

“OBVIATE!”: ADDRESSING MAGICAL
THINKING ABOUT LIMITING INSTRUCTIONS
AND CHARACTER EVIDENCE

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“OBVIATE!”: ADDRESSING MAGICAL THINKING ABOUT LIMITING INSTRUCTIONS AND CHARACTER EVIDENCE

Dora W. Klein*

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INTRODUCTION

In 2011, Nicolas Gomez was convicted of several offenses related to a cocaine distribution conspiracy.¹ At his trial, the government presented extensive wiretap evidence of conversations between a known cocaine supplier and someone referred to in the conversations as “Guero.”² The government believed that Gomez was Guero.³ Gomez’s defense at trial was that his brother-in-law, not he, was Guero.⁴ To strengthen its case that Gomez was Guero, the government introduced evidence of a small amount of cocaine found in the pocket of a pair of pants in Gomez’s bedroom at the time of his arrest.⁵ Gomez objected to this evidence, arguing that it was barred by Federal Rule of Evidence 404(b), which prohibits the use of evidence of “crimes, wrongs, or other acts” to prove action in conformity with character.⁶ The trial judge allowed the evidence, relying on the inclusion of “identity” in the list of permitted purposes for other-acts evidence found in Rule 404(b)(2).⁷ A divided three-judge panel of the Seventh Circuit Court of Appeals rejected Gomez’s argument that the small, “user quantity” of cocaine was inadmissible under 404(b) as it was only relevant to prove his identity as a participant in a cocaine distribution conspiracy through an impermissible inference about his character.⁸

In 2014, the en banc Seventh Circuit Court of Appeals found that the trial judge had erred in admitting the evidence of the cocaine.⁹ The court’s opinion explored numerous problems associated with the use of other-acts evidence,¹⁰ including: whether the trial court failed to detect that the evidence was character evidence disguised as identity evidence; whether the trial court adequately considered a risk of unfair prejudice; and whether the trial court’s instructions adequately directed

¹ United States v. Gomez, 712 F.3d 1146, 1148 (7th Cir. 2013), *vacated en banc*, 763 F.3d 845 (7th Cir. 2014).

² United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014) (en banc).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 851–52.

⁶ *Id.* at 852.

⁷ *Id.*

⁸ United States v. Gomez, 712 F.3d 1146, 1152–54 (7th Cir. 2013).

⁹ Gomez, 763 F.3d at 863.

¹⁰ *Id.* at 852–63.

jurors to consider the evidence only for the permitted purpose of proving identity and not for the prohibited purpose of proving action in accordance with character.¹¹

The Seventh Circuit’s en banc decision in *Gomez* is one of several recent circuit court decisions attempting to ensure that trial courts adhere to Rule 404(b).¹² Embracing the common law rule against character evidence,¹³ the Federal Rules of Evidence generally endeavor to prevent juries from making decisions based on character inferences—that is, an inference that someone engaged in certain conduct because that person has a certain character trait, such as a propensity for violence or dishonesty.¹⁴ Rule 404(a)(1) presents the general prohibition against character inferences, stating: “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”¹⁵ Rule 404(a)(2) then presents some limited and relatively straightforward exceptions for defendants and victims in criminal cases, and 404(a)(3) provides for the use of character evidence to impeach a witness’s testimony, which is further governed by Rules 607, 608, and 609.¹⁶

Rule 404(b) is where the rules regarding character evidence become more complex. This rule directs: “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.”¹⁷ Under this rule, evidence of a particular past incident or occurrence, such as possessing cocaine, cannot be used to prove that the person who engaged in this conduct has a particular sort of character, such as a criminal disposition to possess illegal substances, or that the person acted in accordance with that character on another occasion, such as by again intending to possess cocaine.¹⁸

¹¹ *Id.*

¹² Other noteworthy recent circuit court opinions on this issue include *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017) and *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014).

¹³ See *Michelson v. United States*, 335 U.S. 469, 475 (1948) (“Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt.”).

¹⁴ FED. R. EVID. 404.

¹⁵ FED. R. EVID. 404(a)(1).

¹⁶ FED. R. EVID. 404 (a)(2)–(3).

¹⁷ FED. R. EVID. 404(b)(1).

¹⁸ This example is drawn not only from the Seventh Circuit’s *Gomez* case but also hundreds, if not thousands, of other cases in which prosecutors offer—and trial courts allow—evidence of a prior drug

The evidence of the first cocaine possession is inadmissible to prove this chain of inferences because of the likelihood that jurors would overvalue it; more specifically, jurors would assume that people have stable character traits and that those traits invariably determine their actions.¹⁹ Some courts have explained the problem with character inferences as the likelihood that jurors will think, “He did it once, he must have done it again,”²⁰ or “Once a criminal, always a criminal.”²¹ Or as the Fourth Circuit has recently observed, “The trouble with such character wounds is that they bleed, in the sense that ‘bad people’ may be presumed by the factfinder to commit no end of criminal acts.”²²

offense to prove intent to engage in another drug offense. *Accord* United States v. Cotton, 823 F.3d 430, 440 (8th Cir. 2016) (“In a drug trafficking prosecution, evidence of a prior drug conviction is nearly always relevant to show a defendant’s knowledge or intent in committing the charged offense.”) (Colloton, J., concurring); United States v. Harris, 642 F. App’x 713, 718 (9th Cir. 2016) (“This court has ‘consistently held that evidence of a defendant’s prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent [and] knowledge . . . in prosecutions for intent to distribute narcotics.” (alterations in original) (quoting United States v. Mehrmanesh, 689 F.2d 822, 832 (9th Cir. 1982))); United States v. Lee, 687 F.3d 935, 944 (8th Cir. 2012) (“We have held on numerous occasions that a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs.” (quoting United States v. Adams, 401 F.3d 886, 894 (8th Cir. 2005))); United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012) (“The arguments presented in this case suggest that admission of prior drug crimes to prove intent to commit present drug crimes has become too routine.”); United States v. Matthews, 431 F.3d 1296, 1319 (11th Cir. 2005) (“[W]e have bypassed the strictures of Rule 404(b) by presumptively assuming that intent is always an issue in conspiracy cases and that all prior substantively-related acts are relevant to that intent. This is nothing more than propensity by any other name.”) (Tjoflat, J., specially concurring).

¹⁹ See *infra* notes 26–29.

²⁰ See, e.g., United States v. Gonsalves, 859 F.3d 95, 106 (1st Cir. 2017) (“Federal Rule of Evidence 404(b)(1) prohibits the use of evidence of past crimes to show propensity (meaning that if they did it once, they probably did it again).”); United States v. Bailey, 547 F. App’x 756, 765 (6th Cir. 2013); United States v. Johnson, 458 F. App’x 464, 471 (6th Cir. 2012); United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994) (“When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered; to suggest that the defendant is a bad person, a convicted criminal, and that if he ‘did it before he probably did it again.’”); United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985).

²¹ See, e.g., United States v. Richards, 719 F.3d 746, 764 (7th Cir. 2013) (“This looks, walks, and sounds like the argument ‘once a drug dealer, always a drug dealer.’” (quoting United States v. Jones, 389 F.3d 753, 757 (7th Cir. 2004))); Gov’t of V.I. v. Prince, 486 F. App’x 989, 993 n.5 (3d Cir. 2012) (“This is not an argument that ‘once a stabber, always a stabber.’” (quoting United States v. Zizzo, 120 F.3d 1338, 1347 (7th Cir. 1997))); United States v. Hicks, 635 F.3d 1063, 1070 (7th Cir. 2011); United States v. Bell, 516 F.3d 432, 444 (6th Cir. 2008).

²² United States v. Briley, 770 F.3d 267, 277 (4th Cir. 2014).

Despite the prohibition against using evidence of “crimes, wrongs, or other acts” to prove action in accordance with character, other-acts evidence is admissible for other purposes, such as to prove a person’s state of mind.²³ However, even when other-acts evidence is offered to prove state of mind (or anything other than character), there is always the risk that jurors will use the evidence for the prohibited character purpose.²⁴ Under the Federal Rules of Evidence, the solution to this problem is a limiting instruction: the trial judge instructs the jurors that they may consider the evidence only for the purpose of determining the actor’s state of mind.²⁵ In theory, this instruction is a perfectly logical solution. Research shows that jurors generally take their responsibilities seriously and do their best to follow the instructions they receive from the trial judge.²⁶ In practice, though, trial judges’

²³ FED. R. EVID. 404(b)(2). Rule 404(b) is sometimes referred to as a rule of inclusion because it prohibits the use of other-acts evidence for a single purpose—proving action in accordance with character—but allows it for any other purpose. *United States v. Byers*, 649 F.3d 197, 206 (4th Cir. 2011) (“Rule 404(b) is a rule of inclusion, ‘admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.’” (quoting *United States v. Young*, 248 F.3d 260, 271–72 (4th Cir. 2001))).

