate court in a cursory opinion which concludes that there was no abuse of discretion in the trial court’s admission of the defendant’s prior conviction to show his “knowledge” and “intent.”

In reality, there is no need to use any imagination whatsoever to develop this scenario—it is one that is consistently replayed in legions of cases in the federal reporters, particularly in federal drug prosecutions.<sup>2</sup> Although every capable attorney knows that past misdeeds are not admissible to prove a defendant’s criminal conduct, the truth is that Federal Rule of Evidence 404(b) is used to admit evidence of other crimes, wrongs, and acts in criminal trials every day. In fact, Federal Rule of Evidence 404(b) is the most frequently utilized and cited rule of evidence and “has generated more published opinions than any other subsection of the rules.”<sup>3</sup>

The prohibition on character evidence is a time-honored tenet of evidence law. The American adversary system was designed to convict defendants based upon their conduct and not based on their general character or past misdeeds. Rule 404(b) was designed to further this purpose as a rule of exclusion, prohibiting evidence of uncharged acts offered to prove a person’s character (most often the criminal defendant’s character) in order to demonstrate his or her conduct on the occasion in question.<sup>4</sup> To accommodate cases in which a defendant’s other acts may be probative for another *noncharacter* purpose, Rule 404(b)(2) expressly authorizes admission of other-acts evidence to prove matters like motive, opportunity, intent, preparation, plan, knowledge,

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2. See, e.g., *United States v. Smith*, 789 F.3d 923, 929–30 (8th Cir. 2015) (affirming admission of defendant’s eight-year-old conviction for possession of cocaine with intent to distribute to prove “knowledge” and “intent”).

3. 1 Edward J. Imwinkelried et al., *Courtroom Criminal Evidence* § 901, LexisNexis (6th ed. 2016) [hereinafter Imwinkelried et al., *Courtroom Criminal Evidence*]. The Advisory Committee has made similar findings:

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused’s extrinsic acts is viewed as an important asset in the prosecution’s case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., *United States v. McClure*, 546 F.2d 670, 672–73 (5th Cir. 1990) (acts of informant in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

Fed. R. Evid. 404(b) advisory committee’s note to 1991 amendment.

4. Fed. R. Evid. 404(b)(1).

identity, absence of mistake, or lack of accident.<sup>5</sup> For example, evidence that a criminal defendant stole a key that was used to gain access to a business he is charged with robbing would be admissible during his robbery prosecution to prove preparation. In such a case, the theft of the key is not relevant solely because it shows the defendant's criminal tendencies; rather it is crucial to demonstrate his ability to commit the charged robbery.

Notwithstanding its origins as part of a rule with an exclusionary purpose, Rule 404(b) has been characterized by many federal circuit courts as a rule of inclusion.<sup>6</sup> Treating the Rule as one of inclusion, federal courts routinely admit other-acts evidence, especially in drug cases like the one envisioned above. This occurs even when the relevance of the defendant's uncharged acts depends on the defendant's propensity to behave in certain ways and even when the defendant has not contested elements of the charged offense that the other-acts evidence would be used to prove.<sup>7</sup> Utilizing the applicable Rule 403 balancing standard that favors the admission of evidence, federal courts routinely find that the probative value of other-acts evidence is not "substantially outweighed" by the risk of prejudice to a criminal defendant.<sup>8</sup> As one commentator has suggested, "the character rule is steadily losing ground and is perhaps on its way to disappearing" as a result of this cavalier approach to prior bad-acts evidence.<sup>9</sup> Scholars have long lamented the ease with which the government is permitted to sway a jury by parading a criminal defendant's past misdeeds before it.<sup>10</sup> Proof of a criminal defendant's past crimes has a dramatic effect on a jury, almost guaranteeing conviction.<sup>11</sup>

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5. Fed. R. Evid. 404(b)(2). The phrase "other acts"—often used by law professors—is intended to describe acts that are not part of the crime charged. Another phrase often used is "uncharged misconduct." Reference throughout this Article to "acts" and "misconduct" covers evidence of bad acts even if the defendant has not been convicted of those acts. See *Huddleston v. United States*, 485 U.S. 681, 687–90 (1988) (holding that uncharged misconduct evidence is potentially admissible if the government can establish a *prima facie* case that the defendant committed the act).

6. See, e.g., *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017).

7. See *Smith*, 789 F.3d at 930 (rejecting defendant's argument that the uncharged misconduct was irrelevant to the sole dispute in the case).

8. See *infra* notes 35–37 and accompanying text.

9. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775, 777 (2013).

10. See Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 578 (1990) (noting how courts have expanded the admissibility of uncharged misconduct to the point of substantially undermining the character-evidence prohibition); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161, 1164 (1998) (arguing that expanding admissibility of other-acts evidence under Rule 404(b) is inconsistent with the moral foundations for the rule); Milich, *supra* note 9, at 776 ("The American rule barring character evidence in criminal cases is degrading in every sense of the word."); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on*

Recently, the Seventh, Third, and Fourth Circuits have endeavored to restore the prohibition on bad-character evidence by requiring trial courts to take a harder look at evidence of a defendant's other crimes, wrongs, or acts. Specifically, these circuits demand that trial courts articulate the chain of reasoning supporting the relevance of other-acts evidence and forbid any use of such evidence that proceeds through a propensity line of reasoning.<sup>12</sup> In addition, these courts have emphasized the importance of assessing the genuine disputes involved in a criminal trial, carefully restricting other-acts evidence in cases in which the defendant has not actively contested the element to which the other act is relevant.<sup>13</sup> Finally, some courts have sought to eliminate the ill-defined "inextricably intertwined" doctrine, which allows other-acts evidence to be admitted without scrutiny under Rule 404(b), on the theory that the evidence is vaguely connected to the charged offense.<sup>14</sup>

As other circuits continue to admit other-acts evidence liberally by viewing Rule 404(b) as a rule of inclusion, the Judicial Conference Advisory Committee on Evidence Rules has begun to consider whether an amendment to Rule 404(b) could resolve the apparent split among the circuit courts and restore the intended balance to the admission of other-acts evidence.<sup>15</sup> The well-reasoned cases in the Third, Fourth, and

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Character Reasoning from Other Crime Evidence, 17 Rev. Litig. 181, 184 (1998) ("[C]ourts routinely admit bad acts evidence precisely for its relevance to defendant propensity."); Thomas J. Reed, Admitting the Accused's Criminal History: The Trouble with Rule 404(b), 78 Temp. L. Rev. 201, 214 (2005) ("Typically, the courts use . . . Rule 404(b) as a window to permit bad character evidence to be proved against the accused."); David A. Sonenshein, The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts, 45 Creighton L. Rev. 215, 216–17 (2011) (arguing that admitting other-acts evidence as probative of intent is inherently problematic).

11. See Milich, *supra* note 9, at 780 ("Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket."); see also Jeffrey Bellin, Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions, 42 U.C. Davis L. Rev. 289, 295 & n.18 (2008) (citing empirical evidence indicating the significant negative effect on a jury of prior convictions admitted to impeach a criminal defendant). But see Larry Laudan & Ronald J. Allen, The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process, 101 J. Crim. L. & Criminology 493, 507–08, 522–26 (2011) (arguing conviction rates are unaffected by admission of bad-acts evidence and advocating for liberal admissibility of such evidence).

12. See, e.g., *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc) (explaining that other-acts evidence should not be admitted in order to show the defendant's propensity to commit crimes).

13. See, e.g., *United States v. Caldwell*, 760 F.3d 267, 283–84 (3d Cir. 2014) ("[T]he probative value of prior act evidence is diminished where the defendant does not contest the fact for which supporting evidence has been offered.").

14. See, e.g., *United States v. Green*, 617 F.3d 233, 248 (3d Cir. 2010) (demonstrating that the inextricably intertwined test is "vague, overbroad, and prone to abuse" and ultimately rejecting it as the primary standard for intrinsic evidence).

15. See Advisory Comm. on Rules of Evidence, Fall 2016 Meeting Agenda 69–71 (Oct. 21, 2016) [hereinafter Fall 2016 Advisory Comm. Meeting Agenda], [www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf](http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf) [http://perma.cc/TCM9-5E7D]. Of

Seventh Circuits provide many possibilities for amendment—and a number of drafting alternatives for the Advisory Committee to consider. Rule 404(b) could be revised to expressly forbid the admission of any other act that depends upon a propensity inference for its probative value. Alternatively, or in addition to such a propensity ban, Rule 404(b) could be amended to require “active contest” by a defendant of a specific element of a charged offense before other-acts evidence is admitted to prove it. In addition, an amendment could seek to eliminate or curtail widespread use of the vague “inextricably intertwined” doctrine and to channel more of a criminal defendant’s past misdeeds through the appropriate Rule 404(b) analysis.

Although many of these possibilities sound appealing, they may be difficult to capture in rule text and may prove problematic in practice. Adding new terminology like “propensity inference” and “active contest,” foreign to the Federal Rules of Evidence, could invite costly and time-intensive litigation over the proper meaning and application of such standards. Even more importantly, however, amendments that add hard-and-fast, mechanical requirements to Rule 404(b) would be incompatible with the flexible, case-by-case approach that has been the foundation for Rule 404(b) analysis.<sup>16</sup>

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course, admitting evidence that a criminal defendant has committed a prior act of sexual assault or child molestation in a criminal case accusing the defendant of similar acts poses significant risks to the criminal defendant as well. See generally Jeffrey Waller, Comment, *Federal Rules of Evidence 413–415: “Laws Are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil,”* 30 Tex. Tech. L. Rev. 1503 (1999) (describing the debate surrounding the enactment of Rules 413 through 415 and the risks to criminal defendants in particular). The Advisory Committee was unsuccessful in limiting the liberal admissibility of such evidence through Federal Rules of Evidence 413 through 415 when they were proposed by Congress. See Judicial Conference of the United States, Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 52 (1995) (“After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules.”). The recent trend in federal cases to restrict access to other-acts evidence admitted through Rule 404(b) in criminal cases is consistent with the existing language of Rule 404(b) and with the intent in enacting the Rule. See Fed. R. Evid. 404(b)(1) (providing that evidence of a crime, wrong, or other act “to prove a person’s character” to show that the person acted in accordance with that character is “[p]rohibited”). While perceived problems with the admissibility of other-acts evidence in sex offense cases are unlikely to be addressed by rulemakers due to the congressional mandate in that arena, a modification to Rule 404(b) could capture the trend in the federal circuit courts and restore that Rule to its intended exclusionary purpose. Given the frequency with which other-acts evidence is admitted through Rule 404(b) in federal criminal cases, there is some urgency to define the proper application of that Rule. Compare Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3 (discussing the frequent use of Rule 404(b) evidence) with Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487, 1490 (2005) (noting “that rape and child abuse are usually prosecuted as state crimes” and “almost all of the nonmilitary federal cases interpreting . . . Rules [413 and 414] arise in Indian Country”).

16. See Fed. R. Evid. 404(b) advisory committee’s note to 1972 proposed rule (noting that “[n]o mechanical solution is offered” to the question of other-acts evidence and that

Another potential amendment to Rule 404(b) that has not been suggested by recent federal precedent could provide an optimal and elegant solution that would permit the admission of other-acts evidence in appropriate circumstances but preserve the prohibition on propensity evidence and bad-character reasoning. Rather than leaving the admission of other-acts evidence to the Rule 403 balancing test, which favors admissibility, Rule 404(b)(2) could be amended to require a more protective balancing test when the government offers other-acts evidence against a criminal defendant. An amendment could demand that the probative value of a criminal defendant's other crimes, wrongs, or acts offered for a proper noncharacter purpose, such as intent, *outweigh* its prejudicial effect to that defendant. This balancing would favor exclusion by dictating rejection of other-acts evidence in cases when its probative value fails to eclipse the unfair prejudice suffered by a criminal defendant whose past misdeeds are revealed to the jury. This would eliminate the current characterization of Rule 404(b) in many federal circuit courts as a rule of "inclusion." This shift in favor of criminal defendants would encourage more careful scrutiny of other-acts evidence to ensure that it responds to a live dispute at trial and to guard against propensity inferences.

A test that requires probative value to overcome unfair prejudice would also necessitate a more specific and realistic assessment of the prejudice likely to result from admission of a particular defendant's past misdeeds than federal courts traditionally undertake. Crucially, a more protective balancing test offers a flexible solution that will not tie the hands of district court judges when other-acts evidence is needed to respond to a defense. Unlike terms such as "propensity inference" and "active contest," this protective balancing test is very familiar to litigants and judges who already apply it in the context of evaluating admissibility of a criminal defendant's felony convictions for impeachment purposes under Rule 609(a)(1).<sup>17</sup> A more protective balancing test for criminal defendants facing other-acts evidence, therefore, has much to recommend, and is easily added to the text of Rule 404(b).

Part I of this Article will set out the structure of Rule 404(b) and offer a brief history of the Rule. Part II will describe the traditional approach to other-acts evidence under Rule 404(b), which liberally admits prior bad acts of criminal defendants. Part III will showcase recent efforts in some circuit courts to restrict the traditional permissive approach to other-acts evidence and to impose more rigorous barriers to admissibility. Part IV will set forth and discuss drafting alternatives the Advisory Committee is currently considering, which would codify the

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the determination must be made on a case-by-case balancing of the evidence's probative value and prejudicial effect).

17. See Fed. R. Evid. 609(a)(1)(B) (providing for exclusion of prior convictions offered to impeach the criminal defendant's character for truthfulness unless the prior convictions' probative value outweighs their prejudicial effect).

recent common law developments under Rule 404(b)—but which could also raise problems of interpretation and application. Part V will propose the addition of a more protective balancing test to Federal Rule 404(b) that would apply when other-acts evidence is offered against a criminal defendant. Part V will further illustrate how a more protective balancing test would resolve many of the current shortcomings in the contemporary application of Rule 404(b), while still paving the way for admission of important government evidence.

### I. HISTORY AND STRUCTURE OF RULE 404

Fundamental to the adversary system is the principle that a person should be convicted for what she has done and not for who she is.<sup>18</sup> Prior to the Federal Rules of Evidence, American courts prohibited evidence of a person's character to prove her conduct on a relevant occasion.<sup>19</sup> The rule with respect to other-acts evidence was truly one designed to exclude character evidence, forbidding evidence of uncharged crimes, wrongs, or acts unless offered for a proper noncharacter purpose.<sup>20</sup>

In keeping with this tradition, Federal Rule of Evidence 404(a) excludes evidence of "a person's character or character trait" to prove conduct consistent with that character on a specific occasion.<sup>21</sup> This means, for example, that a prosecutor cannot seek to prove that a defendant committed a particular assault by showing that the defendant is generally a "violent" person. Rule 404(b)(1) ensures that the prohibition on character evidence extends beyond generalized character traits to a person's other crimes, wrongs, or acts, banning evidence of past misdeeds as proof of charged misconduct.<sup>22</sup> Thus, a prosecutor cannot seek

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18. 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:21, Westlaw (database updated through June 2017) ("[A] defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged.").

19. See Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 907 (stating that, at common law, most courts subscribed to an "exclusionary conception" of the uncharged misconduct doctrine); see also Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 *Harv. J. Racial & Ethnic Just.* 1, 33 (2016) (discussing the varied and inconsistent history of uncharged misconduct evidence and suggesting that Rule 404(b) reflects a combination of an American common law trend of exclusion and a liberal English approach); Milich, *supra* note 9, at 777 ("The traditional common law rule prohibited use of the accused's bad character or prior, unrelated misconduct to suggest that he or she therefore was more likely guilty of the crime charged.").

20. See Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 907 (laying out exceptions to the general presumption against admitting evidence of other conduct); see also *Michelson v. United States*, 335 U.S. 469, 475 (1948) ("The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.").

21. Fed. R. Evid. 404(a).

22. Fed. R. Evid. 404(b)(1).

to prove that a defendant committed a charged assault by offering evidence that the defendant has committed similar assaults on previous occasions.

Rule 404(b)(2) recognizes, however, that uncharged acts can have an important bearing on issues in a case beyond simply demonstrating an individual's propensity to behave in a certain way. Rule 404(b)(2) thus provides that evidence of other crimes, wrongs, or acts may be admissible for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>23</sup> As noted by the Supreme Court, "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."<sup>24</sup> Another classic example of admissible other-acts evidence would be a criminal defendant's previous crime spree to demonstrate his motivation for shooting at a police officer pursuing him for those offenses.<sup>25</sup> Rather than suggesting some criminal propensity that would make a violent act generally more likely, the prior crime spree would demonstrate the history between the officer and the defendant, and the defendant's reasons for the shooting.

In *Huddleston v. United States*, the Supreme Court outlined the proper methodology for determining the admissibility of evidence of a criminal defendant's other crimes, wrongs, or acts.<sup>26</sup> The Court set out a four-part test, which has been utilized with some linguistic modifications across the federal circuit courts.<sup>27</sup> First, the court must determine whether the proffered other-acts evidence has a "proper purpose" other than demonstrating a person's propensity to behave in a certain manner.<sup>28</sup> Because Rule 404(b)(2) provides for admissibility for purposes "such as" those listed in the Rule, a proper purpose may be one of those enumerated in Rule 404(b)(2) or any other proper, noncharacter purpose identified by the proponent or the court.<sup>29</sup> Second, the court must determine the relevance of the other act to such a proper purpose.<sup>30</sup> This step involves assessing the chain of inferences that leads from the other act to its purpose in proving motive or opportunity, for example, to ensure that the evidence has some tendency beyond simple propensity to

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23. Fed. R. Evid. 404(b)(2).

24. *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

25. Imwinkelried et al., *Courtroom Criminal Evidence*, supra note 3, § 904 (noting that evidence that a defendant stole a pistol used in a murder a month before the murder could be offered in the murder prosecution under Rule 404(b)).

26. 485 U.S. at 691–92.

27. See Mueller & Kirkpatrick, supra note 18, § 4:29 (noting some federal circuit courts "more-or-less rephrase *Huddleston* without departing from it").

28. *Huddleston*, 485 U.S. at 691.

29. Fed. R. Evid. 404(b)(2).

30. *Huddleston*, 485 U.S. at 691.

demonstrate that purpose. Third, the trial court should perform a traditional Rule 403 balancing to determine that the probative value of the other crime, wrong, or act for the proffered proper purpose is not substantially outweighed by the risk of unfair prejudice, namely a chain of bad-character reasoning.<sup>31</sup> Finally, if the court determines that the other-acts evidence can be admitted after Rule 403 balancing, the court should offer the opponent of the evidence an appropriate limiting instruction restricting the other-acts evidence to its proper purpose.<sup>32</sup> The Supreme Court also held that any dispute over whether a defendant actually committed the other act is a Rule 104(b) issue of conditional relevance: That condition is met if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act.<sup>33</sup>

## II. THE TRADITIONAL APPROACH TO RULE 404(B) IN FEDERAL COURT

Notwithstanding the seemingly rigorous four-step analysis of other-acts evidence articulated by the Supreme Court, federal courts have grown increasingly permissive in allowing the admission of other-acts evidence.<sup>34</sup> As the following section sets out, federal courts routinely admit the previous uncharged misdeeds of criminal defendants, threatening to undermine the bedrock ban on character evidence.

Typically, a court presented with a Rule 404(b) objection takes three quick steps: 1) emphasize that Rule 404(b) is a rule of “inclusion” and not exclusion;<sup>35</sup> 2) find that the proffered bad act is probative of one (and often more than one) noncharacter purpose, regardless of whether the defendant actually is contesting that purpose; and 3) declare summarily that the probative value for the proper purpose is not “substantially outweighed” by unspecified prejudicial effect to the defendant.<sup>36</sup>

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31. *Id.*

32. *Id.* at 691–92.

33. *Id.* at 690.

34. See Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 907 (noting liberal use of “plan” purpose by courts to admit similar acts that are merely bad-character evidence); Mueller & Kirkpatrick, *supra* note 18, § 4:28 (“[I]t is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars.”); Frank, *supra* note 19, at 3 (describing the “over-admission” of uncharged act evidence through Rule 404(b)).

35. Mueller & Kirkpatrick, *supra* note 18, § 4:28 (noting the tendency among courts to treat Rule 404(b) as one of “inclusion” and emphasizing the benefits of the contrary view that the Rule is one of “exclusion” and that “courts should be careful before admitting such evidence”); see also *United States v. Lawson*, 410 F.3d 735, 740 (D.C. Cir. 2005) (treating Rule 404(b) as a rule of inclusion); *United States v. Cruz*, 326 F.3d 392, 395 (3d Cir. 2003) (same); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (same).

36. Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, *Federal Rules of Evidence Manual* § 404.03, LexisNexis (database updated 2017) (summarizing numerous circuit court decisions that treat Rule 404(b) as a “rule of inclusion” and find bad acts

One of literally hundreds of examples of this traditional, “knee-jerk” approach to Rule 404(b) is found in *United States v. Geddes*.<sup>37</sup> In *Geddes*, the defendant was charged with aiding and abetting sex trafficking by force, fraud, or coercion.<sup>38</sup> At trial, the defense moved to exclude testimony that he had physically assaulted and threatened to kill a former girlfriend in an unrelated incident because of a text message that he found on her phone.<sup>39</sup> The trial court overruled the objection and allowed the testimony.<sup>40</sup> Following his conviction, Geddes appealed the admission of the testimony regarding the previous assault and threat, claiming Rule 404(b) error.<sup>41</sup>

The Eighth Circuit began its analysis by stating that there is no error under Rule 404(b) “unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.”<sup>42</sup> The court continued by explaining that Rule 404(b) is a rule “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.”<sup>43</sup> The court found that the defendant’s previous threat and assault of a former girlfriend were probative of “knowledge” and “intent,” both of which were relevant to the charged crime because the prosecution was required to prove both knowing transportation in interstate commerce and intent to coerce under the relevant statute.<sup>44</sup> Those elements were at issue, according to the court, simply because the defendant pled not guilty to the charges of aiding and abetting sex trafficking by force, fraud, or coercion. Finally, the court concluded that the risk of prejudice to the defendant did not substantially outweigh the value of proving knowledge and intent, particularly because a limiting instruction had been given to the jury.<sup>45</sup>

The Rule 404(b) analysis in *Geddes* is inconsistent with the original intent of Rule 404(b) for a number of reasons. First, the defendant’s threat to kill his former girlfriend is relevant to prove his “intent” to coerce the alleged victim four years later only if one proceeds through a propensity chain of inferences. Reasoning that, “if the defendant had an

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admissible, even if the purported proper purpose is not actively contested and that purpose depends upon a character inference).

37. 844 F.3d 983, 989–91 (8th Cir. 2017).

38. *Id.* at 987.

39. *Id.* at 989.

40. *Id.* at 987–88.

41. *Id.* at 988.

42. *Id.* at 989 (internal quotation marks omitted) (quoting *United States v. Williams*, 796 F.3d 951, 958 (8th Cir. 2015)).

43. *Id.* (emphasis added) (internal quotation marks omitted) (quoting *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010)).

44. *Id.* at 990; see also Imwinkelried et al., *Courtroom Criminal Evidence*, supra note 3, § 907 (noting that “intent” is the most commonly utilized purpose for admitting other-acts evidence).

45. *Geddes*, 844 F.3d at 990–91.

intent to hurt his girlfriend, it is more likely he had an intent to coerce the alleged victim,” is just another way of saying that the defendant’s threat to his girlfriend shows a propensity to threaten women. Thus, the bad act is not truly offered for a proper, nonpropensity purpose at all despite the court’s lip-service to “knowledge” and “intent.” Second, the defendant was not actively contesting his *intent* to aid and abet sex trafficking by force, fraud, or coercion. Instead, he argued that he never made any threat at all. If simply pleading not guilty is enough to put intent into issue for purposes of Rule 404(b), then virtually any act somewhat similar to the charged act will be admissible in every criminal case that proceeds to trial. Third, the court’s statement that the government overcomes a Rule 404(b) objection by coming up with any nonpropensity purpose for which evidence is at all relevant ignores the work that Rule 403 is supposed to do when the probative value for the nonpropensity purpose is weak. Finally, the *Geddes* court’s characterization of Rule 404(b) as a “rule of inclusion”<sup>46</sup> mischaracterizes the rule and ignores its inherently exclusionary purpose, which demands the rejection of bad-acts evidence offered to prove propensity.

The thin analysis in *Geddes* is regrettably common. A similar cavalier approach to other-acts evidence can be found in the tale of two Smiths. Defendant Erick Smith was charged with conspiracy to distribute and conspiracy to possess with intent to distribute cocaine arising out of a drug operation in Pensacola, Florida.<sup>47</sup> At trial, the defendant objected to the government’s admission of his two prior drug convictions.<sup>48</sup> Both were for mere possession of cocaine (and not for distribution or possession with intent to distribute cocaine) and occurred six and ten years prior to the conduct charged in the indictment.<sup>49</sup> Smith argued that Rule 404(b) prohibited admission of his prior convictions because the convictions were not probative of any material issue in his case “other than character.”<sup>50</sup> After the trial court admitted the evidence and he was convicted, Smith appealed.<sup>51</sup>

The Eleventh Circuit began its analysis by emphasizing that “Rule 404(b) is a rule of inclusion” and that Rule “404(b) evidence . . . should not lightly be excluded when it is central to the prosecution’s case.”<sup>52</sup> The court continued by highlighting circuit precedent providing that a defendant’s not guilty plea in a drug conspiracy case “makes intent a material issue and opens the door to admission of prior drug-related

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46. See *id.* at 989.

47. *United States v. Smith*, 741 F.3d 1211, 1214–15 (11th Cir. 2013).

48. *Id.* at 1225.

49. *Id.*

50. *Id.*

51. *Id.* at 1213–14.

52. *Id.* at 1225 (internal quotation marks omitted) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003)).

offenses.”<sup>53</sup> The court explained that even old convictions for mere possession of drugs could be probative of a defendant’s later “intent to distribute” when the same drug is involved in both the charged and uncharged acts.<sup>54</sup> Thus, the court upheld the admission of the defendant’s previous possession convictions without explaining how they demonstrated his intent to distribute apart from showing his character.<sup>55</sup>

A different Smith, Mario Ronrico Smith, was charged with possession with intent to distribute cocaine, using and carrying a firearm during a drug trafficking crime, and being a felon in possession of a firearm after he was stopped by a law enforcement officer with two kilograms of cocaine, \$6,000 in cash, and a Glock .40 caliber handgun in his car.<sup>56</sup> Because defendant Smith fled the scene of the traffic stop and was apprehended eighteen months later, his principal defense at trial related to his identity: He claimed that he was not the driver of the stopped vehicle carrying the contraband.<sup>57</sup> At trial the government admitted, over Smith’s objection, his eight-year-old prior conviction for possession with intent to distribute cocaine on the theory that it “fit a pattern of intent or knowledge under Rule 404(b).”<sup>58</sup>

On appeal, Smith argued that his prior conviction was not relevant to prove “intent” or “knowledge” when “the sole dispute in th[e] case” was whether “Smith was the driver.”<sup>59</sup> In rejecting this argument and affirming Smith’s conviction, the court characterized Smith’s defense to the current charges as a “general-denial defense,” stating that the Eighth Circuit has “long recognized that a general-denial defense places ‘intent or state of mind into question and allow[s] the admission of prior criminal convictions to prove both knowledge and intent.’”<sup>60</sup> The court found that, although the prior conviction was eight years old at the time of trial, “it was not so remote in time as to be inadmissible.”<sup>61</sup> Thus, the court quickly found evidence of defendant Smith’s prior drug offense admissible under Rule 404(b), although his defense did not dispute his knowledge of drugs or intent to distribute them, and despite the fact that the prior offense demonstrated intent only by way of an inference about Smith’s propensity to sell drugs.<sup>62</sup>

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53. *Id.* (quoting *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997)).

54. *Id.* at 1226.

55. *See id.*

56. *United States v. Smith*, 789 F.3d 923, 927 (8th Cir. 2015).

57. *Id.* at 927–28.

58. *Id.* at 927.

59. *Id.* at 930.

60. *Id.* (quoting *United States v. Foster*, 344 F.3d 799, 801 (8th Cir. 2003)).

61. *Id.* (internal quotation marks omitted) (quoting *United States v. Trogdon*, 575 F.3d 762, 766 (8th Cir. 2009)).

62. *Id.* Several cases have held similarly. For instance, in *United States v. LaFontaine*, the court affirmed the defendant’s conviction for making a threat in a 2015 call to the Department of Justice, stating that Rule 404(b) is “one of inclusion, such that evidence

Another common technique employed by many federal courts in admitting prior uncharged acts against a criminal defendant is to find those acts “inextricably intertwined” with the charged offense and, thus, immune from Rule 404(b) scrutiny altogether.<sup>63</sup> Of course, Rule 404(b)(1) serves only to prohibit evidence of *other* crimes, wrongs, and acts and does not apply to the acts comprising the charged offense.<sup>64</sup> The

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offered for permissible purposes is presumed admissible absent a contrary determination.” 847 F.3d 974, 981–82 (8th Cir. 2017) (internal quotation marks omitted) (quoting *United States v. Contreras*, 816 F.3d 502, 511 (8th Cir. 2016)). Further, the court held that the trial judge did not commit an abuse of discretion when he admitted a 2013 call by the defendant to a federal court employee, because he concluded that the earlier call was relevant to “intent,” which was the key issue in the case. *Id.*; see also *United States v. Thomas*, 847 F.3d 193, 207–08 (5th Cir. 2017) (affirming the defendant’s convictions for theft and finding no plain error in the admission of evidence of defendant’s actions prior to the crime charged when it “lessen[ed] the likelihood that [Thomas] committed the charged offense with innocent intent” (alteration in original) (internal quotation marks omitted) (quoting *United States v. Smith*, 804 F.3d 724, 736 (5th Cir. 2015))); *United States v. Khan*, 771 F.3d 367, 377–78 (7th Cir. 2014) (finding that the court did not abuse its discretion in admitting evidence of prior uncharged acts since “the risk of unfair prejudice did not substantially outweigh the [evidence’s] probative value”); *United States v. Roux*, 715 F.3d 1019, 1026–27 (7th Cir. 2013) (finding other-acts evidence admissible upon considering its “relative probative value and prejudicial effect”); *United States v. Douglas*, 482 F.3d 591, 596–600 (D.C. Cir. 2007) (finding evidence of defendant’s prior arrest admissible since it went to “knowledge or intent” even if it “may also suggest criminal propensity”); *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005) (finding that the “probative value” of a prior conviction did not result in “disproportionate prejudice”); *United States v. Logan*, 121 F.3d 1172, 1177–78 (8th Cir. 1997) (finding evidence of a prior act admissible to determine intent or motivation).

63. See, e.g., *United States v. Ali*, 799 F.3d 1008, 1026–27 (8th Cir. 2015) (holding that evidence that one defendant supported a terrorist group before it was designated as a terrorist organization was “intrinsic” to the crime charged because it explained how the fundraising began); *United States v. Castleman*, 795 F.3d 904, 915 (8th Cir. 2015) (characterizing, in a drug prosecution, evidence of death threats against witnesses, offered to prove consciousness of guilt, as “‘direct evidence of the crime charged’” and so “not subject to a Rule 404(b) analysis” (quoting *United States v. Zierke*, 618 F.3d 755, 759 (8th Cir. 2010))); *United States v. Ford*, 784 F.3d 1386, 1394 (11th Cir. 2015) (holding that common methods used by the defendant to commit fraud were “intrinsic” because they were similar to the charged offenses); *United States v. Campbell*, 764 F.3d 880, 887–88 (8th Cir. 2014) (relying upon the inextricably intertwined theory to uphold admission of other-acts evidence); *United States v. Cancelliere*, 69 F.3d 1116, 1124–25 (11th Cir. 1995) (same); *United States v. Collins*, 779 F.2d 1520, 1531–32 (11th Cir. 1986) (“[E]vidence of criminal activity other than the charged offense is not extrinsic act evidence . . . [if it] was inextricably intertwined with the evidence of the charged offense . . .”); *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985) (holding that Rule 404(b) does not apply when the evidence concerns “context, motive, and set-up of the crime” and is “linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story”).

64. See *Imwinkelried et al.*, *Courtroom Criminal Evidence*, *supra* note 3, §§ 903–904 (suggesting a critical distinction between acts “intrinsic” to a charged offense because they are “part and parcel of the charged offense” and acts that are inextricably intertwined with the charged offense because “redacting the references to the uncharged crime would render the testimony . . . linguistically or psychologically incomprehensible”); *Mueller & Kirkpatrick*, *supra* note 18, § 4:29 (stating that “intrinsic acts” not covered by Rule 404(b)

Committee Note to the 1991 amendment to Rule 404(b) delineates between acts that are covered by Rule 404(b) because they are “extrinsic” to the charged offense and those that are not governed by the rule because they are “intrinsic” to the charged offense.<sup>65</sup> Although there is an obvious need for line drawing in applying Rule 404(b), many federal courts simply label uncharged offenses offered against criminal defendants as “inextricably intertwined” with the charged offense whenever they are in any way related to the charged offense. By utilizing this vague and conclusory characterization, these courts sidestep the careful Rule 404(b) analysis dictated by the Supreme Court’s holding in *Huddleston*.<sup>66</sup>

In *United States v. Ford*, for example, the defendant was charged with multiple counts of mail fraud, false claims, and identity theft based upon her filing of fraudulent tax returns in the names of specific homeless or disabled victims.<sup>67</sup> At trial, Ford objected to government testimony from nine victims who were not included in the indictment and to testimony from an undercover reporter concerning the defendant’s uncharged video-recorded solicitation of the reporter.<sup>68</sup> Ford objected that all of this testimony amounted to evidence of uncharged misconduct that could not survive Rule 404(b) scrutiny.<sup>69</sup> Following the admission of all of this testimony by the trial court and Ford’s conviction, she appealed to the Eleventh Circuit.

The Eleventh Circuit explained that “Rule 404(b) is the wrong place to begin the analysis” of the defendant’s claim.<sup>70</sup> The court noted that a defendant’s uncharged conduct “is admissible as intrinsic evidence outside the scope of Rule 404(b)” whenever the conduct is part of the “same scheme or series of transactions and uses the same *modus operandi*.”<sup>71</sup> Thus, the evidence of nine uncharged fraudulent tax returns and identity thefts, as well as evidence of a fraudulent solicitation of an undercover

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should include “acts of planning and preparation as well as execution and concealment of the charged crime”).

65. See Fed. R. Evid. 404(b) advisory committee’s note to 1991 amendment (adding a notice requirement and explaining that the notice requirement “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense” (citing *United States v. Williams*, 900 F.2d 823 (5th Cir. 1990))); see also Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 903 (noting that Rule 404(b) applies only to “extrinsic acts” that do not constitute part of the charged offense and not to “intrinsic acts” that form part of the charged offense); Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 *Cath. U. L. Rev.* 719, 733–34 (2010) [hereinafter Imwinkelried, *The Second Coming*] (noting that Rule 404(b)’s 1991 amendment does not apply to acts which are “intrinsic” to the charged offense).

66. See *supra* notes 24–33 and accompanying text.

67. 784 F.3d at 1390.

68. *Id.* at 1394–95.

69. *Id.* at 1391.

70. *Id.* at 1394.

71. *Id.*

reporter, was admissible against the defendant without any Rule 404(b) analysis at all. Although the court may have upheld the admissibility of at least some of the uncharged fraudulent acts using a Rule 404(b) analysis, the court's quick reference to "intrinsic" acts "inextricably intertwined" with the charged offense bypassed Rule 404(b) scrutiny altogether.<sup>72</sup>

The analysis becomes even more confusing in courts that have more than one doctrine for determining whether the bad acts are "other" acts covered by Rule 404(b).<sup>73</sup> Consider *United States v. Loftis*, a wire fraud prosecution in which the government sought interlocutory relief after the trial judge ruled that evidence of frauds not specified in the indictment would be evaluated under Rule 404(b).<sup>74</sup> The court held that Rule 404(b) did not apply for two reasons. First, the frauds not specified in the indictment were not "other" acts because the crime charged included not only the specific executions of the fraud scheme alleged in the indictment but also the "overall scheme."<sup>75</sup> Second, the uncharged frauds were "inextricably intertwined" with the frauds specified in the indictment because "they [were] 'part of the same transaction' as the charged transactions."<sup>76</sup> The court did not explain why it engaged with two separate doctrines to find this evidence to be outside Rule 404(b) given the similar reasoning supporting both.<sup>77</sup>

*United States v. Hilgefond* is another prime example of how courts utilize vague references to "inextricably intertwined" acts to sidestep the

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72. See Imwinkelried, *The Second Coming*, supra note 65, at 726 ("In many of the cases in which courts have invoked the [inextricably intertwined] doctrine, they could just as easily have relied on a recognized noncharacter theory, such as motive.").

73. Advisory Comm. on Rules of Evidence, Spring 2017 Meeting Agenda 323 (Apr. 21, 2017) [hereinafter Spring 2017 Advisory Comm. Meeting Agenda], [http://www.uscourts.gov/sites/default/files/advisory\\_committee\\_on\\_rules\\_of\\_evidence\\_-\\_spring\\_2017\\_meeting\\_materials.pdf](http://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf) [http://perma.cc/H24X-ELQB].

74. 843 F.3d 1173, 1175–76 (9th Cir. 2016).

75. *Id.* at 1176.

76. *Id.* at 1178. For another example, see *United States v. Hilgefond*, 7 F.3d 1340, 1345 (7th Cir. 1993) ("When deciding if the 'other acts' evidence was admissible without reference to Rule 404(b), we must determine whether such evidence was 'intricately related to the facts of the case' at hand." (quoting *United States v. Hargrove*, 929 F.2d 316, 320 (7th Cir. 1991))). Of course, Rule 403 will still apply to the evidence. See *id.* ("If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by Rule 403."). However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403.

77. Spring 2017 Advisory Comm. Meeting Agenda, supra note 73, at 323 (providing a summary of *Loftis*). In contrast, in some cases, courts need not engage at all in the "intrinsically intertwined" analysis because the bad-acts evidence is clearly part of the charged misconduct. See, e.g., *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992) (holding the evidence of codefendant's distribution of methamphetamine on October 26, 1990, after Pace was arrested, to be admissible against Pace without regard to Rule 404(b) because the indictment charged Pace with conspiracy to attempt to manufacture and distribute methamphetamine/amphetamine that ended "on or about October 26, 1990"), abrogated by *United States v. Kupfer*, 797 F.3d 1233 (10th Cir. 2015).

appropriate Rule 404(b) analysis.<sup>78</sup> Hilgefورد borrowed over “one million dollars from a bank and the Farmer’s Home Administration (FmHA) using the two farms he owned as security for the debt.”<sup>79</sup> After financial problems “engulfed the defendant . . . the bank foreclosed on the mortgage it held on one of his farms.”<sup>80</sup> The bank then bought the farm at the foreclosure sale and evicted Hilgefورد.<sup>81</sup> The United States foreclosed on his other farm.<sup>82</sup> Hilgefورد retaliated by sending bills to employees of the bank and the FmHA and then taking deductions on his tax returns for the unpaid bills.<sup>83</sup> As a result, Hilgefورد was charged with mail fraud and filing false tax returns.<sup>84</sup> To prove that the defendant’s conduct was willful, the government offered evidence that Hilgefورد had generated “a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms” in the years prior to filing the challenged tax returns.<sup>85</sup> Hilgefورد objected at trial under Rule 404(b).<sup>86</sup> The court held that “evidence of defendant’s prior conduct is ‘intricately related’ or ‘inextricably tied’ to the facts in this case” and that therefore Rule 404(b) was not applicable.<sup>87</sup>

Cases such as *Hilgefورد* are even more suspect than fraud cases like *Ford* and *Loftis*, in which the bad acts occurred while the alleged scheme was ongoing. In *Hilgefورد*, the bad acts did not occur within the time period covered by the indictment.<sup>88</sup> The fact that the groundless litigation was probative of willfulness, an element needed to convict for the charge of filing false tax returns, does not immunize it against Rule 404(b) scrutiny. All evidence offered by the prosecution in a criminal trial must be somehow probative of an element of the crime.<sup>89</sup> The court’s statement that the groundless litigation concerning the farms was “intricately related” to the tax counts<sup>90</sup> ignores the reality that the litigation constituted uncharged bad acts by the defendant that needed to pass Rule 404(b) muster.

*Ford*, *Loftis*, and *Hilgefورد* are hardly the only cases in which courts have been vague and conclusory in finding “inextricably intertwined”

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78. 7 F.3d at 1346.

79. *Id.* at 1341.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1342.

84. *Id.*

85. *Id.* at 1344–45.

86. *Id.* at 1345.