Regrettably, courts sometimes misconstrue the inclusive structure of the rule as creating a kind of presumption in favor of admission of other-acts evidence. The Eighth Circuit is a common offender. *E.g.*, *United States v. Thomas*, 593 F.3d 752, 757 (8th Cir. 2010) (“It is well-settled in this circuit that the rule is one of inclusion, ‘such that evidence offered for permissible purposes is presumed admissible absent a contrary determination.’” (quoting *United States v. Johnson*, 439 F.3d 947, 952 (8th Cir. 2006))); *United States v. Roberson*, 439 F.3d 934, 941 (8th Cir. 2006) (“Rule 404(b) is a rule of inclusion, so we presume that evidence of other crimes is admissible for one of the listed purposes unless the party seeking to exclude the evidence can show that it serves only to prove the defendant’s criminal disposition.” (citing *United States v. Hill*, 410 F.3d 468, 471 (8th Cir. 2005))); *see also* *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995) (“This Rule has been interpreted as one of inclusion and generally allows admission of other crimes or acts except where it tends to prove criminal disposition.” (quoting *United States v. DeSalvo*, 41 F.3d 505, 509 (9th Cir. 1994))); *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) (“This rule is inclusive, not exclusive, and emphasizes admissibility.” (citing *Gov’t of V.I. v. Edwards*, 903 F.2d 267, 270 (3d Cir. 1990))); *cf.* *United States v. Hall*, 858 F.3d 254, 276 (4th Cir. 2017) (“The government first argues that our longstanding characterization of Rule 404(b) as an ‘inclusive rule’ renders evidence of a defendant’s prior convictions presumptively admissible and, therefore, weighs in favor of affirming the district court’s admission of Defendant’s convictions.”). As the Fourth Circuit recently explained: “Our characterization of Rule 404(b) as a rule of inclusion reflects our determination that the Rule’s list of non-propensity uses of prior bad acts evidence is not ‘exhaustive.’ That characterization does not displace the longstanding rule that prior ‘bad act’ evidence is ‘general[ly] inadmissib[le].’” *Id.* at 276–77 (alterations in original) (citation omitted) (citing *United States v. McBride*, 676 F.3d 385, 395 (4th Cir. 2012)).

²⁴ *See Johnson*, 27 F.3d at 1193.

²⁵ FED. R. EVID. 105.

²⁶ Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT’L L. 79, 86 (2003) (“[T]here is strong empirical evidence that jurors almost universally take their duties very seriously.”); Nancy S. Marder, *Batson v. Kentucky: Reflections Inspired by a Podcast*, 105 KY. L.J. 621,

instructions far too often are nothing more than the recitation of a few magic words, rather than a real effort to ensure that jurors do not use other-acts evidence to make inferences about character.²⁷

Many commentators have asserted that limiting instructions are inherently or necessarily ineffective because they ask jurors to perform impossible mental feats.²⁸ Perhaps the most well-known of these assertions is Justice Jackson's statement, "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."²⁹ But such wholesale criticisms of limiting instructions are unlikely to lead to any practical results given that limiting instructions are a long-standing feature of our system of evidence and are unlikely to be discarded anytime soon.³⁰ Additionally, it is unlikely that all limiting instructions are equally futile. This Article argues that there is much room for improving limiting instructions in other-acts evidence cases. Before concluding

644 (2016) ("Polls and empirical studies show that jurors take their role seriously, try to perform it responsibly, and might even become more active citizens after having completed their jury service."); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1623 (1998) ("Jurors ordinarily are conscientious in attempting to comply with directions received from the trial judge.").

²⁷ See *infra* Section II.A.

²⁸ See, e.g., Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 112 (2013) ("[O]ther acts are relevant to both character and the purported 'other' purpose; limiting instructions are useless."); 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, 37 (2016) ("There is a near-consensus in evidence scholarship that limiting instructions are especially unproductive in the context of uncharged act evidence given the highly prejudicial nature of such evidence."); Melilli, *supra* note 26, at 1574 ("[T]he chance that such instructions accomplish their intended purpose is practically nil."); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982) ("To the ordinary human mind, . . . the division between the prescribed and the proscribed uses [of other-acts evidence] may be a bit difficult to perceive.").

²⁹ *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted); see also *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985) ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities.").

³⁰ See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) ("A crucial assumption underlying our constitutional system [of trial by jury] is that jurors carefully follow . . . instructions." (first alteration in original) (quoting *Parker v. Randolph*, 442 U.S. 62, 73 (1979))); *Opper v. United States*, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions.").

that limiting instructions cannot be effective, efforts should be made to try to improve the current approach to other-acts limiting instructions.³¹

Trial judges’ failures to provide meaningful guidance to jurors through limiting instructions regarding how they can and cannot use other-acts evidence is readily apparent from reading appellate courts’ opinions. Certain federal circuit courts of appeals routinely imply that because a trial judge gave a limiting instruction, any risk of unfair prejudice resulting from the admission of other-acts evidence was magically dispelled. “Obviate” is the Fourth Circuit’s word of choice for this magical dispelling of the risk of unfair prejudice.³² For example, the court has proclaimed that “any undue prejudice suffered by the admission of the evidence was obviated by the court’s limiting instruction on the proper use of the evidence.”³³ The court has asserted even more summarily that “limiting instructions generally obviate any prejudice.”³⁴ Sometimes, the court has qualified its assertion slightly, stating, “As to prejudicial effect, we note that cautionary or limiting instructions generally obviate any such prejudice, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt.”³⁵ Other circuit courts like to say that limiting

³¹ See *infra* Part IV.

³² See, e.g., *United States v. Davis*, No. 94-5697, 1996 WL 13848 (4th Cir. Jan. 12, 1996).

³³ *Id.* at *2 (citing *United States v. Mark*, 943 F.2d 444, 449 (4th Cir. 1991)).

³⁴ See *United States v. Cowden*, 882 F.3d 464, 473 (4th Cir. 2018); *United States v. Dixon*, 481 F. App’x 806, 811 (4th Cir. 2012); *United States v. Hedgepeth*, 418 F.3d 411, 421 (4th Cir. 2005); *United States v. Mohr*, 318 F.3d 613, 620 (4th Cir. 2003); *United States v. Day*, Nos. 99-4056, 99-4057, 2000 WL 1233586, at *5 (4th Cir. Aug. 31, 2000); *United States v. Bereano*, Nos. 95-5312, 95-5395, 1998 WL 553445, at *8 (4th Cir. Aug. 28, 1998); *United States v. Van Metre*, 150 F.3d 339, 351 (4th Cir. 1998).

³⁵ *United States v. Powers*, 59 F.3d 1460, 1467–68 (4th Cir. 1995) (quoting *United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980)); see also *United States v. Elebesunu*, 677 F. App’x 862, 868 (4th Cir. 2017) (“[C]autionary or limiting instructions generally obviate any . . . prejudice, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt.” (alterations in original) (quoting *United States v. Powers*, 59 F.3d 1460, 1468 (4th Cir. 1995))).

instructions “mitigated”³⁶ or “cured”³⁷ or “curbed”³⁸ “any” unfair prejudice that resulted from other-acts evidence, without any discussion of how that happened—as if any instruction will magically cause any risk of unfair prejudice to simply disappear.³⁹

³⁶ *United States v. Talley*, 767 F. App’x 477, 486 (4th Cir. 2019) (“[A]ny risk of unfair prejudice was mitigated by a limiting instruction to the jury.”); *United States v. Chase*, 367 F. App’x 979, 982 (11th Cir. 2010) (“[A]ny prejudicial value was mitigated by the court’s limiting instruction.”); *United States v. Gonzalez-Perales*, 313 F. App’x 677, 683 (5th Cir. 2008) (“[E]ven assuming a risk of prejudice, the district court’s cautionary instruction effectively mitigated any potential harm.”); *United States v. White*, 405 F.3d 208, 213 (4th Cir. 2005) (“[A]ny risk of such prejudice was mitigated by a limiting instruction from the district court clarifying the issues for which the jury could properly consider [the Rule 404(b)] evidence.”)).

³⁷ *See, e.g.*, *United States v. Ruiz*, 665 F. App’x 607, 610 (9th Cir. 2016) (“The district court also gave a limiting instruction, curing any error.”); *United States v. Stokes*, 229 F. App’x 347, 348 (5th Cir. 2007) (“[A]ny prejudice arising from the admission of the evidence regarding Stokes’s March 3 firearms possession was cured by the district court’s limiting instruction.”); *United States v. Lothridge*, 332 F.3d 502, 504 (8th Cir. 2003) (“The limiting instruction cured whatever unfair prejudice the introduction of Lothridge’s prior convictions occasioned.”); *United States v. Brooks*, 125 F.3d 484, 500 (7th Cir. 1997) (“[L]imiting instructions are sufficient to cure any potential prejudice resulting from the admission of 404(b) evidence.”); *United States v. Kelsey*, No. 96-50310, 1997 WL 471153, at *1 (9th Cir. Aug. 15, 1997) (“[A]ny risk of undue prejudice was cured by a limiting instruction.”); *United States v. Turoff*, 853 F.2d 1037, 1046 (2d Cir. 1988) (“Fed. R. Evid. 404(b) authorizes the use of proof of previous crimes to show intent to commit the charged offense, and any possible prejudice warranting exclusion under FED. R. EVID. 403 was cured by the cautionary jury instructions.”); *United States v. Marino*, 658 F.2d 1120, 1123 (6th Cir. 1981) (“The guns were relevant to prove Orlando’s intent to engage in a conspiracy to import cocaine and any possible prejudice that might have resulted from their admission was cured by the limiting instruction given by the trial judge in accordance with FED. R. EVID. 404(b).”).

³⁸ *United States v. Aliaga*, 617 F. App’x 971, 974 (11th Cir. 2015) (“[T]he risk of any undue prejudice was curbed by the district court’s limiting instruction to the jury concerning the proper consideration of Rule 404(b) evidence.”); *United States v. Lizalde*, Nos. 93-10114, 93-10224, 1994 WL 114619, at *2 (9th Cir. Mar. 31, 1994) (“The court charged the jury with a limiting instruction to help curb any prejudice.”).

³⁹ Other terms found in circuit courts’ opinions include “control,” “minimize,” and “reduce.” *See, e.g.*, *United States v. Imariagebe*, 679 F. App’x 261, 262 (4th Cir. 2017) (“Last, any danger of unfair prejudice was minimized by the court’s limiting instructions.”); *United States v. Jackson*, 856 F.3d 1187, 1192 (8th Cir. 2017) (“Further, the district court controlled for any potential prejudicial effect when it instructed the jurors that the evidence was only to be considered for the purpose of showing Kemp’s plan, knowledge, and intent.”); *United States v. Reed*, 708 F. App’x 773, 777 (4th Cir. 2017) (“Further, any risk of unfair prejudice was reduced by the court’s repeated limiting instruction.”); *United States v. Beuschel*, 662 F. App’x 818, 828 (11th Cir. 2016) (“In any case, the district court gave the jury a limiting instruction, which reduced the risk of any prejudice posed by the Rule 404(b) evidence.”).

Occasionally, courts recognize that limiting instructions do not magically cure any and all prejudice. *See United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011) (“A limiting instruction ‘does not invariably eliminate the risk of prejudice notwithstanding the instruction.’” (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980))); *United States v. Jenkins*, 345 F.3d 928, 939 (6th Cir. 2003) (“A limiting

Perhaps appellate courts’ expressions of faith in the magical powers of whatever limiting instruction a trial judge happens to have given simply reflect their acceptance of the tenet that jurors are “presumed” to follow a trial judge’s instructions even though no one really thinks that they can.⁴⁰ If jury instructions are believed to be incapable of diminishing a risk of unfair prejudice, then any limiting instruction is just as good (or bad) as any other. On the other hand, it cannot be fairly said that trial courts have given limiting instructions regarding other-acts evidence their best effort.

This Article examines the problems with the current approach of the federal circuit courts of appeals to limiting instructions in other-acts cases and proposes several ways that appellate courts can contribute to better limiting instructions. Part I presents a brief overview of the relevant Federal Rules of Evidence: Rules 404(b), 403, and 105. Part II examines the tendency of the federal circuit courts of appeals to accept that limiting instructions magically cure any prejudice resulting from the admission of other-acts evidence. Part III discusses one pervasive problem with federal appellate court review of limiting instructions in other-acts evidence cases: the acceptance of a boilerplate or “laundry list” instruction that includes all, or some irrelevant subset, of the Rule 404(b)(2) list of permitted purposes. Part IV proposes several specific ways that the federal circuit courts of appeals could contribute to improving limiting instructions in other-acts evidence cases.

instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence.” (quoting *United States v. Haywood*, 280 F.3d 715, 724 (6th Cir. 2002))).

This observation is also occasionally offered in a dissenting opinion. *See, e.g.*, *United States v. Whitt*, 752 F. App’x 300, 308 (6th Cir. 2018) (Rogers, J., dissenting) (“[T]he Government’s proposed limiting instruction does not sufficiently mitigate the danger of jury reliance on the 2013 evidence to infer propensity improperly in this case based on character. A mere admonishment to the jury that they are not to consider the prior act evidence for ‘any other purpose’ than motive will hardly be enough to prevent them from doing so.”); *United States v. Muniz-Saavedra*, 694 F. App’x 216, 220 (5th Cir. 2017) (Graves, J., dissenting) (“Further, there is no indication of whether the limiting instruction diminished the prejudicial effect or to what extent.” (citing *United States v. Kinchen*, 729 F.3d 466, 474 (5th Cir. 2013))).

⁴⁰ *See United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010) (“[I]t is a basic tenet . . . that a jury is presumed to have followed the instructions the court gave it . . . [and i]f we preclude the use of evidence admissible under Rule 404(b) because of a concern that jurors will not be able to follow the court’s instructions regarding its use we will inevitably severely limit the scope of evidence permitted by that important rule.” (alterations in original) (quoting *United States v. Givan*, 320 F.3d 452, 462 (3d Cir. 2003))).

I. THE RULES: OTHER-ACTS EVIDENCE, THE RISK OF UNFAIR PREJUDICE, AND LIMITING INSTRUCTIONS

A. *Other-acts Evidence: Rule 404(b)*

Rule 404(b)(2) has become one of the most contested of the Federal Rules of Evidence,⁴¹ largely because of the risk of unfair prejudice inherent in the use of evidence of “crimes, wrongs, or other acts”—especially evidence of prior convictions, which is the most troubling evidence contested under Rule 404(b).⁴² The

⁴¹ According to the Advisory Committee:

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, 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 (citation omitted); e.g., *United States v. Cortijo-Diaz*, 875 F.2d 13, 13 (1st Cir. 1989) (“Once more we have before us allegations of abuses committed under the aegis of Federal Rule of Evidence 404(b).”).

⁴² Courts and commentators generally agree that a prior conviction is especially powerful other-act evidence. See, e.g., *United States v. McCallum*, 584 F.3d 471, 476 (2d Cir. 2009) (“[P]rior convictions are far more likely to be received as potent evidence of propensity than other prior bad acts routinely offered under Rule 404(b) because they bear the imprimatur of the judicial system and indicia of official reliability.”); *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994) (“When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can.”); *United States v. Gilliland*, 586 F.2d 1384, 1389–90 (10th Cir. 1978) (“[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.”); Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018) (“Proof of a criminal defendant’s past crimes has a dramatic effect on a jury, almost guaranteeing conviction.”); Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 541–42 (2009) (“If jurors hear that the accused was previously convicted of a crime, even if the crime was completely unrelated to the current charges against the defendant, there is a substantial likelihood, indeed a substantial probability, that the jury will convict the defendant for being a ‘bad’ person generally.”); Deena Greenberg, *Closing Pandora’s Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 545 (2015) (“The introduction of a prior conviction can be extremely damaging for a defendant and has a significant effect on whether a defendant is convicted.”); Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 780 (2013) (“Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket.”); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 144 (1989) (“Juries will tend to convict a defendant based upon his alleged or demonstrated bad character.”); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 267 (2011) (“Both empirical and

fundamental problem with character evidence is the risk that jurors will give it undue weight, believing for example that someone with a violent disposition must have committed the violent crime for which they are now standing trial.⁴³ As the Supreme Court long ago explained:

The State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.⁴⁴

Other-acts evidence can also cause unfair prejudice if jurors believe that the other act justifies punishment regardless of whether the defendant committed the presently charged offense.⁴⁵ As the Advisory Committee’s note to Rule 404 explains,

theoretical studies suggest that a defendant is more likely to be found guilty when the jury knows of his or her criminal record.”). *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); Uviller, *supra* note 28, at 883.

⁴³ This rationale for the exclusion of character evidence is supported at least to some extent by psychological research. Specifically, the “fundamental attribution error” explains that people tend to give excessive attributional weight to internal, dispositional factors and insufficient attributional weight to external, situational factors. *See* Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL’Y 241, 254 (2017) (“The overvaluation hypothesis is consistent with psychological research on the fundamental attribution error, which occurs when people overestimate the influence of personality and underestimate the influence of the environment on behavior.”); Sonenshein, *supra* note 42, at 262 (“FAE explains that people systematically underestimate the levels of influence that external factors have on behavior and instead attribute a person’s actions primarily to his disposition.”).

⁴⁴ *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

⁴⁵ *See Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)) (discussing the risk that the jury “uncertain of guilt . . . will convict anyway because a bad person deserves punishment . . .”); *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (“Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a ‘bad man,’ without regard to his guilt of the crime currently charged.”). For a history of the rule prohibiting the use of other acts to prove a defendant’s character, see Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 951–58 (1988).