87. *Id.* at 1346.

88. *Id.* at 1345–46 (discussing the defendant’s prior bad acts).

89. See *id.* at 1346 (holding that, despite Rule 404(b) not being applicable, the trial court must still determine whether the probative value of the evidence is outweighed by its prejudicial effect).

90. *Id.*

acts exempt from Rule 404(b). Courts exacerbate the problem by using different phrases to capture the concept, such as acts that are “intrinsic” to the crime charged; acts that form part of a “single criminal episode”; acts that are an “integral part” of the crime; and acts that “complete[] the story” or “explain[] the context” of the crime.<sup>91</sup> One well-known commentator has summed up the “inextricably intertwined” doctrine with the following criticism:

“Inextricably intertwined” is the “modern de-Latinized” equivalent of *res gestae*, and it has been savaged by a similar critique. The standard has been described as “lack[ing] clarity” and “obscure,” because it does not embody a clear substantive principle. . . . The vacuous nature of the test’s wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.<sup>92</sup>

In sum, a review of federal case law governing the admissibility of uncharged acts by criminal defendants reveals a disturbing pattern. Appellate courts routinely start from a faulty premise that Rule 404(b) is a “rule of inclusion,” which presumes admissibility of other-acts evidence. In many cases, reliance on inferences about a defendant’s propensity to engage in certain conduct is necessary and clear in the government’s purported purpose for offering evidence of uncharged misconduct. And this evidence is routinely admitted in cases in which the defendant has not disputed intent, knowledge, or motive beyond the simple act of pleading not guilty. Finally, many courts avoid even a cursory analysis of Rule 404(b) by characterizing the uncharged misconduct offered against a defendant as “inextricably intertwined” with the charged offense. All of these practices add up to a permissive culture of admissibility of uncharged acts by criminal defendants that flies in the face of Rule 404(b)’s ban on other-acts evidence.<sup>93</sup>

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91. See *United States v. Green*, 617 F.3d 233, 237, 245–47 (3d Cir. 2010) (internal quotation marks omitted) (quoting various courts’ iterations of the test and noting that “[w]hether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs”).

92. Imwinkelried, *The Second Coming*, *supra* note 65, at 729–30 (alteration in original) (footnotes omitted).

93. The appellate courts are not alone in their cursory treatment of other-acts evidence in criminal cases. District courts often give shallow treatment to Rule 404(b) analysis as well. See, e.g., *United States v. Hayes*, No. 2:16-CR-261 TS, 2016 WL 7046747, at \*2 (D. Utah Dec. 2, 2016) (“Defendant’s prior use of methamphetamine may be used to show knowledge, plan, motive or intent to participate in the alleged crimes. Therefore, the evidence is probative of a material issue other than character and is admissible.”); *United States v. Shayota*, No. 15-CR-00264-LHK, 2016 WL 5791376, at \*8 (N.D. Cal. Oct. 4, 2016) (“Defendants’ past history of working together on similar schemes indicates that they understood their roles as well as the objects of the conspiracy, and demonstrates how they gained knowledge, skills, and networks necessary to carry out the alleged 5-Hour ENERGY conspiracy.”).

### III. THE RECENT RULE 404(B) CIRCUIT SPLIT: RECLAIMING THE PROHIBITION ON EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS

Notwithstanding the traditionally permissive approach to other-acts evidence in federal criminal cases, some federal circuits have recently made efforts to limit the admission of other-acts evidence and to restore the promised prohibition on such potentially devastating character evidence. The Seventh,<sup>94</sup> Third,<sup>95</sup> and Fourth Circuits<sup>96</sup> have led a campaign to end the liberal admissibility of other-acts evidence in criminal cases by imposing limits on the prosecutorial use of such evidence. First, some federal courts have articulated a more nuanced historical view of Rule 404(b) as a “rule of inclusion,” finding that this characterization does not signify the presumptive admissibility of other-acts evidence.<sup>97</sup> Second, these circuit courts have articulated a total ban on the dreaded propensity inference, barring the admission of other-acts evidence when any link in the chain of inferences supporting the relevance of the other act depends on the defendant’s propensity to engage in certain conduct.<sup>98</sup> Third, these circuit courts have analyzed the admissibility of other-acts evidence with an eye toward the defense advanced by the criminal defendant, demanding the defendant’s “active contest” of an element of an offense to which the other-acts evidence is relevant.<sup>99</sup> Finally, federal courts have taken a hard look at the vague “inextricably intertwined” doctrine that has allowed other-acts evidence to escape Rule 404(b) scrutiny, either outlawing the doctrine or severely curtailing it.

#### A. *Recasting Rule 404(b) as a Rule of Exclusion*

Nothing is more common than to see a federal circuit court begin an analysis of the admissibility of other-acts evidence by stating that Rule 404(b) is a “rule of inclusion.”<sup>100</sup> Right out of the gate, this characterization

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94. See *infra* notes 116–124, 155–161, 189–196 and accompanying text.

95. See *infra* notes 101–109, 125–131, 140–152, 162–165, 171–188 and accompanying text.

96. See *infra* notes 132–139 and accompanying text.

97. See *infra* section III.A.

98. See *infra* section III.B.

99. See *infra* section III.C.

100. See, e.g., *United States v. Smith*, 789 F.3d 923, 930 (8th Cir. 2015) (“Rule 404(b) is a rule of inclusion, and we will reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.” (internal quotation marks omitted) (quoting *United States v. Trogdon*, 575 F.3d 762, 766 (8th Cir. 2009))); *United States v. Smith*, 741 F.3d 1211, 1225 (11th Cir. 2013) (“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.’” (quoting *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003))); *United States v. Douglas*, 482 F.3d 591, 596 (D.C. Cir. 2007) (“Indeed, ‘Rule 404(b) is a rule of inclusion rather than exclusion’ ‘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.’” (citation omitted) (first quoting *United States v. Bowie*, 232 F.3d 923, 929–30

serves as a foundation for the permissive approach these courts have taken to other-acts evidence in federal criminal cases. Recently, other circuits have articulated an arguably more historically accurate take on what it means for Rule 404(b) to be a “rule of inclusion.” These courts have stated that Rule 404(b) is “inclusive” only to the extent that it allows evidence of other crimes, wrongs, and acts to be admitted for relevant proper purposes beyond those spelled out in the non-exhaustive Rule 404(b)(2) list.

In *United States v. Caldwell*, the Third Circuit performed an in-depth analysis of the origins of the “rule of inclusion” characterization of Rule 404(b).<sup>101</sup> The court found that all American courts throughout the nineteenth and twentieth centuries agreed that evidence of other acts, relevant only to show a defendant’s “general propensity to commit the charged offense,” was inadmissible.<sup>102</sup> Although there was a debate as to whether the common law rule was “exclusionary” or “inclusionary,” the debate “concerned whether the list of previously recognized non-propensity purposes was exhaustive (or ‘exclusive’), or whether *any* non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the ‘inclusive’ approach).”<sup>103</sup>

The *Caldwell* court found that this debate over the list of available proper purposes for other-acts evidence was resolved in 1975 with the adoption of the Federal Rules of Evidence.<sup>104</sup> The drafters of Rule 404(b) elected to introduce the list of proper purposes with the words “such as.”<sup>105</sup> The Third Circuit recognized that in so doing, “the drafters made clear that the list was not exclusive or otherwise limited to a strictly defined class.”<sup>106</sup> The court explained that any reference to Rule 404(b) as a “rule of inclusion” merely refers to the drafter’s decision not to limit the potentially proper purposes for other-acts evidence.<sup>107</sup>

Therefore, the Third Circuit clarified that characterizing Rule 404(b) as a “rule of inclusion” does not signify the presumptive admissibility of prior bad-acts evidence. Rather, the Third Circuit emphasized:

On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it “no presumption of admissibility.”

The Rule reflects the revered and longstanding policy that,

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(D.C. Cir. 2000); then quoting *United States v. Crowder*, 141 F.3d 1202, 1206 (D.C. Cir. 1998))).

101. 760 F.3d 267, 275 (3d Cir. 2014).

102. *Id.*

103. *Id.* (citing David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 4.3.2, at 224 (Richard D. Friedman ed., 2009)) (“[T]he real question is . . . whether the courts actually confine admissibility to a set of enumerated purposes.”)).

104. *Id.*

105. Fed. R. Evid. 404(b)(2).

106. *Caldwell*, 760 F.3d at 276.

107. *Id.*

under our system of justice, an accused is tried for *what* he did, not *who* he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—*unless* the proponent can demonstrate that the evidence is admissible for a non-propensity purpose.<sup>108</sup>

To the *Caldwell* court, therefore, Rule 404(b) as a rule of inclusion simply means that the list of proper purposes in the rule is not exclusive.<sup>109</sup> Cases like *Caldwell* have helped restrict the frequent admission of other-acts evidence by challenging the traditional interpretation of Rule 404(b) as a “rule of inclusion”—in *Geddes* and like cases—that treats Rule 404(b) as a rule providing for presumptive admissibility of uncharged misconduct. Instead, cases like *Caldwell* have placed the “rule of inclusion” language in its proper historical context and have restored the presumptive exclusion of prior uncharged acts by criminal defendants.

### B. Prohibiting Propensity

Although Rule 404(b) is designed to prevent convictions based upon a criminal defendant’s propensity to behave in certain ways, many federal courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether that probative value relies on a propensity inference. Exemplary is *United States v. Matthews*, a case in which the defendant’s prior uncharged drug transaction was held properly admitted to prove his intent to conspire to commit drug transactions.<sup>110</sup> Specifically, the court held that even prior convictions for possession of cocaine for personal use are relevant and admissible to prove a defendant’s intent to distribute cocaine on a separate occasion.<sup>111</sup> Judge Tjoflat concurred specially, arguing that the court had failed to explain how the probative value of the prior drug activity actually proceeded through a nonpropensity inference:

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108. *Id.* (citation omitted) (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed. 2013)).

109. Other courts have recognized this same understanding of the *Caldwell* decision. See *United States v. Hall*, 858 F.3d 254, 276–77 (4th Cir. 2017) (emphasizing that 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)); *United States v. Repak*, 852 F.3d 230, 240–41 (3d Cir. 2017) (reiterating that Rule 404(b) is a rule of “exclusion”); *Imwinkelried et al.*, *Courtroom Criminal Evidence*, *supra* note 3, § 907 (noting that Federal Rule of Evidence 404(b) is “inclusionary” only because the list of proper purposes is illustrative and not exclusive).

110. 431 F.3d 1296, 1311 (11th Cir. 2005). For other examples, see *United States v. Logan*, 121 F.3d 1172, 1179 (8th Cir. 1997) (holding that evidence of prior possession of drugs was probative of knowledge and intent to distribute, with no analysis of how the bad act was probative for those purposes independent of any propensity inference); *United States v. Gadison*, 8 F.3d 186, 192 (5th Cir. 1993) (holding that evidence of defendant’s prior conviction for cocaine possession was relevant to show intent).

111. *Matthews*, 431 F.3d at 1311.

It is difficult to argue that a person had an intention to do something on a particular occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards that intent . . . . If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line. Where, on the other hand, an inference can be drawn that says nothing about the defendant's character—for example, based on the “improbability of coincidence”—the evidence is more appropriately admissible for non-propensity purposes.<sup>112</sup>

Most of the cases involving bad acts that proceed through a propensity inference are, like *Matthews*, cases involving use of prior drug activity, with the prosecution arguing that the prior drug activity is offered for intent.<sup>113</sup> Many have argued that bad acts offered to prove “intent” cannot be readily separated from the propensity inference.<sup>114</sup> But the problem of using propensity inferences for so-called proper purposes occurs for other purposes as well, such as identity and motive.<sup>115</sup>

In keeping with Judge Tjoflat’s *Matthews* concurrence, some federal circuit courts have recently held that in assessing probative value of other-acts evidence, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*. The leading example of the more careful approach is the Seventh Circuit’s decision in *United States v. Gomez*.<sup>116</sup> In *Gomez*, the government had evidence that someone nicknamed “Guero” was a reseller of cocaine.<sup>117</sup> Although the government claimed that Gomez was Guero, Gomez claimed that his brother-in-law was Guero.<sup>118</sup> Over the defendant’s objection, the trial court admitted evidence of the defendant’s prior cocaine possession

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112. *Id.* at 1313 n.1 (Tjoflat, J., concurring in the judgment) (citation omitted). For a similar argument, see Daniel P. Ranaldo, *Is Every Drug User a Drug Dealer? Federal Circuit Courts Are Split in Applying Fed. R. Evid. 404(b)*, 8 Fed. Cts. L. Rev. 147, 150–51 (2014) (noting the dispute in federal courts on whether prior acts of possession are probative of intent to distribute and characterizing the difference as whether or not the court is considering whether the probative value for intent proceeds through a propensity inference).

113. See, e.g., *United States v. Smith*, 741 F.3d 1211, 1216 (11th Cir. 2013).

114. See, e.g., Sonenschein, *supra* note 10, at 218 (“What chain of reasoning can link the prior drug history . . . to the charged crime other than one that infers that the defendant has a drug-related propensity[?] . . . [E]arlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant’s behavior forms an unchanging pattern.” (quoting Morris, *supra* note 10, at 191–92)).

115. See *United States v. Roux*, 715 F.3d 1019, 1025 (7th Cir. 2013) (“[A]cts of abuse described by [minor sisters] CC and SH were probative of Roux’s motive to commit the charged child pornography offense . . . [because] ‘[p]rior instances of sexual misconduct with a child victim may establish a defendant’s sexual interest in children . . . .’” (quoting *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006))).

116. 763 F.3d 845 (7th Cir. 2014) (en banc).

117. *Id.* at 850.

118. *Id.* at 862.

for the purpose of proving the defendant's "identity" as "Guero."<sup>119</sup> In reversing Gomez's conviction, the circuit court stated:

[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. Careful attention to these questions will help identify evidence that serves no permissible purpose.<sup>120</sup>

The *Gomez* court held that the trial court improperly admitted evidence of the defendant's cocaine possession because it suggested defendant's identity as "Guero" only by way of a propensity inference.<sup>121</sup> The court explained as follows:

Gomez's mistaken-identity defense singled out another person—his brother-in-law and housemate Victor Reyes—as the "real" Guero. The government introduced the user quantity of cocaine found in Gomez's bedroom for the purpose of showing that as between the two, it was more likely that Gomez was Guero. . . . [But] the evidence of the defendant's history of drug dealing tended to prove his identity as a participant in the charged drug deal only by way of a forbidden propensity inference: Once a drug dealer, always a drug dealer.<sup>122</sup>

The court concluded that the government's argument was not only "extraordinarily weak," but also dependent on "pure propensity."<sup>123</sup> Accordingly, the full Seventh Circuit Court of Appeals held that the district court should not have admitted evidence of Gomez's cocaine possession pursuant to Rule 404(b).<sup>124</sup>

In *United States v. Smith*, the Third Circuit similarly held that prior misconduct must be excluded if the probative value for the expressed purpose rests on a propensity inference.<sup>125</sup> In *Smith*, the defendant was charged with threatening a federal officer with a gun and possessing a firearm during a crime of violence.<sup>126</sup> At trial, the government moved to admit evidence of the defendant's prior drug dealing at the location of the charged offense, arguing that the evidence was probative of the

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119. *Id.* at 850.

120. *Id.* at 856 (second emphasis added).

121. *Id.* at 863.

122. *Id.* at 862–63.

123. *Id.* at 863.

124. *Id.* But see *United States v. Schmitt*, 770 F.3d 524, 534 (7th Cir. 2014) (introducing evidence of drug-dealing as indicative of Schmitt's motive to possess the firearm "provided a 'propensity-free chain of reasoning' for the evidence's admission") (quoting *Gomez*, 763 F.3d at 856)).

125. 725 F.3d 340, 342 (3d Cir. 2013).

126. *Id.* at 343.

defendant's motive to commit the crime charged to protect his turf.<sup>127</sup> Accepting this argument, the trial court admitted the evidence.<sup>128</sup>

Following Smith's conviction, the circuit court stated that the admission of the prior bad-acts evidence "violates our long-standing requirement that . . . under Rule 404(b), the proponent must set forth 'a chain of logical inferences, *no link of which* can be the inference that because the defendant committed . . . offenses before, he therefore is more likely to have committed this one.'"<sup>129</sup> The court rejected the government's argument that the prior drug sale was admissible to show motive because "one must necessarily (a) assume something about Smith's character based on the 2008 evidence (that he was a drug dealer) and (b) infer that Smith acted in conformity with that character in 2010 by dealing drugs and therefore had a motive to defend his turf."<sup>130</sup> Thus, the mere fact that the government *articulated* the noncharacter purpose of showing "motive" was not enough to admit the evidence for that purpose because the evidence was probative of motive only under the assumption that the defendant had a bad character.<sup>131</sup>

Most recently, the Fourth Circuit joined the chorus denouncing reliance on propensity inferences to support admission of Rule 404(b) evidence. In *United States v. Hall*, law enforcement officers searched a home in which the defendant resided and found six kilograms of marijuana, packaging materials, and three firearms inside a bedroom locked with a deadbolt.<sup>132</sup> Following this search, the defendant was indicted for possession with intent to distribute marijuana, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime.<sup>133</sup> Hall's defense at trial was that his cousin was responsible for the drugs and guns recovered from the residence and that he was not involved in the marijuana operation.<sup>134</sup> Over the defendant's objection, the district court permitted the government to introduce evidence of the defendant's prior marijuana convictions at the close of its case-in-chief—one for possession of marijuana and three for possession

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127. *Id.*

128. *Id.* at 342.

129. *Id.* (quoting *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992)).

130. *Id.* at 346.

131. For a similar example, see *United States v. Steiner*, in which the court reversed the defendant's felon in possession of a firearm and ammunition conviction because the trial judge abused discretion in admitting evidence that an arrest warrant had been issued for the defendant's failure to appear on an unrelated sexual assault charge as "background" evidence to show that the defendant was hiding out in the premises where the gun and ammunition were found. 847 F.3d 103, 106, 113 (3d Cir. 2017). There was no need for the "cavalier[]" use of background evidence in this case. *Id.* at 113. For another example, see *United States v. Caldwell*, 760 F.3d 267, 271 (3d Cir. 2014) (rejecting admission of prior gun possession to show that defendant knew he actually possessed a gun).

132. 858 F.3d 254, 262 (4th Cir. 2017).

133. *Id.*

134. *Id.* at 263.

with intent to distribute marijuana—to prove the defendant's knowledge of marijuana and his intent to distribute the marijuana found in the locked bedroom.<sup>135</sup>

On appeal, the Fourth Circuit reversed Hall's conviction, finding that the trial court abused its discretion in admitting Hall's prior convictions under Rule 404(b).<sup>136</sup> The court found that the prior convictions were not linked to the present charges by similar circumstances or "temporal proximity."<sup>137</sup> Because the prior convictions helped to render the defendant's involvement in the charged marijuana distribution "more plausible" through "precisely the criminal propensity inference Rule 404(b) is designed to forbid," the court found that the prior convictions were not admissible to prove the defendant's intent.<sup>138</sup> Over a vehement dissent, the court found that the government failed to meet its burden of explaining its proper purpose and of presenting a "propensity-free chain of inferences supporting" that purpose.<sup>139</sup>

In *United States v. Repak*, the Third Circuit ultimately approved the admission of prior uncharged acts by the defendant as consistent with its strict ban on the propensity inference but chastised the district court for failing to articulate with careful precision the nonpropensity reasoning supporting the admissibility of the evidence.<sup>140</sup> The defendant in *Repak* was a public official charged with various public corruption offenses based upon his solicitation of goods and services from vendors in exchange for awarding them public contracts.<sup>141</sup> The defendant's principal defense was that he lacked the requisite mental state to influence the award of contracts based upon the provision of specific personal services charged in the indictment.<sup>142</sup> The district court permitted the government to admit evidence of other uncharged acts of solicitation of personal services by the defendant to contractors to show the defendant's knowledge and corrupt intent.<sup>143</sup> In so doing the district court provided paragraphs of analysis supporting the admission of the other-acts evidence, reasoning that "these [uncharged] business dealings and other solicitations will be used by the Government to establish Defendant's knowledge as to the charges of extortion under color of official right and

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135. *Id.*

136. *Id.* at 264.

137. *Id.* at 260.

138. *Id.* at 275 (internal quotation marks omitted) (quoting *United States v. Hernandez*, 975 F.2d 1035, 1040 (4th Cir. 1992)).