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.⁴⁶

Or as some courts have expressed, “the defendant must be tried for what he did, not who he is.”⁴⁷

Trial judges can exacerbate the risk of unfair prejudice by allowing prosecutors to use other-acts evidence without sufficiently examining a prosecutor’s assertion that the evidence is being offered for a permitted, non-propensity purpose.⁴⁸ In some cases, the admission of other-acts evidence, despite its irrelevance for any proper purpose, seems to result from insufficient attention to the underlying chain of inferences that makes the other-act evidence relevant for the asserted non-propensity purpose. For example, in drug possession or distribution cases, the government often seeks to offer evidence that a defendant has a prior conviction for a similar drug offense, for the purported purpose of proving the defendant’s intent to possess or distribute in the current case.⁴⁹ However, in at least some of these cases, the only way that the prior conviction is relevant to proving intent in the current case is by means of a propensity inference.⁵⁰ In *Gomez*, the en banc Seventh Circuit addressed this issue of hidden propensity inferences, observing, “Spotting a hidden propensity

⁴⁶ FED. R. EVID. 404 advisory committee’s note to 1972 proposed rules.

⁴⁷ See, e.g., *United States v. Hall*, 858 F.3d 254, 288 (4th Cir. 2017) (“By admitting Defendant’s prior convictions, the district court gave rise to the very scenario Rule 404(b) is designed to prevent and deprived Defendant of his right to be tried for what he did, not who he is.” (emphasis omitted) (citing *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014))); *United States v. Clark*, 988 F.2d 1459, 1465 (6th Cir. 1993) (“The district court retains broad discretion in determining the admissibility of other-acts evidence. The court, however, must ensure that the defendant is tried for the crimes charged and not for who he is or what he did before.” (citation omitted)); *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985) (“Our reluctance to sanction the use of evidence of other crimes stems from the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not for who he is.”).

⁴⁸ See *Capra & Richter*, *supra* note 42, at 772 (observing that “federal courts routinely admit other-acts evidence”).

⁴⁹ Cf. *United States v. Cabrera-Beltran*, 660 F.3d 742, 755 (4th Cir. 2011) (“In drug cases, evidence of a defendant’s prior, similar drug transactions is generally admissible under Rule 404(b) as evidence of the defendant’s knowledge and intent.”).

⁵⁰ *Greenberg*, *supra* note 42, at 541 (“The intent justification almost always collapses into impermissible propensity reasoning.”).

inference is not always easy.”⁵¹ Trial judges who accept at face value the government’s assertion that other-acts evidence is being offered for a non-propensity purpose will of course miss these hidden inferences because they are not even looking for them.⁵²

Additionally, even if the other-acts evidence is being offered for a genuine non-propensity purpose, there is always the risk that the jury will on its own make the prohibited propensity inference, and therefore this evidence has an inherent risk of unfair prejudice.⁵³ The risk of unfair prejudice is not unique to other-acts evidence, and two additional rules guide the admission of evidence that poses a risk of unfair prejudice. The first is Rule 403, which is intended to protect against the admission of any evidence when the risk of unfair prejudice substantially outweighs the probative value.⁵⁴ The second is Rule 105, which provides for the use of a limiting instruction as a means to diminish the risk of unfair prejudice.⁵⁵ The application of these two rules to other-acts evidence is discussed in the following sections.

B. *The Risk of Unfair Prejudice: Rule 403*

Under Rule 403, otherwise admissible evidence may be excluded if the risk of unfair prejudice substantially outweighs the probative value of the evidence.⁵⁶ In theory, Rule 403 should work to prohibit the use of other-acts evidence in some reasonable number of cases, given the inherent risk of unfair prejudice associated

⁵¹ United States v. Gomez, 763 F.3d 845, 856 (7th Cir. 2014).

⁵² The tendency of judges to admit other-acts evidence without carefully examining whether the evidence is being admitted for a permitted purpose has prompted the Advisory Committee to propose an amendment to Rule 404(b). In 2018, the Committee unanimously approved an amendment to Rule 404(b). Advisory Comm. on Rules of Evidence, Meeting Minutes 14 (May 3, 2019), <https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf>. This amendment will require, among other things, that a party seeking to admit other-acts evidence must articulate a chain of inferences that supports the party’s claim that the evidence is being offered for a non-propensity purpose. The motivation for this amendment was some trial judges’ willingness to accept the simple invocation of one (or all) of the examples of permitted purposes enumerated in Rule 404(b)(2) as a sufficient basis for admitting other-acts evidence. *Id.* at 83–84. Specifically, the proposed amendment provides in part: “In a criminal case, the prosecutor must . . . articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” *Id.* at 72.

⁵³ See United States v. Chapman, 692 F.3d 822, 827 (7th Cir. 2012) (“The admission of [other-act] evidence always carries with it some risk of unfair prejudice” (citing United States v. Green, 258 F.3d 683, 694 (7th Cir. 2001))).

⁵⁴ FED. R. EVID. 403.

⁵⁵ FED. R. EVID. 105.

⁵⁶ FED. R. EVID. 403.

with this evidence. However, there are several problems with Rule 403 as applied to other-acts evidence. The first is that Rule 403 directs trial judges to exclude evidence only when the risk of unfair prejudice “substantially outweighs” the probative value of the evidence. This balancing test is arguably ill-suited to giving fair consideration to the importance of a criminal defendant’s interest in the exclusion of other-acts evidence, particularly evidence of a prior conviction.⁵⁷ Additionally, trial judges often admit other-acts evidence despite the minimal probative value and substantial risk of unfair prejudice, and appellate courts often affirm convictions despite the admission of this evidence,⁵⁸ in part because of an unexamined acceptance of the power of any limiting instruction to diminish any risk of unfair prejudice.⁵⁹ The role of limiting instructions in the admission of other-acts evidence is discussed in the following section.

C. *Limiting Instructions: Rule 105*

Rule 105 provides for the use of limiting instructions as a way to reduce the risk of unfair prejudice when evidence is admitted only for a particular purpose: “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”⁶⁰ The Advisory Committee Notes draw the connection between limiting instructions and the risk of unfair prejudice, explaining, “A close relationship exists between this rule and Rule 403.”⁶¹ Additionally, the Advisory Committee Notes caution that limiting instructions do not automatically or necessarily diminish the risk of unfair prejudice enough that the evidence should be admitted; instead, “The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.”⁶²

Because other-acts evidence is inherently evidence that is admitted for one purpose but not for another purpose, limiting instructions are often given when other-

⁵⁷ See Capra & Richter, *supra* note 42, at 790.

⁵⁸ See *United States v. Johnson*, 27 F.3d 1186, 1194 (6th Cir. 1994) (“The cases in this and other circuits reveal a remarkable willingness in trial courts to readily admit, and in appellate courts to readily approve, other acts evidence without any clear articulation of the specific rationale justifying its admission.”).

⁵⁹ See *infra* Part II.

⁶⁰ FED. R. EVID. 105.

⁶¹ *Id.*

⁶² *Id.*

acts evidence is admitted.⁶³ However, several problems exist with using limiting instructions to diminish the risk of unfair prejudice from other-acts evidence. In addition to the general uncertainty about the effectiveness of limiting instructions,⁶⁴ one problem specific to limiting instructions in other-acts evidence cases is that limiting instructions can be a double-edged sword,⁶⁵ because they potentially diminish the risk of unfair prejudice by explaining to jurors the proper use of the evidence but at the same time they draw jurors' attention to the prejudicial evidence.⁶⁶ Thus, an ineffective limiting instruction concerning other-acts evidence is not neutral, leaving the defendant in the same position as if the court had not given any instruction. Instead, an ineffective limiting instruction imposes a cost on the defendant without giving him any benefit, because the limiting instruction itself carries a risk of unfair prejudice—the risk that the instruction will cause the jury to focus on the other-acts evidence even more than they would have without the instruction. For this reason, trial judges are advised not to give *sua sponte* limiting instructions regarding other-acts evidence but instead are directed to allow defendants to determine whether the likely benefit of a limiting instruction is greater than its likely harm.⁶⁷ In exchange for the increased attention to the inherently

⁶³ See *id.*

⁶⁴ See *supra* note 28. Federal courts also have expressed skepticism about the effectiveness of limiting instructions. See, e.g., *Krulewicz v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

On the other hand, some scholars have challenged this negative view of the effectiveness of limiting instructions. See, e.g., David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 409 (2013) (“There is little reason to assume evidentiary instructions are ineffective, whatever ‘all practicing lawyers’ are thought to know.”).

⁶⁵ See *Griffin v. Berghuis*, 298 F. Supp. 2d 663, 677 (E.D. Mich. 2004) (“Further, because a special instruction concerning defendant’s having been incarcerated would necessarily have highlighted that fact, defense counsel may well have decided not to bring that double-edged sword into play as a matter of sound strategy.”).

⁶⁶ See *United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994) (“In the course of giving this limiting instruction, the judge reminded the jurors repeatedly that Jones was a convicted felon as he simultaneously asked them to put this consideration out of their minds when deciding if the bank employees had identified the right man.”).

⁶⁷ See *United States v. Hardrick*, 766 F.3d 1051, 1056 (9th Cir. 2014) (“The government’s argument is well-taken that defense counsel may have had strategic reasons for not asking the district court to give a limiting instruction during the presentation of the 404(b) evidence—namely, defense counsel may not have wanted to draw attention to the evidence. We do not fault the district court for not giving a limiting instruction *sua sponte* on the 404(b) evidence without a request from defense counsel.” (citation omitted)); *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (“Appropriate jury instructions may help to reduce the risk of unfair prejudice inherent in other-act evidence. A limiting instruction must be given upon request. But a defendant may choose to go without one to avoid highlighting the evidence. We caution against judicial freelancing in this area; *sua sponte* limiting instructions in the middle of trial,

prejudicial evidence, the defendant ought to receive an effective limiting instruction, one that stands a reasonable chance of diminishing the risk of unfair prejudice.

Another problem with limiting instructions in other-acts evidence cases is invited by Rule 404(b)(2), which states that 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.”⁶⁸ Prosecutors seeking to admit other-acts evidence often recite some or all of these non-propensity purposes in explaining to trial judges why the evidence should not be excluded as character evidence.⁶⁹ If a trial judge has not carefully examined the prosecutor’s proffered explanation of the purpose for admitting the other-acts evidence to determine which if any of these examples applies in the present case, then the judge’s instruction is likely to also simply repeat some or all of the purposes included in Rule 404(b)(2).⁷⁰ Most of the federal circuit courts of appeals have at least on occasion, although by no means consistently, held that such “laundry list” or “boilerplate” instructions are likely to be ineffective in diminishing the risk of unfair prejudice.⁷¹

In addition to lacking specificity, the typical other-acts limiting instruction also fails to explain to the jury *why* it is allowed to consider the evidence only for one purpose but not for another. As previously explained, the rationale for prohibiting the consideration of other-acts evidence to prove action in accordance with character is that jurors are likely to overvalue such information. If a limiting instruction points out this risk and explains to the jurors that they are not allowed to reach a decision based on character inferences—not because character is irrelevant but because our

when the evidence is admitted, may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction.” (citations omitted); *United States v. Malik*, 928 F.2d 17, 23 (1st Cir. 1991) (“[W]hether a party wishes such an instruction, or wishes to forego the instruction (thereby calling less attention to the statement) is primarily a matter for counsel to decide at trial.”).

⁶⁸ FED. R. EVID. 404(b)(2).

⁶⁹ The frequency of trial judges’ failure to identify a specific permitted purpose prompted the advisory committee’s proposed amendment to Rule 404(b). *See supra* note 52.

⁷⁰ *See, e.g., infra* Section III.A. Of course, if the evidence really is being offered for a propensity purpose, then not even the most carefully tailored limiting instruction can render it admissible. *Cf. United States v. Hall*, 858 F.3d 254, 279 (4th Cir. 2017) (“Here, Defendant’s prior convictions were irrelevant or unduly prejudicial and therefore inadmissible under Rule 404(b)—problems a limiting instruction cannot cure.”). Defense counsel also should be paying close attention, as a failure to object—or even worse, an agreement with the deficient instructions—limits the possibility of a successful appeal. *See infra* Section IV.A.

⁷¹ Frank, *supra* note 28, at 7 (“Appellate courts have criticized trial courts that merely recite the ‘laundry list’ of possible uses enumerated in 404(b).”).

system of justice requires that verdicts be based on what someone has done, not what kind of person she is—then that instruction might increase the possibility that a jury would use the other-acts evidence only for the permitted purpose.⁷² These problems with limiting instructions in other-acts evidence cases are examined in more detail in the following sections.

II. UNEXAMINED FAITH IN THE POWER OF A LIMITING INSTRUCTION

One problem with limiting instructions regarding other-acts evidence is that appellate courts “generally presume” the effectiveness of limiting instructions,⁷³ which means that if the trial judge gave a limiting instruction, an appellate court is likely to find that any risk of prejudice was sufficiently mitigated.⁷⁴ For example, the Fourth Circuit recently stated: “[A]ny prejudicial effect was reduced by the district court’s issuance of two sets of limiting instructions, one given after the witnesses testified and the other given as part of the complete set of jury instructions at the conclusion of the evidence.”⁷⁵ The circuit court’s opinion does not provide or otherwise discuss the content of the trial court’s instructions, so it seems that the appellate court is willing to accept that the instruction, whatever it was, cured whatever risk of unfair prejudice existed. A recent opinion by the Eighth Circuit even more explicitly states that any limiting instruction will cure any risk of unfair prejudice: “[T]he court provided the jury with a limiting instruction, and we have recognized that the presence of a limiting instruction diminishes the danger of any unfair prejudice from the admission of other acts.”⁷⁶ It is possible that the circuit courts are engaging in an in-depth analysis of the risk of unfair prejudice associated with specific other-acts evidence and then considering specific limiting instructions

⁷² See *infra* Section IV.B.

⁷³ See, e.g., *United States v. Zajac*, 680 F. App’x 776, 784 (10th Cir. 2017) (“We generally presume that juries follow the instructions of the court.” (citing *United States v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008)); *United States v. Robinson*, 272 F. App’x 421, 429 (6th Cir. 2007) (“Federal courts generally presume that juries follow their instructions.” (quoting *Hill v. Mitchell*, 400 F.3d 308, 325 (6th Cir. 2005)); *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998) (“We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence.” (citing *United States v. Johnson*, 114 F.3d 435, 444 (4th Cir. 1997))).

⁷⁴ See *Sonenshein*, *supra* note 42, at 235 (“[A]ll [federal circuit courts of appeal] express extraordinary confidence that a limiting instruction will always cure the overwhelming prejudice of the inherent propensity inference attached to the admission of Rule 404(b) evidence.”).

⁷⁵ *United States v. Cowden*, 882 F.3d 464, 473 (4th Cir. 2018).

⁷⁶ *United States v. Wright*, 866 F.3d 899, 905 (8th Cir. 2017) (text of limiting instruction not provided).

that were provided regarding the proper use of this evidence, but the analysis presented in these—and numerous other⁷⁷—circuit court opinions leaves the impression that giving a limiting instruction is essentially like waving a magic wand and making whatever risk of unfair prejudice that exists disappear.

Occasionally a circuit court expresses less certainty in the curative powers of a limiting instruction but nevertheless fails to engage in any analysis of why or how a particular limiting instruction diminished the risk of unfair prejudice. For example, the Sixth Circuit has summarily stated, “The district court’s limiting instruction likely reduced any possible prejudicial effects as well.”⁷⁸ Similarly, the Ninth Circuit has stated, “[T]he district court gave a limiting instruction, which greatly minimizes the danger of prejudice.”⁷⁹ Because such statements are not accompanied by examination of either what the risk of unfair prejudice was or how the limiting instruction reduced this risk, the reader is left with no confidence that the limiting instruction did in fact reduce the risk of unfair prejudice. One step toward better limiting instructions in other-acts evidence cases would be a more explicit

⁷⁷ See, e.g., *United States v. Johnson*, 769 F. App’x 458, 459 (9th Cir. 2019) (“Moreover, the district court gave a limiting instruction on the appropriate use of this other crimes evidence, which mitigated any potential unfair prejudice.”); *United States v. Reed*, 708 F. App’x 773, 777 (4th Cir. 2017) (“Further, any risk of unfair prejudice was reduced by the court’s repeated limiting instruction.”); *United States v. Miers*, 686 F. App’x 838, 842 (11th Cir. 2017) (“Finally, the district court provided a limiting instruction regarding the extrinsic evidence, thus mitigating any unfair prejudice.”); *United States v. Imariagbe*, 679 F. App’x 261, 262 (4th Cir. 2017) (“Last, any danger of unfair prejudice was minimized by the court’s limiting instructions.”); *United States v. Fang*, 844 F.3d 775, 781 (8th Cir. 2016) (“The district court’s limiting instruction likely reduced any possible prejudicial effects as well.”); *United States v. Acosta*, 660 F. App’x 749, 755 (11th Cir. 2016) (“[E]ven if there was some risk that the jury could have drawn improper inferences from the evidence presented, ‘any unfair prejudice . . . was mitigated by the district court’s limiting instruction to the jury.’” (second alteration in original) (quoting *United States v. Edouard*, 485 F.3d 1324, 1346 (11th Cir. 2007))); *United States v. Cooke*, 675 F.3d 1153, 1157 (8th Cir. 2012) (“Also, the district court gave a limiting instruction that diminished the danger of prejudice.”); *United States v. Clark*, 668 F.3d 568, 575 (8th Cir. 2012) (“Here, the district court further reduced any potential for unfair prejudice by giving an appropriate limiting instruction.”); *United States v. Curley*, 639 F.3d 50, 59 (2d Cir. 2011) (“Finally, the district court’s charge to the jury, which included an appropriate instruction on this evidence’s limited purpose, mitigated any lingering risk of prejudice.”); *United States v. Carlton*, 534 F.3d 97, 102 (2d Cir. 2008) (“The admission of this evidence was not unduly prejudicial, and the District Court issued a limiting instruction to minimize any unfair prejudice.”).

⁷⁸ *United States v. Fang*, 844 F.3d 775, 781 (8th Cir. 2016).