139. *Id.* at 277.

140. 852 F.3d 230, 242, 244 (3d Cir. 2017) (explaining that the district court's analysis of the Rule 404(b) question is "inexact and fails to adequately link the other-acts evidence to a non-propensity purpose").

141. *Id.* at 237.

142. *Id.* at 240.

143. *Id.* at 241.

his willful intent as to the charges of solicitation by a bribe.”<sup>144</sup> The district court concluded that the “Government has presented a sufficient chain of inferences connecting these other acts to material facts in this case without implicating the evidentiary rules’ prohibition of using propensity evidence.”<sup>145</sup>

On appeal of Repak’s conviction, the Third Circuit held that the uncharged acts of solicitation were admissible under a proper Rule 404(b) analysis, but found the district court’s analysis of the evidence “lacking.”<sup>146</sup> The court noted that other-acts evidence must fit within a chain of inferences “no link of which is a forbidden propensity inference”<sup>147</sup> and emphasized that this chain of reasoning must be articulated by the proponent and by the trial court with “careful precision.”<sup>148</sup> The court noted the importance of articulating *how* exactly a prior act demonstrates knowledge or intent, for example, to ensure that the evidence is “not susceptible to being used improperly by the jury.”<sup>149</sup> Because the district court’s ruling failed to explain precisely *how* Repak’s uncharged solicitations tended to prove his intent with respect to the charged solicitations, the Third Circuit found that ruling to be “inexact” and an inadequate foundation for the admission of Rule 404(b) evidence.<sup>150</sup> The court ultimately upheld the conviction and the admission of the uncharged acts of solicitation, however, finding that the defendant’s course of conduct with the same vendors over a relatively circumscribed time period made it more likely that he did not “unwittingly” receive personal services free of charge without intending to award contracts based on those services.<sup>151</sup> Although the court upheld admission of the other-acts evidence, it emphasized that such evidence should be subjected to rigorous testing and admonished trial courts to perform careful, precise, and exact analysis of such evidence prior to its admission.<sup>152</sup>

To summarize, federal courts are deeply divided on how to determine the probative value of a criminal defendant’s prior bad act. Circuit courts sharply disagree on the need to assess whether the purported proper purpose for a prior bad act depends upon a propensity inference that reflects on the defendant’s character. Although federal courts have long upheld the admission of other-acts evidence with fleeting lip service to purported proper purposes, more recent circuit precedent demands a

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144. *Id.* (quoting *United States v. Repak*, No. 3:14-01, 2015 WL 4108309, at \*5 (W.D. Pa. July 7, 2015)).

145. *Id.* at 242 (quoting *Repak*, 2015 WL 4108309, at \*5).

146. *Id.*

147. *Id.* at 243 (quoting *United States v. Davis*, 276 F.3d 434, 442 (3d Cir. 2013)).

148. *Id.* (quoting *United States v. Caldwell*, 760 F.3d 267, 281 (3d Cir. 2014)).

149. *Id.*

150. *Id.* at 244.

151. *Id.* at 246.

152. *Id.* at 248 (“The District Court’s application of Rule 403 to the Government’s other-acts evidence lacked the rigor this Court requires.”).

rigorous analysis that eschews any reliance on a defendant's propensity to commit the charged offenses and places significant demands on the trial court in evaluating the admissibility of other-acts evidence.

### C. Putting Defendants in the Driver's Seat: Requiring "Active Contest"

The previous section demonstrates the difficulty and confusion involved in distinguishing between state of mind and propensity. This difficulty is especially salient when the government seeks to introduce bad-acts evidence to prove a defendant's intent or knowledge.<sup>153</sup> To mitigate prosecutorial abuse of bad-acts evidence offered to prove mental state, some courts prohibit the prosecution from admitting such evidence until it is apparent that the defendant is *actively contesting* the element of mental state.<sup>154</sup> In *United States v. Gomez*, the Seventh Circuit described this "active contest" approach as a component of the Rule 403 analysis conducted once a court has determined that there is a proper purpose for which the evidence is relevant without proceeding through a propensity inference.<sup>155</sup> The "general guiding principle" recognized by the court is that "the degree to which the nonpropensity issue actually is disputed in the case will affect the probative value of the other-act evidence."<sup>156</sup>

The court recognized that trials involve varying "degrees of factual disagreement" that affect the application of this general principle.<sup>157</sup> In some cases, a defendant might stipulate to a fact or element that other-acts evidence tends to prove. In this situation, the Seventh Circuit noted that other-acts evidence "may have little probative value" and may be excluded.<sup>158</sup> For trials involving general intent crimes, such as drug

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153. Professor David Sonenshein's review of the social science literature on the effect of prior experience on conduct suggests that "[b]ecause social science is essentially united in rejecting even the logical relevance of similar acts evidence on intent, Rule 404(b) should be amended to exclude intent from its list of permissible offers." Sonenshein, *supra* note 10, at 275. Sonenshein recognizes, however, that "this seemingly radical proposal" might be "unacceptable to those who draft and approve amendments to the Rules." *Id.* The Advisory Committee, consistent with Professor Sonenshein's prediction, is not considering any proposal that would completely bar bad-acts evidence when offered to prove intent.

154. An "active contest" requirement has usually been applied to evidence offered to prove a mental state, but logically it can be applied to other purposes such as identity and motive. See *United States v. Hall*, 858 F.3d 254, 263 (4th Cir. 2017) (noting the defendant was not contesting knowledge of the drugs when considering whether to admit the defendant's prior drug convictions).

155. 763 F.3d 845, 857 (7th Cir. 2014) (en banc) ("One important issue in Rule 403 balancing in this context is the extent to which the non-propensity factual proposition actually is contested in the case.").

156. *Id.*

157. *Id.*

158. *Id.* (citing *Old Chief v. United States*, 519 U.S. 172, 191–92 (1997) (holding that defense stipulation to felon status rendered evidence of defendant's prior felony conviction inadmissible because the "risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction")); see also Imwinkelried et al.,

distribution offenses, the court noted that it has “adopted a rule that other-act evidence is not admissible to show intent *unless* the defendant puts intent ‘at issue’ beyond a general denial of guilt” because the fact-finder may readily infer the defendant’s intent from the act itself.<sup>159</sup> The court explained that “intent is automatically at issue” in cases involving specific intent crimes and that active contest by the defendant is not necessarily required for admission of other-acts evidence to demonstrate intent in those circumstances.<sup>160</sup> The court cautioned, however, that other-acts evidence is not automatically admissible in specific intent cases because the evidence must always be relevant to intent in a permissible way.<sup>161</sup>

Similarly, the Third Circuit requires that the defendant actively contest his mental state before the prosecution may seek to admit bad-acts evidence to show “knowledge” or “intent.”<sup>162</sup> In *Caldwell*, the government alleged that the defendant, a convicted felon, had actual possession of a gun, which the defendant flatly denied.<sup>163</sup> Because the defendant did not dispute the mental element of the offense, but rather denied the conduct entirely, the court held that “knowledge . . . was not a proper basis for admitting evidence of Caldwell’s prior [weapons] convictions.”<sup>164</sup> The “active contest” requirement formed part of the court’s Rule 404(b) analysis, as follows:

Finally, we believe it necessary to address the District Court’s suggestion that Caldwell “put his knowledge at issue by claiming innocence.” It is unclear whether the District Court understood Caldwell to have “claimed innocence” by testifying at trial, or more broadly by pleading not guilty. Either way, we believe this line of reasoning is improper.

Situations may indeed arise where the content of a defendant’s trial testimony transforms a previously irrelevant 404(b) purpose into a material issue in a case. For example, if

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Courtroom Criminal Evidence, *supra* note 3, § 908 n.77 (“[Old Chief] strengthens the argument that if the defense tenders a full, unconditional stipulation to a fact in issue, the tender greatly reduces the prosecution need to resort to uncharged misconduct evidence to establish the fact.” (citation omitted)).

159. *Gomez*, 763 F.3d at 858 (citing *United States v. Hicks*, 635 F.3d 1063, 1070–71 (7th Cir. 2011); *United States v. Shackleford*, 738 F.2d 776, 781 (7th Cir. 1984)).

160. *Id.* (internal quotation marks omitted) (quoting *United States v. Conner*, 583 F.3d 1011, 1022 (7th Cir. 2009)).

161. See *id.*; see also *United States v. Schmitt*, 770 F.3d 524, 537 (7th Cir. 2014) (“By putting on evidence regarding who possessed the drugs in the house and disputing motive, Schmitt ‘opened the door’ to evidence that he was convicted of possessing the marijuana.”); *Miller*, 673 F.3d at 697–98 (“[E]vidence tending to prove intent becomes more probative, when the defense actually works to deny intent, joining the issue by contesting it . . . [I]f merely denying guilt opens the door wide to prior convictions for the same crime, nothing is left of the Rule 404(b) prohibition.”).

162. *United States v. Caldwell*, 760 F.3d 267, 283 (3d Cir. 2014).

163. *Id.* at 272, 278–79.

164. *Id.* at 279, 281.

Caldwell had testified that he thought the object in his hand was something other than a gun, then it would immediately become critical for the prosecution to rebut his claim of mistake and to show his knowledge of the true nature of the thing possessed. We disagree, however, with the proposition that, merely by denying guilt of an offense with a knowledge-based *mens rea*, a defendant opens the door to admissibility of prior convictions of the same crime. . . . Accordingly, we reject the suggestion that “claiming innocence” is sufficient to place knowledge at issue for purposes of Rule 404(b).<sup>165</sup>

But many courts find that a defendant puts knowledge at issue simply by entering a plea of not guilty because the government is then required to prove mental state beyond a reasonable doubt, regardless of whether the defendant actively contests that element at trial.<sup>166</sup> Thus, there is a circuit split on the use of prior bad acts to prove the defendant’s mental state when the defendant does not actively contest mental state at trial. The more traditional approach to uncharged misconduct permits the government to admit other-acts evidence to carry its high burden of proof notwithstanding the lack of an actual trial dispute over

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165. *Id.* at 281. For additional examples, see *United States v. Hall*, 858 F.3d 254, 265 (4th Cir. 2017) (emphasizing that the defendant did not contest his knowledge of marijuana or his intent to distribute it if he possessed it, but only contested his dominion and control over the contraband); *United States v. Ford*, 839 F.3d 94, 109 (1st Cir. 2016) (expressing concern about the trial court’s admission of evidence concerning defendant’s prior acts because the defendant’s decision not to contest intent “significantly reduced” the probative value of the testimony (citing *United States v. Varoudakis*, 233 F.3d 113, 121–24 (1st Cir. 2000))); *United States v. Sampson*, 385 F.3d 183, 193 (2d Cir. 2004) (holding evidence of uncharged drug activity was not admissible to prove intent because the defendant “unequivocally” relied on a defense that he did not do the act at all (quoting *United States v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988))). But see *United States v. Repak*, 852 F.3d 230, 242–43 (3d Cir. 2017) (noting that uncharged acts of solicitation were admissible pursuant to Rule 404(b) because the defendant put his mental state at issue by “contending that he did not accept items from JRA contractors with the intention of influencing the awarding of JRA contracts”).

166. See, e.g., *United States v. Smith*, 789 F.3d 923, 930 (8th Cir. 2015) (holding, in a prosecution for cocaine trafficking, that a prior drug distribution conviction was properly admitted despite defendant’s general-denial defense); *United States v. Smith*, 741 F.3d 1211, 1225 (11th Cir. 2013) (“There is ‘[a]mple precedent . . . in this circuit finding that a not guilty plea in a drug conspiracy case . . . makes intent a material issue and opens the door to admission of prior drug-related offenses as highly probative . . . evidence of a defendant’s intent.’” (quoting *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997))); *United States v. Olgun*, 643 F.3d 384, 390 (5th Cir. 2011) (“A defendant’s not-guilty plea intuitively puts his intent and knowledge into issue.”); *United States v. Hardy*, 643 F.3d 143, 151 (6th Cir. 2011) (stating that prosecutors may use Rule 404(b) evidence to prove specific intent regardless of the defendant’s defense in cases in which the crime charged requires specific intent); *United States v. Douglas*, 482 F.3d 591, 597 (D.C. Cir. 2007) (stating that the prosecution is entitled to present Rule 404(b) evidence to establish the elements of intent and knowledge despite defendant’s offer to stipulate because the prosecution has to prove each element of the offense beyond a reasonable doubt); *United States v. Jones*, 982 F.2d 380, 382 (9th Cir. 1992) (same).

the element at issue, whereas more recent Rule 404(b) holdings reveal a definite trend toward an “active contest” requirement.

#### D. *A Requiem for the “Inextricably Intertwined” Doctrine*

Rule 404(b)(1) provides that “crimes, wrongs, or other acts” cannot be offered as proof of character to prove conduct on a particular occasion.<sup>167</sup> Therefore, the Rule 404(b) prohibition applies only to “other” crimes, wrongs, or acts and not to acts that are part of the charged offense. However, courts have struggled to determine which acts are “other acts” under the purview of Rule 404(b) as opposed to acts that are part of the offense charged. Most courts ask whether the bad-acts evidence the prosecution seeks to admit is “inextricably intertwined” with the crime charged.<sup>168</sup> In cases in which the bad-acts evidence is “inextricably intertwined” with the acts constituting the crime charged, Rule 404(b) is considered inapplicable. Thus, the government need not articulate a “not-for-character” purpose when seeking to admit the evidence, and need not provide prior notice of the intent to use the evidence.<sup>169</sup>

As examined above, federal courts have frequently applied the “inextricably intertwined” doctrine loosely with shallow analysis of the connection between the proffered acts and the charged offense.<sup>170</sup> Another recent trend in Rule 404(b) decisions reveals that some courts are limiting the scope of the “inextricably intertwined” doctrine. These federal opinions are demanding a much closer connection between proffered acts and a charged offense before exempting such acts from Rule 404(b) scrutiny.

Several circuits have gone so far as to question whether acts that are inextricably intertwined with the charged offense should be exempt from Rule 404(b) scrutiny. In *United States v. Green*, for example, the government sought to introduce evidence that the defendant, who was charged with drug offenses, threatened to kill the person who turned him over to authorities.<sup>171</sup> The government argued that the evidence was “intrinsic evidence” relevant to the charged drug offenses.<sup>172</sup> Without conducting a Rule 404(b) analysis, the trial judge granted the government’s motion to

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167. Fed. R. Evid. 404(b)(1).

168. See, e.g., *United States v. Hilgeforsd*, 7 F.3d 1340, 1345 (7th Cir. 1993) (“When deciding if the ‘other acts’ evidence was admissible without reference to Rule 404(b), we must determine whether such evidence was ‘intricately related to the facts of the case’ at hand.” (quoting *United States v. Hargrove*, 929 F.2d 316, 320 (7th Cir. 1991))).

169. Of course, Rule 403 will still apply to the evidence. See *id.* (“If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by Rule 403.”).

170. See *supra* notes 63–93 and accompanying text.

171. 617 F.3d 233, 237 (3d Cir. 2010).

172. *Id.*

admit the evidence.<sup>173</sup> Although the Third Circuit ultimately affirmed the trial judge's ruling, the court rejected the "inextricably intertwined" doctrine as "vague, overbroad, and prone to abuse."<sup>174</sup> The court's detailed opinion describes three problems with the "inextricably intertwined" test. First, the test "creates confusion" because "no one knows what it means."<sup>175</sup> The confusion, the court notes, has resulted in different and non-interchangeable formulations of the test, and the question of "[w]hether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs."<sup>176</sup> The court reasoned that "Green's threat to kill [the person who turned him over to authorities] would qualify as intrinsic if the test is whether it 'pertain[s] to the chain of events explaining the context' of the crime," but that it would *not* qualify as inextricably intertwined "if the test were whether that threat was 'an integral part of the immediate context of the crime charged.'"<sup>177</sup> According to the *Green* court, another failing of the "inextricably intertwined test" is that it is "unnecessary."<sup>178</sup> The court noted that a common justification for the admission of "intertwined acts is to allow a witness to testify freely and coherently" without "tiptoe[ing] around uncharged bad acts by the defendant," a goal that can be met "without circumventing Rule 404(b)."<sup>179</sup> This is necessarily so because "allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b)."<sup>180</sup> The third and final flaw in the "inextricably intertwined" doctrine, according to the court, is its susceptibility to being applied in a broad and conclusory fashion that allows "virtually any bad act" to be classified as "intrinsic."<sup>181</sup> Thus, the *Green* court explicitly held that the "inextricably intertwined" standard would no longer serve as the test for intrinsic evidence: "Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)."<sup>182</sup>

Of course, line drawing is unavoidable in connection with Rule 404(b) because it applies only to "other" acts. Therefore, the *Green* court did not entirely "reject the concept of intrinsic evidence" and outlined "two narrow categories of evidence" it would consider "intrinsic" to the

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173. *Id.*

174. *Id.* at 248.

175. *Id.* at 246.

176. *Id.*

177. *Id.* (first quoting *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004); then quoting *United States v. Hall*, 604 F.3d 539, 543 (8th Cir. 2010)).

178. *Id.* at 247.

179. *Id.*

180. *Id.*

181. *Id.* at 248.

182. *Id.*

charged offense and exempt from Rule 404(b) analysis.<sup>183</sup> The court found that acts that “directly prove” the charged offense could not be considered “other acts” subject to a Rule 404(b) analysis. In addition, the court found that “uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime.”<sup>184</sup> According to the Third Circuit, any proffered acts not within these two narrow categories must be analyzed pursuant to Rule 404(b).

Under this narrow formulation of “intrinsic” evidence, the court held that the defendant’s threat to kill the witness was not intrinsic and thus fell under Rule 404(b).<sup>185</sup> The court reasoned that the proffered evidence was not intrinsic because it did not directly prove that the defendant attempted to possess cocaine with the intent to distribute.<sup>186</sup> Additionally, the proffered evidence “did not in any meaningful way facilitate his attempt to procure cocaine . . . the only crime with which [the defendant] was charged.”<sup>187</sup> Ultimately, the court affirmed the admission of the evidence under a Rule 404(b) analysis, consistent with its position that the “inextricably intertwined” doctrine is unnecessary. The court found that the threat evidence was properly admitted under Rule 404(b) to provide important context to the jury and to explain the motives of a government witness that the defendant challenged at trial.<sup>188</sup>

Similarly, in *United States v. Gorman*, the Seventh Circuit discarded the “inextricably intertwined” doctrine.<sup>189</sup> In *Gorman*, the defendant was charged with perjury after he lied to a grand jury by testifying that he did not store a car in a parking garage.<sup>190</sup> At trial, the government offered evidence that the defendant took two bags of money from the car, moved the car from its original location, and later abandoned the car.<sup>191</sup> The trial court admitted this evidence as “inextricably intertwined” with the perjury charge, and the defendant was convicted.<sup>192</sup>

The Seventh Circuit affirmed the conviction but explicitly held that “[h]enceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.”<sup>193</sup> The court acknowledged that “[t]here traditionally have been subtle distinctions between direct evidence of a charged crime, inextricable intertwinement evidence, and

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183. *Id.*

184. *Id.* at 249 (internal quotation marks omitted) (quoting *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000)).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 250.

189. 613 F.3d 711, 719 (7th Cir. 2010).

190. *Id.* at 715.

191. *Id.*

192. *Id.*

193. *Id.* at 719.

Rule 404(b) evidence,” but found that courts have frequently “lumped together these kinds of evidence” and have clouded “the already murky waters of the inextricable intertwinement doctrine.”<sup>194</sup> Consequently, the court held that “the inextricable intertwinement doctrine has since become overused, vague and quite unhelpful” and pronounced that the doctrine “has outlived its usefulness.”<sup>195</sup>

In examining the evidence of the defendant’s conduct with respect to the car in the garage, the court found it admissible without the need to invoke the intertwinement doctrine:

Because the basis for the perjury charge was that [the defendant] denied “having” the car in his garage, his theft of the car and extrication of the money from within were direct evidence of his false testimony. The fact that [the defendant] removed the Bentley from the garage demonstrated that he “had” a Bentley in the garage in the first instance. Therefore, this evidence was properly admitted, albeit as direct evidence rather than inextricable intertwinement evidence.<sup>196</sup>

Similarly, in *United States v. Bowie*, the D.C. Circuit refused to apply the “inextricably intertwined” test to determine the admissibility of evidence offered to “complete the story” or “explain the circumstances” of the charged crime.<sup>197</sup> In rejecting the test, the court reasoned that acts truly “intrinsic” to the charged crime “will, by definition, always satisfy Rule 404(b).”<sup>198</sup> Thus, the only real impact of branding other-acts evidence “inextricably intertwined” is “to relieve the prosecution of Rule 404(b)’s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel’s request.”<sup>199</sup> The *Bowie* court concluded that “there is no general ‘complete the story’ or ‘explain the circumstances’ exception to Rule 404(b)” and that “Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.”<sup>200</sup>

Notwithstanding this trend to eliminate or restrict resort to the “inextricably intertwined” doctrine, other circuits continue to employ

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194. *Id.*

195. *Id.*

196. *Id.* For another example of this reasoning, see *United States v. Schmitt*, 770 F.3d 524, 533 (7th Cir. 2014) (finding the “district court’s conclusion that the drug evidence was ‘inextricably intertwined’ with the charged act and ‘fill[ed] the story’” ran counter to recent precedent and was “not dispositive on the issue of relevance or the ultimate admissibility of the drug evidence”). For further discussion of the Seventh Circuit’s position on the “inextricably intertwined” doctrine, see Jaime L. Padgett, *How Less Is More: The Unraveling of the Inextricable Intertwinement Doctrine Under *United States v. Gorman**, 6 Seventh Cir. Rev. 196, 229 (2010) (applauding the court for abandoning the “inextricably intertwined” doctrine).

197. 232 F.3d 923, 928–29 (D.C. Cir. 2000).

198. *Id.* at 927.

199. *Id.*

200. *Id.* at 929.

the doctrine broadly to find that Rule 404(b) is inapplicable. In these circuits, “evidence used to ‘complete the story’ is pretty much the same as evidence admitted for ‘context’ under Rule 404(b).”<sup>201</sup> Indeed, evidence found “intrinsic” in these circuits could often be characterized as evidence of state of mind or consciousness of guilt, which fall under the purview of Rule 404(b).<sup>202</sup> Therefore, there remains a split of authority regarding proper application of Rule 404(b) and the role that the doctrine of “intrinsic” or “inextricably intertwined” acts plays in the Rule 404(b) analysis.

#### IV. AMENDING FEDERAL RULE 404(B): THE POSSIBILITIES

The growing divide between circuits that have curtailed the admissibility of other-acts evidence in criminal cases and those that have routinely admitted evidence of a criminal defendant’s past crimes signals that the time is ripe for an amendment to Federal Rule of Evidence 404(b).<sup>203</sup> The concerns and limitations, outlined most prominently in the Seventh and Third Circuit cases described above, provide several possibilities for amendment.<sup>204</sup> Consequently, the Advisory Committee is currently considering a number of proposals to amend Rule 404(b).<sup>205</sup> This Part discusses the drafting alternatives being considered by the Committee.

##### A. *A Propensity Inference Ban*

One possibility for amending Federal Rule of Evidence 404(b)(2) would be to add language expressly prohibiting the use of any other

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201. Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 326 (describing the split of authorities).

202. *Id.* For examples of cases using this reasoning, see, e.g., *United States v. Loftis*, 843 F.3d 1173, 1176–77 (9th Cir. 2016) (finding uncharged fraudulent transactions are intrinsic to the charged scheme); *United States v. Ali*, 799 F.3d 1008, 1026–27 (8th Cir. 2015) (finding evidence that defendant supported al Shabaab before it was designated a terrorist organization “intrinsic” to a conspiracy charge because it “provid[ed] context to the charged crime”); *United States v. Castleman*, 795 F.3d 904, 915 (8th Cir. 2015) (finding that death threats against witnesses, offered to prove consciousness of guilt in a drug prosecution, constituted “direct evidence of the crime charged” and [were] not subject to a Rule 404(b) analysis” (quoting *United States v. Zierke*, 618 F.3d 755, 759 (8th Cir. 2010))); *United States v. Ford*, 784 F.3d 1386, 1394 (11th Cir. 2015) (“[E]vidence of uncharged conduct that is part of the same scheme or series of transactions and uses the same modus operandi as the charged offenses is admissible as intrinsic evidence outside the scope of Rule 404(b).”); see also *Imwinkelried*, *The Second Coming*, *supra* note 65, at 726 (noting that when courts have invoked the inextricably intertwined doctrine, they could “just as easily” have used a “noncharacter theory” under Rule 404(b)).

203. See 28 U.S.C. § 2073(b) (2012) (authorizing changes to the rules “as may be necessary to maintain consistency”).

204. See *supra* notes 101–109, 116–131, 140–152, 155–165, 171–196 and accompanying text (summarizing the Third and Seventh Circuit’s decisions).

205. Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 17–20.

crime, wrong, or act if its probative value depends at all upon a propensity inference that suggests that a defendant is guilty of a charged crime because “she did it before.” A strict propensity ban would eliminate any interpretation of Rule 404(b) as a rule of “inclusion.”<sup>206</sup> Such an amendment would echo the recent opinions of the Third, Fourth, and Seventh Circuits and would go hand in hand with a requirement that the proponent of Rule 404(b) evidence and the district court articulate with “careful precision” the chain of reasoning that demonstrates the probative value of the other act to ensure that it does not rely upon a propensity inference.<sup>207</sup> An amendment that expressly bans use of a crime, wrong, or act that depends upon a propensity inference could also assist litigants and judges in policing such a requirement by beefing up the notice provisions of Rule 404(b).<sup>208</sup> Adding both a propensity ban and enhanced notice requirements will assure timely notice of nonpropensity arguments, and will also provide specific authority for the court to exclude the bad-acts evidence if the probative value for the asserted purpose actually proceeds through a propensity inference.

This amendment to Rule 404(b) could add the emphasized language below and read:

(b) CRIMES, WRONGS, OR OTHER ACTS.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in

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206. A Committee Note might also address the problem, but that would depend on what textual amendments are proposed. A Note must be attendant to some change to the text. See 28 U.S.C. § 2073(d). Moreover, the Rule Committees follow a practice that a Committee Note cannot establish rules that are not found in the text. See Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 315–16 (“The problem is such a profound one (with such a substantial impact on litigation) that if it is going to be addressed, it should probably be addressed in text, with an explanatory note in support.”).

207. See, e.g., *United States v. Caldwell*, 760 F.3d 267, 274 (3d Cir. 2014).

208. Requiring that proponents of other-acts evidence articulate a nonpropensity chain of reasoning in their Rule 404(b) notice without adding an express prohibition on propensity in the substantive standard is another alternative. Changing the notice provision alone, however, would be less effective than an amendment that alters both the substantive standard of admissibility and the notice provision. A violation of a substantive provision renders evidence inadmissible. See, e.g., *United States v. Hitesman*, No. 14-CR-00010-LHK-1, 2016 WL 3523854, at \*5 (N.D. Cal. June 28, 2016) (excluding evidence of the defendant’s prior bank robbery convictions because they were insufficiently distinctive to show identity as required by Rule 404(b)(2)). A violation of the notice provision, however, means only that the proponent failed to timely articulate a nonpropensity purpose, and it will be in the discretion of the court whether to exclude the evidence. See Fed. R. Evid. 404(b)(2)(B) (requiring only “reasonable notice” and permitting trial courts to “excuse” lack of pretrial notice altogether for good cause); see also *United States v. Perez-Tosta*, 36 F.3d 1552, 1560–63 (11th Cir. 1994) (affirming the trial court’s decision to admit Rule 404(b) evidence notwithstanding the government’s failure to give notice until just before voir dire and concluding that the defendant could not show prejudice from failure). In other words, a notice provision does not itself guarantee that the bad-acts evidence will have to proceed through nonpropensity inferences; rather, the notice provision would only guarantee timely articulation of the proponent’s nonpropensity purpose.

order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *But the probative value for the other purpose may not depend on a propensity inference.*<sup>209</sup>

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:<sup>210</sup>

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial;
- (B) articulate in the notice the nonpropensity purpose for which the prosecution intends to offer the evidence;
- (C) articulate the chain of reasoning supporting the purpose for offering the evidence; and
- (D) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.<sup>211</sup>

Such an amendment, which combines an express propensity ban with enhanced notice provisions, could include an Advisory Committee Note explaining the meaning and impact of the changes, as follows:

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209. The notice provision in current Rule 404(b) appears in subsection (2) as part of the substantive admissibility limitations. See Fed. R. Evid. 404(b). If the propensity prohibition is added as above, it would make sense to drop Rule 404(b)'s notice provision to a new and separate subsection (3) independent of the substantive provisions governing admissibility. A separate notice subsection would be consistent with the structure of Federal Rule of Evidence Rule 412, which includes subsection (c) governing the "Procedure to Determine Admissibility" separate from the previous subsections dictating substantive admissibility. See Fed. R. Evid. 412(c).

210. Because the requirement that the defendant "request" notice is complied with on a pro forma basis, it adds nothing but a trap for the unwary to the operation of the notice provision. For this reason, the Advisory Committee has already approved in principle a proposed amendment to the Rule 404(b) notice provision that eliminates the requirement of a defense "request" for notice. See Fall 2016 Advisory Comm. Meeting Agenda, *supra* note 15, at 31.

211. This proposal places the good cause exception last to make clear that it applies to all of the prosecution's notice and articulation obligations. One problem with requiring detailed articulation of nonpropensity purposes within the criminal notice provision is that this would deprive judges and litigants in civil cases of such detailed information in advance of trial to assist them in ascertaining nonpropensity purposes for other-acts evidence. Although the problems in the admission of other-acts evidence have largely arisen on the criminal side, this evidence can present difficulties in the civil context as well. See Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063, 1076 (2005) ("[W]hen plaintiffs purport to offer evidence of an employer's 'motive,' they overwhelmingly do so [because] . . . [t]he employer's prior acts reveal that the employer has some discriminatory mindset . . ."). To obtain the maximum benefit from expanded notice and articulation requirements, therefore, the Advisory Committee could consider extending the notice provision to civil cases.

The amendment emphasizes that it is not enough simply to articulate a noncharacter purpose for evidence of other crimes, wrongs, or acts. In order for Rule 404(b) to protect in accordance with its intent, the probative value of the evidence for the proper purpose cannot be dependent on a propensity inference. For example, if evidence of uncharged misconduct is offered to prove intent, it cannot be admitted for that purpose if the inference is, “because the bad act shows the accused has a propensity to commit a crime like the one charged, it tends to prove the accused had the intent to commit the charged crime.” The proponent must therefore articulate to the court the chain of inferences from the bad-acts evidence to the purpose for which it is offered and explain how that chain of inferences does not depend on the actor’s propensity.

An absolute ban on propensity could present some significant problems, however. First, one might argue that “adding” a ban on the propensity inference to Rule 404(b)(2) merely reiterates the prohibition already stated in Rule 404(b)(1) that provides: “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.”<sup>212</sup> An amendment to the Federal Rules of Evidence that provides, in essence, “We really mean it—please follow the rule,” is certainly not in keeping with effective rulemaking. Further, such a potentially redundant admonition may do little to curb the abuses of Rule 404(b) by the federal circuits already inclined to admit other-acts evidence permissively.

Even if one might interpret the existing language of Rule 404(b)(1) as creating a de facto propensity prohibition, the fact remains that Rule 404 nowhere uses the term “propensity.” Instead, the Rule speaks in terms of proving that a “person acted in accordance” with character.<sup>213</sup> Amending Rule 404(b) to introduce a ban on “a propensity inference” would require courts to define this new terminology and to engage in the difficult task of determining with precision which uses of other-acts evidence involve a propensity inference—especially when the proper purpose is intent. As Judge Tjoflat emphasized in his special concurrence in *United States v. Mathews*, “[T]he line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear.”<sup>214</sup> Introducing new terminology into the Rule is certain to invite costly litigation aimed at interpreting it.

Assuming that an amendment that adds a propensity ban to Rule 404(b)(2) would alter the existing meaning of Rule 404(b), it could also alter existing, well-accepted uses of other-acts evidence. To be sure, the

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212. Fed. R. Evid. 404(b)(1).

213. See Fed. R. Evid. 404(a)(1), (b)(1).

214. 431 F.3d 1296, 1313 n.1 (11th Cir. 2005) (Tjoflat, J., concurring in the judgment).

use of other-acts evidence to prove a defendant's knowledge and intent poses the greatest propensity risk.<sup>215</sup> But even commonly accepted "proper purposes" for other-acts evidence could be seen as involving some degree of propensity reasoning. Take classic modus operandi evidence as an example. Imagine a bank robber with a distinctive signature—perhaps the robber wears a ball cap with Mickey Mouse emblazoned on the front and leaves tellers with typewritten thank-you notes in Chaucerian English on heavy cardstock stationery. If a defendant were charged with robbing a bank in this way, her strikingly similar method of operation in a previous bank robbery would have a strong tendency to suggest the defendant's identity in connection with the charged offense. When a defendant contests her identity, at least, all courts would agree that other-acts evidence that rises to the level of a signature should be admissible to prove identity pursuant to Rule 404(b)(2).<sup>216</sup> To be sure, such modus operandi evidence relies on an assumption about how *objectively unlikely* it would be for a different person to light upon this same distinctive method of operation to rob a bank.<sup>217</sup> But this type of "signature" evidence surely relies to some extent upon a degree of propensity reasoning. If the defendant did the crime in this unique way before, the defendant is the one who probably did it in the same unique way again because of her unusual tendency to operate in this manner. To effectuate a true ban on propensity, courts will be forced to define "propensity," to ferret out any reliance on a propensity inference, and to reject other-acts evidence the probative value of which relies to any degree on such an inference.

Further, while the "intent" purpose for other-acts evidence has been one of the most abused "proper purposes" under existing precedent, a wholesale ban on propensity inferences would risk eliminating "intent" as a proper purpose for other-acts evidence altogether, even in cases in which it would be appropriate. In cases like the pair of *Smith* cases discussed above, courts have misused the intent purpose for other-acts evidence, allowing a defendant's past drug offenses to prove "intent" to commit a current offense even when the defendant does not dispute knowledge of drugs or intent to possess or sell them, but simply denies commission of the charged offense.<sup>218</sup> In such cases, a defendant is essentially saying, "I didn't engage in this conduct at all." In cases like these, the only probative value of prior drug offenses is to show that a

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215. See *supra* section III.B (discussing several federal cases illustrating the difficulties of separating the permissible purposes of knowledge and intent from impermissible propensity inferences).

216. See, e.g., *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982) (noting that "[i]f the crimes share elements that possess 'signature quality,' evidence of the 'other crime' may be admitted" when identity is in dispute).

217. Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 907 (discussing the doctrine of objective chances).

218. See *supra* notes 47–62 and accompanying text.

defendant is more likely to “commit” an offense involving drugs because the defendant has done so in the past. This is pure propensity and should be prohibited as violating the ban on character evidence. Adding an express prohibition on any chain of reasoning that relies on propensity to Rule 404(b) could curb abuses such as these.

It may be appropriate, however, to permit use of other-acts evidence to prove intent in cases in which it is probative and necessary to refute a specific defense raised by a criminal defendant—even though that use involves some reliance on a propensity inference. For example, take a defendant charged with willful tax evasion due to failure to report cash earnings as taxable income. Such a defendant might concede earning the money, as well as the failure to report it to the IRS, and yet deny the necessary *intent* to evade taxes.<sup>219</sup> The defendant could argue that the failure to include the particular earnings stemmed from oversight and forgetfulness but not from an intent to avoid legal tax obligations or to defraud the IRS. To rebut this defense, evidence that the same defendant had earned significant cash income during one previous uncharged time period (in an amount impossible to “forget”) and failed to report it for that time period would be highly probative of the absence of any “mistake” or “accident” and of the defendant’s “intent” to evade tax obligations. The fact that the defendant had willfully failed to report earnings before could powerfully refute the defendant’s specific defense of accident raised in the instant case.

Because proof of state of mind is elusive and because obtaining alternative evidence to combat the defendant’s purported reasons for the current failure to report would be difficult, the probative value of such prior conduct for the government would be high and would surely eclipse the risk that the jury would use the prior act simply to assume, “Once a tax evader, always a tax evader,” or to punish the defendant for past misdeeds. Thus, when a defendant like this one actively contests state of mind or intent, prior intentional acts may be extremely important to the government’s ability to respond. And yet, a complete ban on any purpose for which a propensity inference is required could eliminate the prosecution’s ability to use this defendant’s prior act because it would be arguing that the previous failure to report taxes knowingly and intentionally makes it more likely that the current failure to report was also knowing and intentional. The defendant willfully did it before, making it more likely that this time, it was also willful. The specter of “propensity” rears its head.

One could attempt to argue that the doctrine of “objective chances”<sup>220</sup> supports the inference of intent in such a circumstance, rather

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219. See, e.g., *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994) (noting that voluntary, intentional violation is an element of tax evasion).

220. See Imwinkelried et al., *Courtroom Criminal Evidence*, supra note 3, § 907 (explaining the doctrine of objective chances, which supports an inference of guilty know-

than propensity. If the defendant did it on purpose previously, what are the chances that this time was inadvertent? If the government could prove *many* prior intentional acts, such “objective chances” might be said to support the showing of intent without regard to any propensity inference. But when the government can point to only a single prior instance, as in this hypothetical and in many actual cases, it is very hard to see how one might draw an inference of intent in the absence of any inference about the defendant’s tendencies with respect to tax evasion. Similar legitimate uses of other acts to show “intent” could come up in classic federal drug prosecutions as well, such as when a defendant concedes the possession of a distribution quantity of drugs but argues specifically that she had no intent to distribute and planned to maintain the large quantity for personal use. Previous distribution convictions or convictions for possession with intent to distribute would be important to the government’s ability to refute this testimony but would certainly depend upon some propensity inferences.

This use of other-acts evidence is emblematic of the traditional “door-opening” or “turnabout is fair play” operation of the evidence rules.<sup>221</sup> And yet, the use of prior acts of drug distribution or nonreporting of income in either of these cases would suggest intent and knowledge, at least in part, by way of a propensity inference.<sup>222</sup> Placing an absolute prohibition on a propensity inference, as the Seventh and Third Circuits have done, may swing the pendulum too far in the direction of exclusion and prevent government use of other-acts evidence even in compelling circumstances that would be in keeping with the original intent behind Rule 404(b). Indeed, an express propensity ban may write “intent” off the list of proper purposes under Rule 404(b)(2).<sup>223</sup>

Finally, enforcing a complete ban on the propensity inference also requires “careful precision” and exact articulation of the reasoning supporting the use of other-acts evidence by the trial judge, as noted in the

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ledge and intent based on the “improbability of coincidence” and the objective unlikelihood that an innocent person will repeatedly find herself in suspicious circumstances).

221. See *Huddleston v. United States*, 485 U.S. 681, 688 (1988) (“The Advisory Committee specifically declined to offer any ‘mechanical solution’ to the admission of evidence under 404(b). Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility . . . .” (citation omitted)); James P. Gillespie, Note, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 *Notre Dame L. Rev.* 382, 390 & n.78 (1987) (citing Rule 404(a)(1) as performing a “door opening” function).

222. See Milich, *supra* note 9, at 786 (“[T]he distinction between legitimate ‘propensity free’ inferences from character evidence and disfavored propensity uses is far from clear and is difficult to apply. Many of Rule 404(b)’s admissible uses of character evidence are more or less dependent on propensity inferences.”); Morris, *supra* note 10, at 191 (“The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant’s behavior forms an unchanging pattern.”).

223. See Sonenschein, *supra* note 10, at 275 (“Rule 404(b) should be amended to exclude intent from its list of permissible offers.”).

recent *Repak* case out of the Third Circuit.<sup>224</sup> Although the trial judge in that case provided paragraphs of analysis supporting the admission of other-acts evidence by the government, the Third Circuit found that the district court's findings fell short.<sup>225</sup> Like a law professor critiquing a student's paper, the Third Circuit chastised the district court for omitting the magic words establishing precisely *how* the other-acts evidence demonstrated intent without reliance on propensity.<sup>226</sup> Although detailed record findings supporting the admissibility of other-acts evidence are appropriate, helpful, and should be encouraged, to reject the extensive analysis performed by the trial judge in *Repak* places an impossible burden on even the most careful trial judge to find just the right words to eliminate the slippery specter of propensity.<sup>227</sup>

An amendment to Rule 404(b) that holds trial judges to such exacting standards could prove inefficient and unrealistic, even when decisions are made in advance of trial, but particularly when other-acts objections are raised during the heat of a criminal trial. Such mandatory detail and precision would hamstring trial judges and slow down proceedings. In addition, such a requirement would place new burdens on prosecutors to identify and articulate the precise reasoning supporting the use of any other-acts evidence to include in their pretrial notices. Indeed, as set forth above, an amended notice provision would be a likely and necessary companion to an amendment that flatly prohibits propensity reasoning.<sup>228</sup> Although the notice provision would excuse a lack of such precise articulation for "good cause," prosecutors may risk losing other-acts evidence due to a failure to predict precisely in advance of trial the reasoning supporting a proffer of other-acts evidence.