⁷⁹ *United States v. Pizarro*, 756 F. App’x 458, 459 (5th Cir. 2019).

examination by appellate courts of both what the risk of unfair prejudice was and how a particular limiting instruction did or did not diminish that risk.⁸⁰

III. THE UNLIMITED AND UNEXPLAINED LIMITING INSTRUCTION

One pervasive problem with limiting instructions regarding other-acts evidence is the tendency of trial judges simply to recite to the jury the entire Rule 404(b)(2) list of examples of permitted uses, or some irrelevant subset of the entire list, rather than explain to the jury the specific permitted use of the other-acts evidence.⁸¹ Jurors are then told that although they may consider the other-acts evidence to determine whether a defendant had the intent or motive or plan to commit the charged crime, they cannot use the evidence to determine whether the defendant committed the crime. Such instructions are not only unlikely to have the desired effect of reducing the risk of unfair prejudice but they may even increase the risk, by drawing attention to the other-acts evidence, by causing the jury mistakenly to think that the propensity inference is a permitted purpose, or by otherwise confusing the jury about the proper purpose for the other-acts evidence.⁸²

A trial judge's decision to admit other-acts evidence should mean that the proponent of the evidence has articulated a specific non-propensity purpose for admitting the evidence.⁸³ If the opposing party requests, the judge should give a limiting instruction to the jury explaining the specific permitted purpose for which the jury may consider the evidence.⁸⁴ In practice, however, judges who give limiting instructions regarding the proper use of other-acts evidence often resort to simply reciting the examples of permitted purposes provided in Rule 404(b)(2). The following section presents recent examples of these opinions.

⁸⁰ The Advisory Committee Note to Rule 403 implies that not all limiting instructions are necessarily effective, stating that “consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.” See FED. R. EVID. 404 advisory committee’s note to 1972 proposed rules.

⁸¹ See *infra* Section III.A.

⁸² See *infra* Section IV.B.

⁸³ If the proponent of the evidence has not articulated a specific non-propensity purpose for admitting the evidence, then the trial judge should not admit the evidence. The tendency of advocates to offer, and trial judges to accept, non-specific purposes for admitting other-acts evidence is a problem that has recently drawn the attention of a few circuit courts as well as the Advisory Committee on Evidence. See *supra* note 52.

⁸⁴ See FED. R. EVID. 105.

A. *The Usual Acceptance of “Laundry List” Limiting Instructions*

The federal courts of appeals routinely accept unlimited, “laundry list” limiting instructions that merely recite some or all of the examples of permitted purposes listed in Rule 404(b). Recent examples include:

- “As for Tumer’s argument that the jury may have improperly considered the Chilly evidence as proof of his ‘bad character,’ the court instructed the jury that it was only to consider that evidence with respect to his intent, motive, opportunity, or plan, or to show the absence of an accident or mistake, and the jury is presumed to have followed those instructions.”⁸⁵
- “[T]he Court’s limiting instruction, which explained that the evidence was offered only for the purposes listed in Rule 404(b)(2), mitigated any concern that the jury would have used this evidence to draw a propensity inference.”⁸⁶
- “[T]he district court mitigated any prejudice with a limiting instruction, telling the jury that it could consider Brown’s gang affiliation ‘for the limited purposes of establishing guilty knowledge, intent, plan, motive, and lack of mistake or accident, if any, and evaluating the credibility of witnesses.’”⁸⁷
- “The district court also recognized a risk that jurors might consider the evidence for an improper purpose, and it abated this risk by instructing both juries to consider Defendants’ prior acts . . . only ‘as it relates to the government’s claim on the defendant’s intent, knowledge, identity, absence of mistake, or lack of accident.’”⁸⁸
- “[T]he probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, because the district court instructed the jury, both during and at the end of trial, that such evidence was ‘admitted only for the limited purpose of proving [John’s] intent, motive, opportunity,

⁸⁵ United States v. Reed, 778 Fed. App’x 654, 661 (11th Cir. 2019) (citing United States v. Ramirez, 426 F.3d 1344, 1352 (11th Cir. 2005)).

⁸⁶ United States v. Khan, 778 F. App’x 94, 98 (3d Cir. 2019) (quoting United States v. Repak, 852 F.3d 230, 247 (3d Cir. 2017)).

⁸⁷ United States v. Brown, 730 F. App’x 638, 654 (10th Cir. 2018).

⁸⁸ United States v. Ramer, 883 F.3d 659, 671 (6th Cir. 2018).

preparation, plan, knowledge, identity, absence of mistake, or absence of accident, and, therefore, [must be considered] only for that limited purpose and not for any other purpose.”⁸⁹

- “At trial, the court imposed a limiting instruction applicable to each witness offering Rule 404(b) testimony. Specifically, the court instructed the jury that it could not infer from the government’s evidence that Mabie is a bad person or has the propensity to commit crimes; instead, to the extent that the jury was to consider this evidence, it could do so only for a proper purpose, like background, context, knowledge, and motive.”⁹⁰
- “[A]ny prejudicial effect of admitting the prior-conviction evidence was mitigated by the district court’s limiting instruction to the jury that it could consider the evidence of Ellis’s prior conviction only to evaluate his credibility and to determine ‘knowledge, motive, absence of mistake, accident or intent.’”⁹¹
- “The district court instructed the jury it could not consider this evidence as proof that James ‘is a bad person or that . . . he is the kind of person who is likely to commit a crime,’ but it could use the evidence to evaluate his state of mind, intent, motive, opportunity to commit the charged crimes, or to determine if James acted according to a plan or by accident or mistake.”⁹²
- “The court twice gave the jury a limiting instruction regarding this evidence, stating that it could be considered only to prove ‘the defendant’s motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in connection with’ Faulls’s charges, but not as evidence of Faulls’s character or propensity to commit the offenses.”⁹³
- “As for Rule 403 balancing of relevance and prejudice, the court minimized the risk of prejudice by twice giving limiting instructions to the jury. During Ross’s testimony, the court reminded the jury that Moon was not charged with any drug offense, and stated that the testimony was being admitted for a limited purpose related to the firearms charge, i.e., to show motive,

⁸⁹ United States v. John, 683 F. App’x 589, 594 (9th Cir. 2017) (alterations in original).

⁹⁰ United States v. Mabie, 862 F.3d 624, 633–34 (7th Cir. 2017).

⁹¹ United States v. Ellis, 817 F.3d 570, 580 (8th Cir. 2016).

⁹² United States v. Ford, 839 F.3d 94, 102 (1st Cir. 2016) (alteration in original).

⁹³ United States v. Faulls, 821 F.3d 502, 507 (4th Cir. 2016).

opportunity, intent, preparation, plan, knowledge, identity or absence of mistake.”⁹⁴

B. The Rare Admonishment to Give Specific Limiting Instructions

Federal appellate courts have, on occasion, recognized the need for limiting instructions that go beyond the recitation of some or all of the examples of permitted purposes listed in Rule 404(b)(2). For example, the Seventh Circuit, in the en banc case *United States v. Gomez*, stated: “When given, the limiting instruction should be customized to the case rather than boilerplate.”⁹⁵ The Tenth Circuit has stated, “We have disfavored ‘laundry list’ limiting instructions that merely list the text of Rule 404(b).”⁹⁶ The D.C. Circuit has stated,

[A] proper Rule 404(b) jury instruction should identify the evidence at issue and the particular purpose for which a jury could permissibly use it, rather than providing an incomplete description of the evidence at issue and an undifferentiated laundry list of evidentiary uses that may confuse more than it instructs.⁹⁷

The First Circuit has stated, “[T]his instruction, which consisted of a laundry-list of permitted uses contained in the rule, was simply incapable of limiting the damage caused by this evidence.”⁹⁸

On the other hand, even circuit courts that have expressly discouraged the use of “laundry list” instructions have also asserted that such instructions are not necessarily inadequate. For example, the Tenth Circuit has stated, “Although a

⁹⁴ *United States v. Moon*, 802 F.3d 135, 144–45 (1st Cir. 2015).

⁹⁵ *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (citing *United States v. Jones*, 455 F.3d 800, 811–812 (7th Cir. 2006) (Easterbrook, J., concurring)).

⁹⁶ *United States v. Reddeck*, 22 F.3d 1504, 1510 (10th Cir. 1994) (citing *United States v. Doran*, 882 F.2d 1511, 1525 (10th Cir. 1989)); *see also* *United States v. Hardwell*, 80 F.3d 1471, 1491 (10th Cir. 1996) (“‘Laundry list’ limiting instructions that simply recite all of the purposes listed by Rule 404(b) are disapproved because they do not adequately advise the jury of the limited purposes for which the evidence was admitted.”); *United States v. Patterson*, 20 F.3d 809, 813 n.3 (10th Cir. 1994) (“We have previously stated the ‘laundry list’ approach is not ideal in limiting instructions.” (citing *United States v. Doran*, 882 F.2d 1511, 1525 (10th Cir. 1989))).

⁹⁷ *United States v. McGill*, 815 F.3d 846, 889 (D.C. Cir. 2016).