In sum, while a propensity ban could potentially serve to curb some of the worst abuses in Rule 404(b) cases, it is rife with thorny problems that could thwart its operation.

#### B. *Requiring "Active Contest"*

To address the many federal decisions in which courts find that defendants open the door to other-acts evidence simply by pleading not guilty—and to assure that the prosecution would not be allowed to admit bad acts to show a proper purpose that the defendant does not even contest—Rule 404(b)(2) could be amended to require "active contest" by

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224. United States v. *Repak*, 852 F.3d 230, 244–45 (3d Cir. 2017) (internal quotation marks omitted) (quoting United States v. *Caldwell*, 760 F.3d 267, 281 (3d Cir. 2014)).

225. *Id.* ("In essence, this was the 'mere recitation of the purposes in Rule 404(b)(2)' that we have previously deemed inadequate." (quoting *Caldwell*, 760 F.3d at 277)).

226. *See id.*

227. *See Mueller & Kirkpatrick*, *supra* note 18, § 4:29 ("There may even be a risk that a hard rule demanding that judges jump through hoops every time such evidence is offered would lead to recitations of stock phrases that do little to assure the exercise of care.").

228. *See supra* notes 206–212 and accompanying text.

the opponent of his “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>229</sup> Such an amendment would be in keeping with recent precedent in the Seventh and Third Circuits discussed above.<sup>230</sup>

This amendment would appear within Rule 404(b)(2) and could read:

(b) CRIMES, WRONGS, OR OTHER ACTS.

(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.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident—*where that purpose has been actively contested by the opponent.*<sup>231</sup>

There would be undeniable benefits to an approach that required “active contest” before permitting other-acts evidence. First, the cases holding that a criminal defendant “opens the door” to evidence of his prior misdeeds simply by pleading “not guilty” would effectively be overruled by such an amendment.<sup>232</sup> In the classic possession with intent to distribute prosecution, for example, even the most permissive jurists would be hard-pressed to find that a defendant actively contested “intent” merely by denying the commission of the offense and going to trial. And of course, a committee note could shore matters up by stating that the textual change is indeed intended to overrule this precedent.

Additionally, such an amendment would continue to allow other acts to be proved in cases like the hypothetical tax evasion or possession with intent to distribute prosecutions described above. By claiming accidental failure to report income, or an intent to keep a large quantity of drugs for purely personal use, a criminal defendant would actively contest intent and open the door to probative other-acts evidence proffered by the

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229. Fed. R. Evid. 404(b)(2).

230. See *supra* section III.C.

231. Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 335. This version of Rule 404(b) emphasizes language that could be added to create an “active contest” requirement. An amendment mandating “active contest” by the opponent of Rule 404(b) evidence could be combined with an amendment expressly banning a propensity chain of reasoning or could be added independently. Instead of amending the text of Rule 404(b)(2) to require “active contest” by the opponent, the Advisory Committee alternatively could address the importance of “active contest” in a committee note accompanying other amendments to the Rule, such as the propensity ban. This option, however, risks the note doing much more than the text. Moreover, the note would be guidance but not controlling.

232. See *supra* note 166 (discussing cases in which the court admitted evidence of prior bad acts given defendants’ not guilty plea).

prosecution. Indeed, an amendment that adds an “active contest” requirement to Rule 404(b) could prove more effective and offer a better calibration in the admission of other-acts evidence than an amendment that bans propensity inferences altogether.<sup>233</sup>

That said, an “active contest” requirement would present significant concerns in application that could prove even more insurmountable than the obstacles facing courts and litigants in policing a propensity ban. First and foremost, such an amendment would require parties to define and trial courts to interpret the contours of the term “active contest.” Because determining whether a defendant has actively contested a particular point may be murky at best, courts and litigants may be forced to expend significant resources pursuing this elusive standard. Notwithstanding predictable battles over an “active contest” requirement, it is nearly impossible to articulate lines that can be drawn consistently.

Courts would have to adopt a case-by-case approach to address the questions sure to arise about various degrees of “active contest.” For example, courts would have to determine to what extent arguing that the government has not proven every element of the offense beyond a reasonable doubt constitutes “active contest” of all elements of the offense. If a government witness testifies in a way that tends to prove a defendant’s intent to commit the charged crime, and the defendant simply attacks the witness’s credibility, courts will have to determine whether that impeachment constitutes “active contest” of intent. Moreover, questions are certain to arise about timing if a defendant *delays* actively contesting the mental element of the offense until late in the case. For example, if the defense does not contest intent until calling witnesses in its case-in-chief, the prosecution will need to present rebuttal witnesses to present its Rule 404(b) evidence. And requiring “active contest” as a prerequisite to admitting other-acts evidence would create extreme difficulties if a defendant waits to contest intent until closing arguments after the close of all evidence. Because it seems impossible to draft rule text that will accurately cover all possible nuances, an amendment that adds such a requirement may not be worth the candle.<sup>234</sup>

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233. Of course, if an amendment were to combine *both* a propensity ban and an “active contest” requirement, all the difficulties in the application of a propensity ban would continue to be in play.

234. Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 321. The problem of line drawing here is analogous to the situation in which the defendant, at a proffer session, signs an agreement that his statements can be used in contradiction of a position that the defense takes at trial. Just recently, the Second Circuit, in a lengthy opinion, analyzed a variety of arguments that the defendant could make without opening the door, and also described a number of arguments the making of which would open the door to allow admission of the proffer statements. See *United States v. Rosemond*, 841 F.3d 95, 110–14 (2d Cir. 2016). The length and specificity of the analysis is most helpful. But it is the kind of analysis that is probably better found in a lengthy opinion than in the text of an Evidence Rule.

Indeed, federal judges *already* disagree about the type of defense that creates a dispute that may be resolved by other-acts evidence. For example, in *United States v. Hall*, the government prosecuted the defendant for the possession with intent to distribute marijuana, as well as for gun offenses, based upon the presence of marijuana and guns in a locked bedroom in his house.<sup>235</sup> Because the government could not prove the defendant's actual possession of the contraband, it relied on his constructive possession of the drugs and guns in his house to prove its case.<sup>236</sup> At trial, the defendant offered the testimony of a cousin who claimed that he also lived in the house and that the drugs and guns in the locked room belonged to him and not to the defendant.<sup>237</sup> Over a defense objection, the government admitted the defendant's four prior marijuana offenses to demonstrate the defendant's knowledge of the marijuana and intent with respect to the drugs in the locked room.<sup>238</sup>

On appeal, the Fourth Circuit found admission of the defendant's prior convictions erroneous due in part to the defendant's failure to contest knowledge and intent.<sup>239</sup> The majority noted that the defendant did not dispute his knowledge of marijuana or that he intended to distribute it if he possessed it but argued only that he had no dominion or control over the drugs and guns in the locked room.<sup>240</sup> A vehement dissent argued that the defendant's presentation of a "cock-and-bull" story characterizing himself as an innocent occupant randomly living in a residence housing a marijuana distribution operation was sufficient to actively contest defendant's knowledge and intent and to open the door to his prior marijuana convictions.<sup>241</sup> Enshrinining an "active contest" requirement within the text of Rule 404(b) is certain to intensify the already heated debate among the federal courts about what it means to *actively* contest an element, without offering any hard and fast answers.

*Hall* raises another concern about an "active contest" amendment, namely that there may be circumstances in which "active contest" should *not* be a necessary predicate to use of other-acts evidence. Another potential purpose for admitting the defendant's prior convictions in *Hall* could have been to impeach his testifying cousin based upon bias.<sup>242</sup> The defendant's previous record illustrated *why* his cousin might be willing to take the fall to protect the defendant from the significant prison time he would face as a repeat offender. Even if the defense did not actively

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235. 858 F.3d 254, 259 (4th Cir. 2017).

236. *Id.*

237. *Id.* at 261, 263.

238. *Id.* at 262–64.

239. *Id.* at 263–64.

240. *Id.* at 263.

241. *Id.* at 290–91 (Wilkinson, J., dissenting).

242. See *id.* at 291. The majority rejects this argument in part because the government did not rely on this basis for admitting the prior convictions. See *id.* at 285–86 (majority opinion).

contest the defendant's knowledge or intent, the defendant's prior convictions would tend to discredit his cousin without relying upon any propensity reasoning whatsoever. The defendant's record and the cousin's lack of record gave the cousin a powerful incentive to accept responsibility in the defendant's place. These facts could have helped the jury evaluate the credibility of the cousin's testimony. Of course, the Rule 403 balancing required as part of the Rule 404(b) analysis might serve to exclude defendant's prior drug convictions offered for this purpose when the prejudice of potential propensity could substantially outweigh any impeachment value. But it would be close, given that the cousin was the star witness for the defense and given that Rule 403 favors admissibility by requiring that prejudice "substantially outweigh" probative value. Most importantly, the impeachment purpose for offering the prior convictions would seem to be a proper nonpropensity purpose despite the absence of "active contest" by the defendant. Even the Seventh Circuit in *Gomez* articulated the need for "active contest" by the defendant in prosecutions involving general intent crimes, but recognized that such a wholesale requirement would not be appropriate for proving specific intent crimes.<sup>243</sup>

In addition, although the recent push to restrict Rule 404(b) evidence in the federal courts has targeted common abuses in the admission of other-acts evidence against criminal defendants, adding an "active contest" requirement to Rule 404(b)(2) would not serve to protect criminal defendants alone. Any litigant seeking to offer evidence of acts other than those at issue in a given case must comply with Rule 404(b).<sup>244</sup> Hence, requiring an opponent to actively contest an element or issue before other-acts evidence may be admitted would burden criminal defendants relying upon Rule 404(b)(2) to advance reverse 404(b) evidence, as well as civil litigants who must also resort to Rule 404(b)(2) to offer evidence of other crimes, wrongs, or acts.<sup>245</sup> Therefore, an "active contest" requirement may be an overly broad response to specific problems involving government reliance on Rule 404(b) evidence in criminal cases.

Furthermore, adding an "active contest" mandate to Rule 404(b) threatens to undermine and obfuscate the meaning of the Supreme Court's dicta in *Old Chief v. United States*.<sup>246</sup> In *Old Chief*, the Court held that a defendant's offer to stipulate to his felon status during his trial on a felon-in-possession charge rendered proof of his prior felony assault

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243. *United States v. Gomez*, 763 F.3d 845, 858–59 (7th Cir. 2014) (en banc).

244. See Fed. R. Evid. 1101(b) (requiring that the Federal Rules of Evidence apply in "civil cases and proceedings" and "criminal cases and proceedings").

245. Although it would require a criminal defendant offering reverse 404(b) evidence to articulate the "active contest" to which the evidence goes, the government would actively pursue every element in a criminal case in order to meet its burden of proof.

246. 519 U.S. 172, 190 (1997).

inadmissible under Rule 403.<sup>247</sup> In the course of its reasoning, however, the Court emphasized that the government generally has the authority to “prove its case by evidence of its own choice.”<sup>248</sup> More specifically, as to Rule 404(b), the Court stated that “if . . . there were a justification for receiving evidence of the nature of prior acts on some issue other than status (*i.e.*, to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,’ Fed. Rule Evid. 404(b)), *Rule 404(b) guarantees the opportunity to seek its admission.*”<sup>249</sup>

Notably, *Old Chief* distinguished between stipulations to the defendant’s legal status, which can be forced upon the prosecution, and stipulations to other elements of a crime, such as “intent” or “knowledge,” which the prosecution is entitled to reject.<sup>250</sup> The Court reasoned “that proof of the defendant’s status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.”<sup>251</sup> In contrast, the intent and knowledge elements go directly to “what the defendant is charged with thinking and doing to commit the current offense.”<sup>252</sup> Since *Old Chief*, federal courts have followed the Supreme Court’s lead with respect to stipulations and Rule 404(b). In *United States v. Crowder*, for example, the D.C. Circuit sitting en banc relied on the *Old Chief* dictum in reaching its holding: “[W]e hold that a defendant’s offer to stipulate to an element of an offense does not render the government’s other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant’s proposed stipulation is unequivocal . . . .”<sup>253</sup>

The addition of an “active contest” requirement to Rule 404(b) would seem to undermine the Supreme Court’s dictum in *Old Chief* and to reverse the result in cases like *Crowder*. By definition, an “active contest” precondition to the admission of other-acts evidence would mean that a defense offer to concede a particular point through a binding stipulation would foreclose access to Rule 404(b) evidence on that point, period. Indeed, in *Gomez*, in discussing its “active contest” requirement, the Seventh Circuit cited *Old Chief* for the proposition that “if a defendant offers to concede or stipulate to the fact for which the evidence is offered,” such as mental state, “additional evidence may have little probative value,” thereby making bad acts inadmissible.<sup>254</sup> An amendment designed to prevent overreaching by the prosecution could, thus, serve to place defendants in the driver’s seat with respect to other-

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247. *Id.* at 174, 191–92.

248. *Id.* at 186–87.

249. *Id.* at 190 (emphasis added).

250. *Id.* at 190–91.

251. *Id.* at 191.

252. *Id.*

253. 141 F.3d 1202, 1209 (D.C. Cir. 1998).

254. *United States v. Gomez*, 763 F.3d 845, 857 (7th Cir. 2014) (en banc) (citing *Old Chief*, 519 U.S. at 191–92).

acts evidence, carefully stipulating to any element that might call for admission of prior misdeeds, while resting a defense on specific elements free from such risk. While probative value of other acts is already diminished by a defendant's offer to stipulate under the Rule 403 analysis that applies to Rule 404(b) evidence, a hard and fast amendment that gives criminal defendants exclusive control over the admissibility of other-acts evidence may swing too far in the other direction—unfairly hampering the government in carrying a heavy burden of proof.

A final problem with amending Rule 404(b) to include an “active contest” requirement is that the requirement itself appears not to be grounded in Rule 404(b) at all. Rather it is more logically grounded in Rule 403, and most courts, such as the *Gomez* court, place the requirement in Rule 403.<sup>255</sup> Rule 404(b) requires the proponent to articulate a purpose for the bad-acts evidence other than to prove character and conduct in accordance therewith. Once the court finds that the evidence is probative for a proper, noncharacter purpose, the analysis shifts to Rule 403. Under Rule 403, the court determines whether the probative value for the noncharacter purpose is substantially outweighed by the prejudicial effect (that is, the risk that the evidence will actually be considered to demonstrate defendant's character).<sup>256</sup> The government's need to utilize other-acts evidence for a noncharacter purpose is diminished if the defendant does not actively contest that purpose. Put another way, other-acts evidence may demonstrate knowledge, for example, without proceeding through any propensity inference in accordance with Rule 404(b), but the probative value of the evidence will be weak on the Rule 403 scale if the defendant does not actively contest knowledge.<sup>257</sup> Therefore, consideration of a defendant's “active contest” of an element of an offense is a key component of a sound Rule 403 analysis and not a component of Rule 404(b) at all. It would be odd to amend a rule when its major effect would be on a different rule.<sup>258</sup>

In sum, while an examination of the live disputes in a criminal case is an essential part of determining the admissibility of other-acts evidence, an amendment to Rule 404(b) that makes “active contest” by the opponent a hard and fast requirement may be impracticable and costly to police and may unfairly disadvantage the government in its effort to prove charges beyond a reasonable doubt.

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255. See *id.* at 856–57.

256. See *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

257. See, e.g., *United States v. Ford*, 839 F.3d 94, 109 (1st Cir. 2016) (finding the prior bad act satisfied Rule 404(b) since it was relevant to intent, but the defendant's failure to contest intent “render[ed] the probative value of [the bad act] significantly reduced” under Rule 403).

258. Some may propose the alternative solution of adding the “active contest” requirement to Rule 403, but that is a nonstarter. Rule 403 is iconic and applies to all sorts of evidentiary determinations. Amending Rule 403 to cover one of the many situations in which it applies would be disruptive and confusing.

### C. *Inextricably Intertwined Doctrine Laid to Rest*

Another possibility being considered by the Advisory Committee is to amend Rule 404(b) to rein in the overuse of the “inextricably intertwined” doctrine by many federal courts.<sup>259</sup> As described above, federal courts routinely rely on vague references to acts by a criminal defendant that are “inextricably intertwined” with the charged offense to bypass a Rule 404(b) analysis altogether.<sup>260</sup> The recent *Green* and *Gorman* opinions in the Third and Seventh Circuits seek to eliminate or, at least, to limit the doctrine of “inextricably intertwined” bad acts of a criminal defendant.<sup>261</sup> Limiting the application of this doctrine through an amendment to Rule 404(b) could serve to channel a criminal defendant’s prior misdeeds through the intended Rule 404(b) analysis and to eliminate the shortcut routinely taken through liberal labeling of prior acts as “inextricably intertwined” with charged acts.

Although crafting an amendment to mark the elusive line between evidence “of” the charged act itself and evidence of “other” acts would be challenging, one potential textual remedy for the overly broad “inextricably intertwined” doctrine being considered by the Advisory Committee is to add a “direct/indirect” distinction to Rule 404(b)(1).<sup>262</sup> Such an amendment could provide:

(b) CRIMES, WRONGS, OR OTHER ACTS.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act—offered as *indirect evidence of a matter in dispute*—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.<sup>263</sup>

A “direct/indirect” amendment like this one could prevent courts from casually applying an “inextricably intertwined” label in cases like *United States v. Hilgefond*, discussed above.<sup>264</sup> To prove the willful filing of false tax returns, the government offered evidence that in the *years* prior to the challenged tax returns, Hilgefond generated “a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms.”<sup>265</sup> Although the court held that Rule 404(b) was

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259. See Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 5 (noting the Advisory Committee’s intention to devote attention to the “inextricably intertwined” doctrine).

260. See *supra* notes 63–72 and accompanying text.

261. See *supra* notes 171–196 and accompanying text.

262. Advisory Comm. on Rules of Evidence, Fall 2017 Meeting Agenda 137–38 (Oct. 1, 2017), [http://www.uscourts.gov/sites/default/files/a3\\_0.pdf](http://www.uscourts.gov/sites/default/files/a3_0.pdf) [<http://perma.cc/ER33-YCS4>] (discussing the possibility of amending Rule 404(b) to include a “direct/indirect” distinction).

263. The emphasized language represents suggested additions to Fed. R. Evid. 404(b)(1).

264. See *supra* notes 78–87 and accompanying text.

265. *United States v. Hilgefond*, 7 F.3d 1340, 1344 (7th Cir. 1993).

inapplicable because the baseless litigation was “intricately related to the facts of the case’ at hand,”<sup>266</sup> an amendment requiring Rule 404(b) analysis of all acts proving the charged offense “indirectly” would force these acts into the Rule 404(b) framework because they did not even occur in the time period covered by the indictment—and were admissible if at all only as circumstantial evidence of the crime.

Such an amendment would not be without difficulties, however. For one thing, a distinction between “direct” and “indirect” evidence may in some cases fail to create a demarcation that is any clearer than that found in the existing case law. In the wire fraud prosecution in *United States v. Loftis*, for example, the Ninth Circuit overruled the trial court’s determination that evidence of frauds not specified in the indictment would be evaluated under Rule 404(b).<sup>267</sup> The court held that Rule 404(b) was inapplicable for two separate reasons. The first reason was that the crime charged included not only the specific executions of the fraud scheme alleged in the indictment, but also “the overall scheme.”<sup>268</sup> Thus, the uncharged frauds were direct evidence of the charged *scheme* to defraud. For cases like *Loftis*, even a “direct/indirect” distinction may be difficult to draw. And for courts currently inclined to apply the “inextricably intertwined” doctrine broadly, such remaining ambiguity in a direct/indirect distinction presents a perfect opportunity to broadly construe the term “direct” in an amended rule to achieve similar results.