⁹⁸ *United States v. Cortijo-Diaz*, 875 F.2d 13, 15–16 (1st Cir. 1989).

limiting instruction containing a ‘laundry list’ of permitted uses of Rule 404(b) evidence is disfavored, we have never held that such an instruction is improper *per se*.⁹⁹ The Third Circuit has observed that its circuit’s model 404(b) instruction includes the entire list of examples of permitted purposes from Rule 404(b)(2), and while the model instruction encourages trial judges to tailor the instructions to the specific facts of particular cases, such tailoring is not required. As a Third Circuit opinion explained in response to a dissenting opinion arguing that boilerplate instructions are inadequate:

The implication from the Dissent is that the District Court’s limiting instruction—which followed nearly word-for-word our Circuit’s model 404(b) instruction—is inherently inadequate. We disagree. The list of proper evidentiary purposes set forth in 404(b) and repeated in the model instruction, which is the list that the District Court used here, is not made improper solely because the Court was not as clear as it could have been in articulating why motive was a proper purpose that the jury could rely on when considering Lee’s statements to Kraus. We take this opportunity to encourage district court judges to delineate the specific grounds for admissibility of 404(b) evidence, even if the entire 404(b) litany has already been recounted. Our dissenting colleague is quite right to note that comments to the model jury instructions encourage that practice. However, the government argued motive; motive is apparent on the record; and the District Court instructed on motive. Given the very deferential standard we are under, the instruction was adequate.¹⁰⁰

This opinion raises two other important points regarding appellate court review of trial judges’ limiting instructions: the role of circuit courts’ pattern or model instructions, and the role of the standard of review that appellate courts apply to their assessment of trial judges’ limiting instructions. Both of these issues are examined in the following section.

⁹⁹ *United States v. Joe*, 8 F.3d 1488, 1496 (10th Cir. 1993) (citations omitted).

¹⁰⁰ *United States v. Lee*, 612 F.3d 170, 192 n.25 (3d Cir. 2010) (citations omitted). The Fifth Circuit has expressed even more explicitly that a “laundry list” limiting instruction is adequate: “Lugo contends that the court’s instruction did not cure any error because it simply recited the list of permissible purposes found in Rule 404(b). We have held, however, that an instruction that tracks the language of Rule 404(b) properly instructs the jury on permissible uses of extrinsic evidence.” *United States v. Ordonez*, 286 F. App’x 224, 231 n.2 (5th Cir. 2008) (citing *United States v. Pompa*, 434 F.3d 800, 805–06 (5th Cir. 2005)).

IV. SOME PROPOSALS FOR IMPROVING OTHER-ACTS LIMITING INSTRUCTIONS

A. *Better Circuit Court Opinions*

Appellate courts are in a position to model a better approach to limiting instructions in other-acts evidence cases. For example, appellate courts should not write opinions that imply that limiting instructions are magic words that have a special power to eliminate any risk of unfair prejudice¹⁰¹ but instead should write opinions that imply—if not state explicitly—that limiting instructions are a tool that when properly crafted can potentially reduce the risk of unfair prejudice. Appellate court opinions should not simply ask whether the trial court gave some limiting instruction but instead should ask whether the trial court’s limiting instruction was likely to have been effective, given the particular other-acts evidence, its particular probative value and risk of unfair prejudice, and the particular instructions in each case.

One impediment to better circuit court opinions is the standards of review that appellate courts apply when reviewing trial courts’ jury instructions. Appellate courts are hesitant to find error in trial judges’ jury instructions, viewing the instructions as an aspect of trial practice that trial judges are in a better position to manage than are appellate judges.¹⁰² The most deferential standard, plain error, applies when the defendant has failed to object at trial to the jury instructions.¹⁰³

¹⁰¹ *See supra* Section III.A.

¹⁰² *See* United States v. Hall, 858 F.3d 254, 288–89 (4th Cir. 2017) (Wilkerson, J., dissenting) (“On evidentiary questions, especially those of non-constitutional dimension, appellate judges are best advised to keep hands off. Our instincts are less practiced than those of the trial bench and our sense for the rhythms of a trial less sure.”).

¹⁰³ “Plain error” review applies when a party failed to object at the trial court level; appellate courts usually say that these issues are forfeited, except for plain error review. If a party affirmatively agreed with a trial judge’s ruling, then appellate courts will usually decline to review the issue at all, considering it to have been waived. As the Seventh Circuit recently explained:

We think the omissions from the pattern instructions created an error. . . . Nevertheless, Morgan’s counsel affirmatively agreed to this instruction, not just once, but twice. . . . Thus any objection was unequivocally waived. When a defendant negligently fails to object to a jury instruction before the jury retires to deliberate, the defendant may later attack that instruction only for plain error. A defendant who waives—rather than forfeits—his objection as Morgan did here however, ‘cannot avail himself of even the demanding plain error standard of review. He has no recourse and generally must live with his earlier decision not to press the error.’

Under this standard, the appellate court will find that the instructions were erroneous only if the error was “clear” and if it affected “substantial rights.”¹⁰⁴ It is a rare case that meets this test. Courts have referred to the plain error standard as a “cold comfort”¹⁰⁵ and “high hurdle”¹⁰⁶ for appellants seeking review of errors that were not objected to at trial. The best remedy for the plain error standard of review is for trial counsel to object to inadequate jury instructions. However, trial judges also bear some responsibility for ensuring that the instructions that they give are carefully drafted to diminish the risk of prejudice from the admission of other-acts evidence.

Additionally, appellate courts should not assume that an erroneous instruction is better than no instruction.¹⁰⁷ A defendant might choose to forgo a limiting instruction because of the belief that it will be more harmful than helpful—that it will draw attention to the prejudicial evidence without adequately diminishing the risk of unfair prejudice. If a trial court gives a flawed limiting instruction, the defendant is, at least in some cases, more likely to be harmed than if the trial court does not give a limiting instruction at all.¹⁰⁸ Also, trial judges might reasonably believe—as Rule 105 instructs—that they should not give limiting instructions unless the defendant asks.¹⁰⁹ However, there should be no argument that a trial judge could reasonably believe that giving a flawed limiting instruction, such as one that recites the whole Rule 404(b)(2) list, is proper. Thus, appellate courts are wrong to

United States v. Morgan, 929 F.3d 411, 431–32 (7th Cir. 2019) (citations omitted).

¹⁰⁴ FED. R. CRIM. P. 52(b) provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

¹⁰⁵ See United States v. Gonzalez, 570 F.3d 16, 21 (1st Cir. 2009).

¹⁰⁶ See United States v. Paniagua-Ramos, 251 F.3d 242, 246 (1st Cir. 2001).

¹⁰⁷ See, e.g., United States v. Hernandez-Guevara, 162 F.3d 863, 873 (5th Cir. 1998) (“If a district court does not commit plain error by neglecting to give a limiting instruction, we do not see how it does so by reciting the permissible uses of extrinsic offense evidence as laid out in Rule 404(b).”).

¹⁰⁸ See United States v. Jones, 16 F.3d 487, 492–93 (2d Cir. 1994).

¹⁰⁹ FED. R. EVID. 105. As the First Circuit has explained:

To arguments such as the one presented here, based upon a failure to give an unrequested limiting instruction, we have been particularly unreceptive. Indeed, “it would be most unusual for us to find that a district court erred in failing to give a limiting instruction that was never requested.” That is because “[t]he district court is not required to act sua sponte to override seemingly plausible strategic choices on the part of counseled defendants.”

United States v. Rodriguez, 759 F.3d 113, 121 (1st Cir. 2014) (citations omitted).

imply that any instruction is better—and less likely to be plain error—than no instruction.

Even if trial counsel objects to an erroneous limiting instruction, an appellate court will generally review the instruction only for an abuse of discretion. As the Fifth Circuit has explained: “Because district courts enjoy substantial latitude in formulating a jury charge, we review all challenges to, and refusals to give, jury instructions for abuse of discretion.”¹¹⁰ Under this standard, the appellate court will find that the instruction was erroneous only under the most limited circumstances.¹¹¹ In explaining the “abuse of discretion” standard, the Third Circuit stated, “Jury instructions are reviewed for abuse of discretion, and we will reverse only when the district court’s decision is arbitrary, fanciful, or clearly unreasonable, and where no reasonable person would adopt the district court’s view.”¹¹²

There are two possible solutions to the problem posed by deferential standards of review. The first is for appellate courts to consider that a “laundry list” limiting instruction, which recites the entirety of 404(b)(2) or some irrelevant subset of that rule’s list of permitted purposes, is an incorrect statement of the law.¹¹³ As the

¹¹⁰ *United States v. Hinojosa*, 463 F. App’x 432, 446 (5th Cir. 2012).

¹¹¹ *See* DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* § 4.10 (2019) (“Abuse of discretion is a very deferential standard; it is said that in general, an abuse of discretion will be found only if the trial court’s decision is arbitrary, irrational, capricious, whimsical, fanciful, or unreasonable. It has also been said that the trial court’s exercise of its discretion will not be disturbed unless no reasonable person would adopt its view.”) (footnote and internal quotation marks omitted).

¹¹² *United States v. Moorefield*, 683 F. App’x 99, 101 (3d Cir. 2017).