Second, even in cases in which the distinction between direct and indirect evidence seems clear, a textual distinction that sweeps all acts constituting “indirect” evidence of a charged offense into a Rule 404(b) analysis may expand the coverage of Rule 404(b) unnecessarily. For example, consider evidence that a defendant, charged with bank robbery, was seen the day after the robbery burning a ski mask in a trash can in his backyard. That is not “direct” evidence of the robbery itself, but it is not at all clear that this circumstantial evidence should have to proceed through Rule 404(b). On the other hand, evidence that the defendant shot a witness two days after the robbery is also “indirect” evidence that seems much more appropriate for Rule 404(b) treatment. The point is that there is significant room for argument and line drawing when it comes to acts that are “close” to the crime even if not part of the crime itself.

Increasing the coverage of Rule 404(b) to include acts like the burning of the ski mask posited above certainly would not affect the ultimate admissibility of the evidence. Even if forced through a Rule 404(b) analysis, an act like destruction of evidence that demonstrates concealment and consciousness of guilt would have little propensity risk and would

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266. *Id.* at 1345 (quoting *United States v. Hargrove*, 929 F.2d 316, 320 (7th Cir. 1991)).

267. 843 F.3d 1173, 1176–77 (9th Cir. 2016).

268. *Id.* at 1177.

easily pass muster under the four-part Rule 404(b) test. Still, expanding the scope of Rule 404(b) with a “direct/indirect” distinction would generate significant work for prosecutors who would be required to identify and give notice of *all* acts providing *indirect* evidence of the charged offense. The burdens in doing so, and the risk of losing technical Rule 404(b) evidence due to under-identification, hardly seem worth it to admit probative and noncontroversial evidence that is causing no current problems in federal criminal cases. An expanded Rule 404(b) would create more work for trial judges too, who would have to perform the four-part Rule 404(b) analysis for all acts indirectly probative of the charged offense and to make findings on the record concerning their admissibility. For example, evidence that a criminal defendant purchased the gun used in the charged murder weeks before the killing ordinarily would not raise a Rule 404(b) issue. Under an amended rule containing a “direct/indirect” distinction, the trial judge would have to perform a full Rule 404(b) analysis before admitting this act offering only “indirect” evidence of the charged murder. Amendments that tax already scarce judicial resources to increase scrutiny of highly probative and admissible evidence would seem ill-advised.

Finally, line drawing in the Rule 404(b) context can never be eliminated completely. Rule 404(b), by definition, applies only to “other” crimes, wrongs, or acts and not to the charged acts themselves. It may make little sense to amend the Rule and potentially create more work for litigants and judges without truly eradicating the slippery line-drawing exercise that precipitated it. While a “direct/indirect” distinction may be the best potential addition to Rule 404(b) to deal with the “inextricably intertwined” doctrine, it may be that an amendment can do no better than the courts have done in delineating what is covered by Rule 404(b) and what is not. Perhaps the best that can be hoped is that courts that currently treat “inextricably intertwined” as a *res gestae* exception to Rule 404(b) will heed the call of the circuits that have sought to impose more rigor on the doctrine.<sup>269</sup>

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269. See *supra* notes 170–182 and accompanying text. It should be said that a “direct/indirect” textual solution at least seems miles better than other possible fixes. For example, adding language that Rule 404(b) doesn’t apply to evidence of acts “inextricably intertwined” with the charged crime adds nothing to the enterprise. Moreover, if applying Rule 404(b) to all “indirect” evidence would end up expanding the Rule’s coverage in some courts, the consequences are not terrible. There will be costs of resolution, to be sure. But the only substantive difference is that the notice requirement of Rule 404(b) will apply—because indirect evidence close to the crime will almost certainly fit a noncharacter purpose like “background” or “context” and so will be admissible even if Rule 404(b) applies to it.

#### V. AN ELEGANT SOLUTION TO A CLASSIC PROBLEM: A MORE PROTECTIVE BALANCING TEST FOR CRIMINAL DEFENDANTS

Given all the potential pitfalls involved in amending the time-honored provisions of Rule 404(b), it is tempting simply to leave well enough alone and hope that the federal courts will follow the lead of the recent cases out of the Seventh, Third, and Fourth Circuits and restore Rule 404(b) to its intended role as a rule of exclusion. Indeed, some voices may decry any effort to alter the provisions of Rule 404(b) in any manner, arguing that the federal courts should be left to resolve inadequacies in the Rule through judicial interpretation.<sup>270</sup> Although that is certainly a credible alternative, there is reason to be skeptical about the willingness of circuits with longstanding traditions of permissive and inclusive admission of other-acts evidence to follow their stricter sister circuits. And it will certainly take time for other circuits to come around. The rulemaking process is slow, of course, taking more than two-and-a-half years from an Advisory Committee proposal to date of enactment.<sup>271</sup> But achieving judicial uniformity on a rule as controversial and ingrained as Rule 404(b) is likely to take far longer than that. The whole point of a codification of evidence rules is that they are uniform. And yet the current state of the law on one of the most important evidence rules is hardly that. Furthermore, even if all circuits *were* to ride the wave of the recent recalibration in Rule 404(b) analysis, the recent opinions may go too far in stating a total ban on the use of any other act that relies to any extent on a propensity inference and in permitting defense stipulations to foreclose other-acts evidence in certain cases, as discussed above.<sup>272</sup> Therefore, an amendment to the text of Rule 404(b) may indeed be the most efficient and effective method for refereeing the contemporary use of other-acts evidence in federal criminal cases, and the time may be right for the Advisory Committee to weigh in on the Rule 404(b) circuit split.

One amendment that would go beyond simply enshrining the requirements imposed in recent federal cases in the text of Rule 404(b) could provide a more elegant solution than the potential amendments outlined above, restoring Rule 404(b) to its exclusionary purpose without imposing rigid solutions like total propensity bans or active contest mandates, and without adding troublesome and elusive new terminology to the text of Rule 404(b). Rule 404(b)(2) could be amended to require that the proper probative value of any other crime, wrong, or act

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270. See Spring 2017 Advisory Comm. Meeting Agenda, *supra* note 73, at 18–19 (stating that some have suggested that the solution to the Rule 404(b) circuit split is “to allow courts to be influenced by the cases decided by the Seventh and Third Circuits”).

271. See 28 U.S.C. §§ 2073–2074 (2012) (describing the procedure by which proposed rules become enacted, including the deadline for transmission and the effective date).

272. See *supra* notes 207–214 and accompanying text.

admitted against a criminal defendant *outweigh* any unfair prejudice to that defendant likely to result from admission of the bad acts evidence.<sup>273</sup>

The standard Rule 403 balancing test applies to the admission of *all* other acts under the existing version of Rule 404(b). Although Rule 403 serves as a basis for the exclusion of evidence, the balance it strikes *favors* admissibility by requiring that unfair prejudice “substantially outweigh[]” any probative value in order to exclude.<sup>274</sup> An amendment that requires the probative value of other acts offered against a criminal defendant to *outweigh* the potential for prejudice would tip the scale in favor of exclusion, restoring a baseline that is consistent with the exclusionary intent of Rule 404(b)(1).<sup>275</sup> This amendment would appear within Rule

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273. The application of a more protective balance that favors criminal defendants in the Rule 404(b) context is not an untested concept. Both Virginia and Pennsylvania have enacted versions of Rule 404(b) that contain just such an approach to other-acts evidence. Pennsylvania’s rule provides as follows:

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa. R. Evid. 404(b)(2). Virginia’s rule provides as follows:

[E]vidence of other crimes, wrongs, or acts is *generally* not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

Va. Sup. Ct. R. 2:404 (emphasis added). In addition, Uniform Rule of Evidence 404(c) contains a similar heightened balancing test. Unif. R. Evid. 404(c) (1999).

274. Fed. R. Evid. 403; see, e.g., United States v. Fallen, 256 F.3d 1082, 1091 (11th Cir. 2001) (“Rule 403 is an extraordinary remedy . . . ‘which should be used only sparingly since it permits the trial court to exclude concededly probative evidence.’” (quoting United States v. Fortenberry, 971 F.2d 717, 721 (11th Cir. 1992))).

275. See Milich, *supra* note 9, at 789, 797–98 (noting the “diluted and vague expression of the illegitimate use of character evidence fares poorly . . . particularly when the balancing test is uneven—the evidence is excluded only if the illegitimate effects ‘substantially outweigh’ the probative value” and suggesting that courts reorient balancing to mitigate systemic prejudice). In Virginia, where this protective balancing is already in place, the criminal cases reflect a more circumspect approach to other-acts evidence. See, e.g., Commonwealth v. Rankin, 93 Va. Cir. 169, 173 (2016) (“The Court agrees with the Defense that such evidence [of a 2011 shooting] would be highly prejudicial to the Defendant and that any legitimate probative value of the evidence does not outweigh such prejudice.”); see also Pryor v. Commonwealth, 661 S.E.2d 820, 822 (Va. 2008) (finding it erroneous to allow videotape of a later drug transaction to be used to prove identity in connection with an earlier drug sale because even assuming the later transaction was relevant to corroborate the defendant’s visits to the location, its probative value could not overcome its prejudicial effect); Scates v. Commonwealth, 553 S.E.2d 756, 758–60 (Va. 2001) (reversing the burglary conviction in a case in which the prosecution introduced testimony that the defendant used credit cards to break into “homes” because there was

404(b)(2)—thus supplanting the Rule 403 test when bad acts are offered against the accused. The amendment would provide as follows:

(b) CRIMES, WRONGS, OR OTHER ACTS.

(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.

(2) *Permitted Uses; Notice in a Criminal Case.*<sup>276</sup> This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident—but may not be admitted against a defendant in a criminal case unless its probative value outweighs its prejudicial effect to that defendant.<sup>277</sup>

A more protective balancing test for criminal defendants could resolve many longstanding failings in the application of Rule 404(b) without creating new struggles for courts and litigants that could flow from the alternative amendments discussed above.<sup>278</sup>

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no use of a credit card in the charged offense and the testimony prejudiced the defendant by suggesting multiple other offenses); *Donahue v. Commonwealth*, 300 S.E.2d 768, 773–74 (Va. 1983) (reversing the conviction as a result of trial court's erroneous admission of defendant's prior conviction for distribution of PCP to establish her "intent" to distribute drugs on the charged occasion when defense claimed only that drugs belonged to defendant's husband).

276. This amendment also could be coupled with an amendment moving the criminal notice provisions to a new and separate subsection.

277. The Kansas Evidence Code includes a specific reference to its version of Rule 403 in its version of 404(b). Kan. Stat. Ann. § 60-455(b) (West 2016). Generally, express references to Rule 403 in any particular evidence rule seem ill-advised because such references are superfluous. Rule 403 applies unless it is specifically supplanted by another rule—such as the special balancing test provided for civil cases involving sexual assault. See Fed. R. Evid. 412. It should be noted, though, that Federal Rule of Evidence 609(a) does contain an express reference to the Rule 403 balancing test (for all witnesses other than the accused) to contrast it with the heightened balancing required for criminal defendants. Fed. R. Evid. 609(a). It could be argued that the same contrast should be emphasized in an amended Rule 404(b) that provided a more protective balancing test for criminal defendants. But a distinguishing factor is that Rule 609 contains *four* different admissibility tests in the same rule: automatic admissibility (subdivision (a)(2)), Rule 403 (subdivision (a)(1)(A)), probative value outweighs prejudicial effect (subdivision (a)(1)(B)), and a reverse Rule 403 test (subdivision (b)). Fed. R. Evid. 609(a)–(b). When Rule 609 was restyled, the drafters decided that it would be too confusing to specifically provide for the other three balancing tests, but leave a vacuum for the Rule 403 test. See Daniel J. Capra, *Federal Rules of Evidence: 2017–2018 Edition* 121 (2017). That same confusion is unlikely to exist in an amended Rule 404(b) as discussed in text. Therefore, the proposal in text does not set forth a Rule 403 balancing test when bad-acts evidence is offered in a civil case or against the government in a criminal case. Any question about continued Rule 403 applicability in such cases can be addressed in a committee note.

278. Indeed, there is some support in the literature for an enhanced balancing in the Rule 404(b) context. See Frank, *supra* note 19, at 43 (proposing reverse balancing, among other amendments); 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.

### A. A Silver Bullet

Providing criminal defendants with a more protective balancing test within the text of Rule 404(b) would resolve many of the problems in the traditional permissive approach to Rule 404(b) evidence in criminal cases. First and foremost, a more protective balancing test that favors exclusion would make clear once and for all that Rule 404(b) is *not* a rule of “inclusion” that provides for “presumptive admissibility” of other-acts evidence. As examined above, federal courts that routinely admit other-acts evidence consistently begin a Rule 404(b) analysis by emphasizing that the Rule is one of “inclusion” that expressly “permits” other-acts evidence. Courts like these have suggested that “404(b) evidence . . . should not lightly be excluded when it is central to the prosecution’s case”<sup>279</sup> and that Rule 404(b) “admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove *only* criminal disposition.”<sup>280</sup> Directing district courts to exclude other-acts evidence offered against a criminal defendant unless its probative value for a proper noncharacter purpose is stronger than any prejudice likely to result would help to reclaim Rule 404(b) as the rule of “exclusion” it was intended to be.<sup>281</sup>

Such a balancing test could assist with the problem of pure propensity uses for other-acts evidence without imposing a rigid propensity prohibition. By setting a higher standard for the admission of other-acts evidence against criminal defendants, a heightened balancing test would naturally encourage prosecutors and trial judges to articulate the probative value of other-acts evidence to ensure that it clears the higher hurdle set by a more protective balancing and that its admission survives appellate scrutiny. A more protective test also would demand that judges identify the type and magnitude of unfair prejudice likely to result from admission of other-acts evidence. Because the standard Rule 403 balancing test favors admission of other-acts evidence possessing any

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Rev. 1465, 1497 (1985) (predicting courts would adopt a restrictive approach to Rule 404(b) evidence at odds with the language of Rule 402 and Rule 403 and proposing addition of protective balancing to bring the Rule in line with pre-Rules federal opinions); Milich, *supra* note 9, at 799 (“A stepped up balancing test in Rule 404(b) would require that the state’s need for the evidence outweighs the policy that the presumption of innocence should remain intact whenever possible.”); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L.J. 135, 140–41 (1989) (proposing an amendment to Rule 403 that would provide protective balancing of evidence offered against criminal defendants under Rules 404(b), 608(b), and 609(a)(1)).

279. *United States v. Smith*, 741 F.3d 1211, 1225 (11th Cir. 2013) (internal quotation marks omitted) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003)).

280. *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017) (emphasis added) (internal quotation marks omitted) (quoting *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010)).

281. Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 908 (explaining that other-acts evidence proffered by the prosecution in a criminal case should possess “substantial” noncharacter relevance).

probative value, courts rarely devote significant analysis to the prejudice side of the equation following an incantation of permissible purposes under Rule 404(b).<sup>282</sup> A more protective balancing test that requires probative value to overpower unfair prejudice would necessitate a closer look at the particular prejudice in a specific case and would tilt the scales against admission of other-acts evidence that creates significant propensity concerns.<sup>283</sup> For example, in the ubiquitous federal drug prosecution in which the defendant merely denies engaging in the unlawful conduct, evidence of prior drug convictions undoubtedly creates significant risk of a prejudicial propensity use by the fact-finder. Any probative value that a trial court might find to show the defendant's "intent" or "knowledge" would be overshadowed by the predictable dynamite effect of the prior misdeeds in suggesting the defendant's tendency to commit drug offenses, thus dooming the evidence to exclusion.

While such a balancing test could alleviate the problem of other acts offered for pure propensity purposes, it would not impose a complete ban on the admission of other-acts evidence, the probative value of which may depend on some propensity reasoning. As discussed above, the government should be permitted to prove a defendant's prior acts of possession with intent to distribute drugs in cases in which the defendant admits possession of a distribution quantity of the same drug in a trial on similar charges, but testifies that he intended to retain it for personal use and not sell it. More than simply pleading "not guilty," that defendant has injected a live dispute about his state of mind and intent into the case. The prosecution needs evidence to resolve the dispute and to meet its high burden of proof, and alternative evidence to demonstrate state of mind (beyond the act itself that the defendant has already sought to explain away) will be difficult to obtain. In such a case, the probative value of prior intentional drug distribution to resolve the narrow issue of "intent" is strong and outweighs the prejudice to the defendant. As discussed above, ascertaining precisely when propensity inferences are at play is a slippery task, and commentators have argued that the use of a prior conviction to show intent in a case like this one does involve inferences about the defendant's tendencies.<sup>284</sup> Even assuming that it does, the government should be permitted to use the evidence to combat such an active dispute of intent. While a rigid propensity ban would jeopardize the government's ability to call on evidence of prior convictions in this

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282. See, e.g., *Geddes*, 844 F.3d at 990–91 (concluding, without analysis, that danger of unfair prejudice was "minimal" because the witness testified "only" to the defendant's prior unrelated act of physical assault); *Smith*, 741 F.3d at 1225–26 (affirming admission of defendant's prior drug possession convictions because they were probative of his intent, which he made a material issue by pleading not guilty, without analyzing likely unfair prejudice to defendant).

283. See *supra* section IV.B –C.

284. See Sonenshein, *supra* note 10, at 257 n.283.

scenario, a flexible but protective balancing test would continue to permit it.

As this discussion demonstrates, other-acts evidence could gain probative value in a trial in which defendants dispute certain elements of the charges against them. A more protective balancing test would thus preserve the importance of a defendant's "active contest" of particular elements as emphasized in recent circuit precedent. But, it would do so in a flexible manner that does not rigidly require a court to define and identify "active contest." Further, adoption of a protective balancing test instead of an "active contest" mandate would preserve the trial court's discretion in dealing with defense offers to stipulate to certain points, as suggested by the Supreme Court in *Old Chief*.<sup>285</sup> While defense offers to stipulate would undoubtedly affect probative value under a balancing test, they would not necessarily be dispositive due to the government's need to present its case in a compelling way. To be sure, a more protective balancing test could still permit the government to use other-acts evidence even in the acknowledged *absence* of any "active" contest. As explained by the Seventh Circuit in *Gomez*, when a criminal defendant pleads not guilty to a specific intent charge, intent is "automatically" at issue.<sup>286</sup> While that does not necessarily mean that other-acts evidence is "automatically" admissible, it does leave a trial judge free to admit such evidence to assist the government in proving intent even when there is no "active contest" or testimony about intent at trial, if the court determines that the government's need for the evidence to meet its burden of proof is strong enough to overcome prejudice to the defendant. While a mechanical "active contest" mandate would threaten to undermine the government's ability to offer other-acts evidence in specific intent cases, a balancing test would continue to allow trial judges to assess the need for such evidence on a case-by-case basis. Thus, the more protective balancing test would do much of the work that an "active contest" limitation would do, without adding categorical and potentially confusing language about "active contest" to the text of the rule.

Finally, a more protective balancing test that favors only criminal defendants would continue to permit criminal defendants to offer "reverse 404(b)" evidence without any new obstacles like an "active contest" requirement or propensity ban in the way. Unlike other potential amendments, this balancing approach would also leave civil cases untouched. There is no demonstrated need for a change in the application of Rule 404(b) or to the standard Rule 403 balancing in civil cases, or in cases in which the defendant offers evidence of other acts. The reason for a new, more protective balancing test is to address the well-documented prejudice suffered uniquely by criminal defendants when their character is attacked by bad-acts evidence. Singling out criminal defendants for

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285. See *supra* notes 246–252 and accompanying text.

286. *United States v. Gomez*, 763 F.3d 845, 858–69 (7th Cir. 2014).

special protections is appropriate and time honored in light of the high stakes for defendants facing the prosecutorial power of the government. The case has not been made that similar abuses are routine when other-acts evidence is offered in civil cases or in the rare case in which the criminal defendant seeks to offer other-acts evidence. Furthermore, the standard Rule 403 balancing is more than adequate to address any concerns in these circumstances in which the liberty of the opponent of the evidence is not in jeopardy. The proposed amendment, therefore, seeks to capture the trend in some federal courts to impose a more rigorous analysis of bad-acts evidence when it is offered against criminal defendants.<sup>287</sup>

One of the principal benefits of an amended balancing test is that it eschews rigid and mechanical solutions that are ill-suited to Rule 404(b). On the other side of that coin, a flexible balancing test by definition would leave significant discretion to trial judges. This is likely to be one of the chief criticisms of a proposal to add a new balancing test to Rule 404(b). A heightened balancing test cannot entirely control innate judicial tendencies to admit other-acts evidence permissively. There is reason to expect that an amendment adding a protective balancing test to Rule 404(b) would have significant effects, however. Entering the stage some forty-plus years after the adoption of the Federal Rules of Evidence, such an amendment would signal an unmistakable change in the status quo that would be impossible for courts to ignore. Furthermore, a detailed Advisory Committee Note accompanying an amended balancing test would enhance its operation by emphasizing the purposes for the addition to the rule and highlighting the shortcomings in the traditional approach that the amendment seeks to correct. Such a committee note could provide, as follows:

#### Committee Note

Rule 404(b)(2) has been amended to require that the proper probative value of any crime, wrong, or other act

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287. There have been longstanding concerns about the *Huddleston* approach to proof of other acts as a matter of conditional relevance under Rule 104(b). Some have argued for a stronger role for the judge in regulating the admissibility of other-acts evidence and a tougher standard of proof for other acts. Although some states have required preliminary findings by the trial judge that the defendant committed the other act and a higher standard of proof, see, e.g., Minn. R. Evid. 404(b), federal courts treat the issue as a jury question requiring only proof by a preponderance pursuant to the *Bourjaily* and *Huddleston* line of cases. Adopting a more protective balancing test administered by the trial judge pursuant to his or her Rule 104(a) authority to determine admissibility could achieve the tighter judicial control over other-acts evidence that many have sought. Even if the government could satisfy the low preponderance threshold for showing the defendant's commission of the other act to justify submission to the jury, a balancing test that favors exclusion would afford the trial court a strong and distinct basis for excluding the evidence.

admitted against a criminal defendant outweigh any unfair prejudice to that defendant. This is the same balancing test in favor of a criminal defendant prescribed by Rule 609(a)(1)(B). No change is being made to the application of Rule 404(b) or to the standard Rule 403 balancing test in civil cases, or in cases where the criminal defendant offers evidence of other acts. The more protective balancing test for criminal defendants is weighted in favor of exclusion and clarifies that Rule 404(b) is not a rule of “inclusion” as some federal opinions have stated. In evaluating other-acts evidence pursuant to this amended balancing test, trial judges should carefully consider how a proffered other act is probative for a proper purpose, in order to guard against the character reasoning outlawed by Rule 404(b)(1). For example, where a defendant accused of federal drug crimes simply denies commission of the underlying acts, prior drug offenses offered to prove “intent” or “knowledge” have minimal probative value, and it is very likely that the prejudice by way of a propensity inference outweighs any limited probative value. In determining the probative value of other-acts evidence, trial judges should consider which issues are genuinely disputed in the case. While a defendant’s active contest of an element to which other act evidence is relevant will increase the probative value of other act evidence, an active contest is not always required and a defense stipulation is not necessarily dispositive of admissibility. The amended balancing test requires a weighing of legitimate probative value against likely prejudicial effect. Trial judges should carefully evaluate the effect of any crime, wrong, or other act of a defendant on the fact-finder and assess the likelihood that such evidence will detract from fair consideration of charged offenses. All of these factors should be considered in applying the more protective balancing test to other-acts evidence offered against a defendant in a criminal case to ensure that the government’s legitimate need for the evidence outweighs the unfair prejudice to the defendant from the jury’s consideration of prior bad acts.

Furthermore, an Advisory Committee Note would be particularly important in addressing the problem of “inextricably intertwined” acts by a defendant that evade Rule 404(b) analysis altogether. The regular Rule 403 balancing that applies to all evidence would continue to apply to acts of the criminal defendant that are not “other acts” regulated by Rule 404(b), but a heightened balancing test would protect criminal defendants against admission of “other acts.”<sup>288</sup> Thus, there would be even more at stake in the line drawing exercise than there is now. While a more protective balancing test may make some trial judges more cautious in applying the “inextricably intertwined” doctrine to justify avoidance of the

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288. Mueller & Kirkpatrick, *supra* note 18, § 6:42 (noting a regular Rule 403 balancing favors admissibility, while the heightened balancing test offered to criminal defendants under Rule 609(a) favors exclusion).

protective balancing test, federal judges already inclined to admit a defendant's prior misdeeds could be even *more* motivated to classify them as "inextricably intertwined" with the charged offense to avoid the new heightened balancing test. An Advisory Committee Note could address this concern, cautioning that:

Of course, Rule 404(b) and the amended balancing test for criminal defendants apply only to evidence of "other" crimes, wrongs, or acts. Trial judges must, therefore, determine which acts are "other" or extrinsic to the charged offense, necessitating Rule 404(b) analysis, and which are "intrinsic" to the charged offense and free from Rule 404(b) scrutiny. Courts should not circumvent the more protective balancing test by attaching vague and conclusory labels, such as "inextricably intertwined," to a defendant's other acts. In place of employing conclusory labels, trial judges should explain *how* an act is so connected to the charged offense so as to avoid Rule 404(b) treatment. Because appropriate line drawing in this context is impossible to capture with precision, close calls in classifying a defendant's acts should be resolved in favor of Rule 404(b) application—especially given the importance of filtering bad-acts evidence through the new and more protective balancing test.<sup>289</sup>

At first blush, prosecutors may assume that an amendment that adds a more protective balancing test for the admission of other-acts evidence against a criminal defendant represents a "pro-defendant" modification. Indeed, some may oppose the addition of a protective balancing test due to concern that it would place an unjust obstacle in the path of prosecutors who must prove criminal charges beyond a reasonable doubt. But a more protective balancing test in reality could represent a more neutral amendment than many of the reforms suggested by recent federal precedent in the Seventh and Third Circuits.<sup>290</sup> A more protective balancing test for criminal defendants would preserve the government's ability to utilize other-acts evidence to prove intent or modus operandi, even though that use may rely to some extent on propensity inferences and even without "active contest" by the defendant. Unlike the recent circuit precedent suggesting that a criminal defendant can foreclose prosecutorial use of other-acts evidence by offering stipulations,<sup>291</sup> a

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289. Commentators have suggested standards for excusing certain acts from the coverage of Rule 404(b) that also could be incorporated into a committee note. For example, acts that are "part and parcel of the charged offense" or the exclusion of which would "render the testimony about the charged crime linguistically or psychologically incomprehensible" could be exempt from Rule 404(b) analysis. See Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, §§ 903–904 (quoting Imwinkelried, *The Second Coming*, *supra* note 65, at 725). The "direct/indirect" distinction examined in the text above also could be added to a committee note rather than being enshrined in a rule's text. Of course, the difficulties in administering such a distinction would remain.

290. See *supra* section III.C.

291. See *Gomez*, 763 F.3d at 857 (suggesting that a defense stipulation could foreclose government use of other-acts evidence).

protective balancing test would maintain a trial judge's discretion to balance the competing pros and cons of the evidence even in the face of a stipulation. An amendment could serve to curtail the "inextricably intertwined" doctrine and to push more evidence into the heightened balancing test. However, the acts of a criminal defendant that are truly so close to the charged offense as to be "inextricably intertwined" with it will have no trouble clearing even the hurdle created by the new balancing test. Importantly, the amendment would not be a true *reverse* Rule 403 test and would not require the probative value of an "other act" to *substantially* outweigh any potential prejudice.<sup>292</sup> It would simply require the scale to tip in favor of the probative value.<sup>293</sup> Any act that could

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292. See Frank, *supra* note 19, at 43 (proposing amendments to Rule 404(b) that would, in part, require probative value to "substantially outweigh[] its prejudicial effect"). Of course, it is surely an option for the Advisory Committee to consider a reverse 403 balancing test for bad-acts evidence offered against a criminal defendant. Federal Rules of Evidence 412 and 703 contain true reverse 403 balancing tests. See Fed. R. Evid. 412(b)(2) (allowing evidence of a victim's sexual behavior or predisposition in civil cases involving alleged sexual misconduct only if its probative value substantially outweighs harm to any victim or unfair prejudice to any party); Fed. R. Evid. 703 (allowing an expert witness to disclose inadmissible basis for an opinion only when the probative value in helping the jury evaluate the expert's opinion substantially outweighs prejudicial effect). Federal Rule of Evidence 609(b) employs a heightened reverse 403 balancing test for impeaching convictions that are more than ten years old. Fed. R. Evid. 609(b) (excluding convictions after ten years unless the probative value "supported by specific facts and circumstances substantially outweighs its prejudicial effect"). This reverse 403 test is designed to stack the deck firmly against admissibility and to exclude the relevant evidence in all but the rarest of cases. The proposed amendment to Rule 404(b) is designed to reinstate the Rule as one of exclusion and to tip the scale in favor of criminal defendants who suffer significant prejudice from the admission of their prior bad acts. Still, other-acts evidence should remain available to the prosecution in cases in which there is genuine and proper probative value, notwithstanding the risk of prejudice. Thus, a true reverse 403 balancing risks swinging the pendulum too far in the other direction. Furthermore, as a matter of practicality, such an amendment is unlikely to find its way through the rulemaking process. The Justice Department—with a voting member on the Advisory Committee and on the Judicial Conference Committee on Rules of Practice and Procedure—is likely to oppose vigorously any attempt to completely reverse the balancing test from which it has benefited for forty years. Of course, the Department is also likely to oppose even the modest shift in the balancing test that is proposed in this Article. But there is at least some hope that the more modest shift might be seen as a compromise position and as a way to address the strong trends in the case law favoring more rigorous application of Rule 404(b). Such a compromise would be not unlike that which was reached in Congress when Rule 609(a)(1) was enacted to provide a modest protection for criminal defendants. For an account of that compromise, see Bellin, *supra* note 11, at 304–07.

293. Another drafting alternative would be to include a balancing test that excludes other-acts evidence offered against a criminal defendant whenever probative value is outweighed at all by unfair prejudice—even if the probative value is not *substantially* outweighed. State analogues to Federal Rule of Evidence 404(b) in Massachusetts, Minnesota, and Tennessee modify the Rule 403 balancing test traditionally applicable to other-acts evidence in this way. See Mass. Guide to Evid. § 404(b)(2) ("However, evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk."); Minn. R. Evid. 404(b) (admitting other-acts evidence only if "the probative value of the evidence

legitimately be characterized as “inextricably intertwined” because it constitutes part of the charged crime will be more probative than prejudicial by definition.

### B. *Protective Balancing for the Criminal Defendant: Lessons from Rule 609(a)*

Another advantage of a more protective balancing test is that it would avoid loading up the familiar Rule 404(b) standard with new terminology foreign to the Federal Rules of Evidence, such as “propensity inference,” “active contest,” “direct,” and “indirect,” that would require interpretation and invite litigation. To the contrary, a modified version of the Rule 403 balancing test that offers increased protection to criminal defendants constitutes a familiar and well-understood standard already embodied in Rule 609(a)(1)(B) of the Federal Rules of Evidence. This will enable federal courts to deploy this familiar balancing within the Rule 404(b) context.

Rule 609 authorizes certain prior convictions of a witness to be admitted to attack the witness’s character for truthfulness, that is, to suggest that the witness has an untruthful character and so is lying on the stand.<sup>294</sup> Due to the potential for unfair prejudice and bad-character reasoning when the prior felony convictions of testifying criminal defendants are offered under Rule 609(a)(1), the Rule provides that felony

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is not outweighed by its potential for unfair prejudice to the defendant”); Tenn. R. Evid. 404(b) (“The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.”). The “probative value is outweighed by the prejudice” test is of course only marginally different from the test advocated in this Article and appears to provide some additional protection to criminal defendants. See Commonwealth v. Crayton, 21 N.E.3d 157, 176 n.27 (Mass. 2014) (“[B]ecause ‘other bad acts’ evidence is ‘inherently prejudicial,’ it makes sense to impose a more exacting standard on its admissibility than the standard applicable to other evidence.” (citations omitted) (quoting Commonwealth v. Johnson, 617 N.E.2d 1040, 1045 (Mass. App. Ct. 1993))); Commonwealth v. Christie, 53 N.E.3d 1268, 1271 n.2 (Mass. App. Ct. 2016) (“Had the judge had the benefit of the [more protective balancing test] he may, of course, have concluded that the challenged evidence was not admissible.”). But the difference between the two balancing tests is marked in terms of the signal that is sent. The balancing test advocated in this Article makes clear that Rule 404(b) is a rule of exclusion. Under the test adopted by Massachusetts, Minnesota, and Tennessee, Rule 404(b) remains a rule of inclusion. Moreover, adding the “probative value is outweighed by the prejudice” test to Rule 404(b) is not ideal as a matter of rule-making, because it would be the only test with that balance in the Federal Rules of Evidence. All things being equal, it is a better solution to add a balancing test that is already found in the Federal Rules. See *infra* section V.B.

294. Rule 609(a)(1) covers felony convictions that do not involve dishonesty or false statement. Fed. R. Evid. 609(a)(1). Subdivision 609(a)(2) covers convictions that involve dishonesty or false statement. Fed. R. Evid. 609(a)(2). Subdivision 609(b) covers “old” (and presumably less probative) convictions. Fed. R. Evid. 609(b). The balancing test suggested in this Article for Rule 404(b) is identical to the test provided for impeaching criminal defendant-witnesses with recent convictions that did not involve dishonesty or false statement. That test is found in Rule 609(a)(1)(B).

convictions that do not involve dishonesty or false statement<sup>295</sup> may be admitted only if their probative value with respect to dishonesty *outweighs* any prejudicial effect to the defendant.<sup>296</sup> This more protective balancing test has resulted in a number of cases in which non-falsity-based convictions offered for impeachment have been excluded or have been found on appeal to have been erroneously admitted. That is especially likely when the conviction offered for impeachment is similar to the crime charged, or when the conviction is for conduct that is especially inflammatory.<sup>297</sup> This is not to say that results have been absolutely uniform or that criminal defendants have received absolute protection.<sup>298</sup> The nature of any balancing test is that there is room for play and room for unjust results. But it is to say that tipping the balancing test has resulted in more protection for criminal defendants, and that federal litigants and courts are familiar with this protective balancing test and could readily adapt it to the Rule 404(b) context.

Indeed, there is a certain symmetry to incorporating the same balancing test in favor of criminal defendants in both Rules 609 and 404(b).<sup>299</sup> Like Rule 609(a), Rule 404(b) seeks to walk a fine line in criminal cases. It aims to protect against prejudice from past acts that may be utilized by a jury to assume that a criminal defendant must have committed the charged offense if he did something similar on another occasion, while at the same time permitting evidence of other acts that shed light on important issues in the case. Recognizing the strong likelihood of prejudice to a criminal defendant from evidence of past misdeeds, Rule 609(a)(1) keeps them out unless their probative value is

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295. If the prior conviction involves dishonesty or false statement, it is automatically admissible against all witnesses in all cases. Fed. R. Evid. 609(a)(2).

296. Fed. R. Evid. 609(a)(1)(B).

297. See, e.g., *United States v. Caldwell*, 760 F.3d 267, 283–85 (3d Cir. 2014) (finding a prior felon-firearm conviction could not be admitted to impeach the accused in a felon-firearm prosecution); *United States v. Kemp*, 546 F.3d 759, 764 (6th Cir. 2008) (finding error to admit prior convictions for taking indecent liberties with a minor in a prosecution for felon–firearm possession); *United States v. Brackeen*, 969 F.2d 827, 831 (9th Cir. 1992) (finding that, in a bank robbery prosecution, the trial judge excluded the defendant’s prior bank robbery convictions under Rule 609(a)(1), but improperly admitted them under Rule 609(a)(2)); *United States v. Sanders*, 964 F.2d 295, 298 (4th Cir. 1992) (finding error to admit evidence of prior convictions for assault and contraband possession in a prosecution for assault with a dangerous weapon); *United States v. Bagley*, 772 F.2d 482, 486–88 (9th Cir. 1985) (finding error to admit prior robbery convictions in a prosecution for bank robbery); *United States v. Martinez*, 555 F.2d 1273, 1277 (5th Cir. 1977) (finding error to admit prior narcotics conviction in a prosecution for conspiracy to distribute cocaine).

298. See *Sanders*, 964 F.2d at 300 (holding that the admission of a prior conviction inadmissible under Rule 609(a)(1) was harmless error as to the possession of contraband count); see also *Bellin*, *supra* note 11, at 319–35 (suggesting that federal courts have failed to apply this balancing as carefully as Congress intended).

299. See *Milich*, *supra* note 9, at 797–98 n.48 (suggesting a need to apply similar balancing to other-acts evidence and prior convictions offered to impeach under Rule 404(b)); *Ordover*, *supra* note 278, at 138, 140–41 (same).

actually stronger than that potential for prejudice.<sup>300</sup> When the prejudice to criminal defendants in the Rule 404(b) and Rule 609(a)(1) contexts is similar, a similar protective test in favor of a criminal defendant would seem warranted in both circumstances. Arguably, it may be even more important to provide more protection to a criminal defendant in the Rule 404(b) context than in the already-recognized impeachment context, because a criminal defendant always has the option not to testify and may control the admission of prior convictions for impeachment by staying off the stand.<sup>301</sup> A defendant who wishes to plead not guilty may have less choice about the defense she offers and ordinarily has less control over the application of Rule 404(b) to admit her past misdeeds.<sup>302</sup> Accordingly, amending Rule 404(b) to add an already-established protective balancing test in favor of criminal defendants would import an existing and well-understood standard already in the Federal Rules of Evidence into a related arena.

## CONCLUSION

Rule 404(b) is the most litigated Federal Rule of Evidence,<sup>303</sup> cropping up routinely in criminal cases, in which jury trials continue to be a mainstay. Although Rule 404(b)(1) states an exclusionary rule, cautioning against the use of evidence of “other” crimes, wrongs, or acts to suggest a person’s tendencies to behave in a particular manner, it is tempered by exceptions in Rule 404(b)(2), which permit the use of such evidence for other purposes.<sup>304</sup> The most common purposes listed in Rule 404(b)(2) are to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>305</sup> It is an open secret that federal courts have traditionally played fast and loose with other-acts evidence, listing all proper purposes in justifying admissibility and allowing past misdeeds of criminal defendants to come before juries on a routine basis. The devastating effect of such other-acts evidence on juries is well-documented.

Recently, the Seventh, Third, and Fourth Circuits have issued opinions seeking to restore Rule 404(b) as a rule of *exclusion*. These opinions caution against use of any prior act that depends for its probative value

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300. Mueller & Kirkpatrick, *supra* note 18, § 6:45 (noting the Rule 609 “framers made the judgment that prior convictions are especially risky for criminal defendants, and the language of Rule 609(a)(1) is cast in favor of caution”).

301. See *id.* (noting criminal defendants with prior records frequently stay off the stand to avoid damaging admission of their prior convictions).

302. *Id.* § 4:28 (“[F]ew categories of evidence bring greater risk of prejudice to the accused . . .”).

303. Imwinkelried et al., *Courtroom Criminal Evidence*, *supra* note 3, § 901 (stating that Rule 404(B) “has generated more published opinions than any other subsection of the rules”).

304. See Fed. R. Evid. 404(b).

305. Fed. R. Evid. 404(b)(2).

upon inferences about a defendant's "propensity" to conduct him or herself in relevant ways. They have emphasized the importance of some "active" dispute launched by the defense to bring prior acts into play. Finally, these courts have worked to funnel all other-acts evidence through the Rule 404(b) gauntlet by eliminating or restricting significantly the doctrine of "inextricably intertwined" acts that may be admitted as part of proving the charged offense without application of Rule 404(b). All the while, several federal circuit courts continue to treat Rule 404(b) as a "rule of inclusion."

In order to resolve the conflict in the circuits over the proper handling of other-acts evidence in federal criminal cases, the time may be ripe for an amendment to Federal Rule of Evidence 404(b). Although the limits imposed by the Seventh, Third, and Fourth Circuits present interesting opportunities for modifying the text of the Rule, each of those alternatives is rife with difficulties. Rule 404(b)'s history is one of case-by-case determinations that eschew mechanical solutions. An amendment that could change the tune in the traditional approach to other-acts evidence, without cluttering Rule 404(b) with foreign terminology that invites costly litigation, would be a new balancing test that favors criminal defendants. Instead of relying on the standard Rule 403 balancing that admits other-acts evidence so long as its probative value isn't "substantially outweighed" by unfair prejudice, an amended rule could demand that the probative value of other-acts evidence admitted against a criminal defendant *outweigh* any potential for prejudice. By reversing the scale to favor exclusion, such an amendment could serve the important goals of the recent Seventh, Third, and Fourth Circuit precedent in a flexible manner consistent with the history and purpose of Rule 404(b).