¹¹³ *Cf.* *United States v. Hall*, 858 F.3d 254, 282 (4th Cir. 2017) (“Far from a ‘routine discretionary call,’ the district court’s determination that Defendant’s prior convictions were admissible under Rule 404(b) was an erroneous legal conclusion”) (citation omitted); *United States v. Caldwell*, 760 F.3d 267, 274 (3d Cir. 2014) (“We review a district court’s evidentiary rulings for an abuse of discretion. ‘We exercise plenary review, however, of the district court’s rulings to the extent they are based on a legal interpretation of the Federal Rules of Evidence.’”) (citation omitted).

In a few cases, a panel of circuit court judges has stated or implied that it is inclined to find that a limiting instruction that included irrelevant purposes as plain error but cannot because of prior panel decisions. *See, e.g.*, *United States v. Newsom*, 452 F.3d 593, 606 (6th Cir. 2006) (“In sum, three of the four permissible uses for uncharged conduct that were enumerated by the district court in its jury instructions were not at issue in this case. One use listed by the jury instructions was actually at issue, however, compelling the conclusion that the district court did not commit plain error.”). In these cases, the en banc court—or the U.S. Supreme Court—must decide that including irrelevant purposes, even if a relevant purpose is also included, can be plain error. *See id.* (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision

Supreme Court has stated, “A district court by definition abuses its discretion when it makes an error of law.”¹¹⁴

A second potential remedy is for the appellate courts to model appropriate regard for the inherent risk of prejudice posed by other-acts evidence. Deference does not have to mean unquestioned acceptance. Even if a court eventually finds that a deficiency in limiting instructions was not so erroneous as to be reversible error,¹¹⁵ appellate courts should still entertain seriously the question whether the limiting instructions diminished the risk of unfair prejudice. It is not helpful for an appellate court to say, “Even if this instruction was erroneous, the error was harmless.”¹¹⁶ These “even if” statements suggest a cavalier attitude toward erroneous other-acts instructions that does not model appropriate regard for the importance of properly crafted jury instructions.

B. *Better Circuit Court Pattern Instructions*

Another way that the federal circuit courts of appeals could encourage better limiting instructions is by creating better pattern instructions. Almost all of the circuit courts have pattern instructions for other-acts evidence.¹¹⁷ Advisory Committees

of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”).

¹¹⁴ *Koon v. United States*, 518 U.S. 81, 100 (1996). *Accord Hall*, 858 F.3d at 275 (4th Cir. 2017) (“The district court’s failure to apply the proper legal standard for determining whether a prior bad act is admissible under Rule 404(b) is, by definition, an abuse of discretion.”).

¹¹⁵ An appellate court will find that a trial judge’s error was harmless error, rather than reversible error, when “after reviewing the entire record, we determine that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict.” *Ferguson v. United States*, 484 F.3d 1068, 1074 (8th Cir. 2007) (quoting *United States v. Crenshaw*, 359 F.3d 977, 1003–004 (8th Cir. 2004)).

¹¹⁶ *See, e.g., United States v. Suarez*, 364 F. App’x 602, 604 (11th Cir. 2010) (“[E]ven if that instruction was erroneous, it is undisputable that Suarez has not demonstrated that her substantial rights were affected, or that the alleged error affected the fairness or integrity of the proceeding.”); *United States v. Hattabaugh*, 295 F. App’x 249, 251 (9th Cir. 2008) (“Certainly, a more specific instruction could have been given, and it might have been better practice to do so, but any error was harmless.”); *United States v. Lucero*, 164 F. App’x 594, 595 (9th Cir. 2006) (“The district court repeatedly gave the jury cautionary instructions that followed this circuit’s pattern instructions. Even if its doing so were error, the error certainly would not be ‘plain.’”).

¹¹⁷ Only the Second and Fourth Circuits do not have pattern instructions. *See* 1ST CIR. CRIM. PATTERN JURY INSTR. § 2.05 cmt. 3 (2019), 3D CIR. MODEL CRIM. JURY INSTR. § 2.23 (2017), 5TH CIR. CRIM. PATTERN JURY INSTR. § 1.32 (2019), 6TH CIR. CRIM. PATTERN JURY INSTR. § 7.13 (2019), 7TH CIR. CRIM. PATTERN JURY INSTR. § 3.11 (2019), 9TH CIR. MODEL CRIM. JURY INSTR. § 2.10 (2019), 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.30 (2018), 11TH CIR. CRIM. PATTERN JURY INSTR. § 4.1 (2019).

draft pattern instructions and, although not officially endorsed by the circuit courts, they carry significant weight.¹¹⁸ Pattern instructions can have several benefits, including ensuring that judges provide complete and consistent instructions.¹¹⁹ However, pattern instructions can be problematic because they are written to apply to a broad spectrum of cases, and if trial judges do not tailor them to the specific facts of particular trials, the result is an unhelpful or even harmful boilerplate instruction.¹²⁰ Despite the potential harm caused by simply reciting the pattern instructions, trial judges may be reluctant to modify them out of fear of reversal.¹²¹

¹¹⁸ William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 737 (1981).

¹¹⁹ “Pattern instructions were designed to serve four principal purposes: (1) save the court and counsel time in preparing instruction; (2) eliminate argumentative instructions prepared by counsel; (3) improve accuracy and avoid error and thereby reduce the number of appeals and reversals; and (4) improve jury comprehension.” *Id.*

¹²⁰ Cf. Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 712 (2000). Edward J. Devitt, Circuit Judge, Address Delivered at Tenth Circuit Judicial Conference (July 9, 1965) *Ten Practical Suggestions About Federal Jury Instructions*, in 38 F.R.D. 75, 77 (D. Colo. 1965) (“Very few pattern instructions are intended to be copied verbatim in every case. They are intended principally as an aid to the preparation of an appropriate instruction in the particular case.”); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1252 (2002) (criticizing “pattern jury instructions, which are drafted without the facts of any particular case in mind, resulting in overly abstract, general, and technical language”); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 43 (1993) (citing research finding that “comprehension levels for pattern instructions are low and that rewriting pattern instructions leads to greater understanding”); Walter W. Steele, Jr., *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 99 (1988) (reporting research finding that “all of the empirical studies show juror comprehension of pattern instructions to be so low as to be dysfunctional”).

¹²¹ Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 459 (2006) (“The trial judge is usually careful not to deviate from the instruction because he or she does not want to be reversed on appeal and have the case return for a new trial.”); Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1115 (2000) (“Trial judges greatly reduce risk of reversal by using instructions previously approved on appeal or offered by a pattern instruction committee, because those instructions are most likely to be held legally sufficient.”); Hunt, *supra* note 43, at 264 (“[P]attern jury instructions, which are intended for broad usage across a range of trials, often are written in abstract language, and jurors may be unsure how to apply them to specific cases. However, judges may be hesitant to clarify the language of an instruction or draw connections between abstract language and the case at hand for fear of being overturned on appeal.”) (footnote omitted).

Reciting the pattern instructions as written might be ineffective (or worse),¹²² but it almost certainly is not going to be reversible error.¹²³

1. Laundry List Instructions

One problem with pattern instructions is that most circuit courts’ instructions are written in a way that implicitly encourages trial judges to include all of the examples of permitted purposes from Rule 404(b)(2) rather than instruct the jury more specifically regarding the particular purpose for which they are allowed to use other-acts evidence. For example, the Fifth Circuit’s pattern instruction states in full: “You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant. You may consider that evidence only as it bears on the defendant’s [e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose.”¹²⁴

The First, Third, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all include some or all of the Rule 404(b)(2) list in their pattern instructions. Of these, only the Third Circuit’s instruction includes a direction within the text of the pattern instruction that the trial judge should not include the entire list, stating in part:

You have heard testimony that the defendant (summarize the other act evidence). . . . You may only consider this evidence for the purpose of deciding whether the defendant (describe the precise purpose for which the other act evidence was admitted: for example [Pick only those of the following, or other

¹²² See *United States v. Jones*, 16 F.3d 487, 492–93 (2d Cir. 1994).

¹²³ *United States v. Brown*, 658 F. App’x 100, 104 (3d Cir. 2016); *United States v. Peterson*, 569 F. App’x 353, 355 (6th Cir. 2014) (“Whether jury instructions are identical to or track the essential language of Sixth Circuit Pattern Jury Instructions is one factor in determining if the provided instructions are misleading or plainly erroneous.”); *United States v. McNeal*, 591 F. App’x 760, 764 (11th Cir. 2014) (“We have previously held that it is not error to give the Eleventh Circuit pattern instruction on Rule 404(b) evidence.”); *United States v. Petersen*, 622 F.3d 196, 208 (3d Cir. 2010) (“We have a hard time concluding that the use of our own model jury instruction can constitute error”); *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009) (“It is well-settled that a district court does not err by giving a charge that tracks this Circuit’s pattern jury instructions and that is a correct statement of the law.”); William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 285 (1993) (“Trial judges and attorneys routinely face the challenge of drafting jury instructions that appellate courts will approve and jurors will understand. They often duck this challenge, relying on ‘pattern’ instructions or instructions that have survived past appeals despite being incomprehensible to jurors.”); Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1025 (1994) (“Trial judges know that supplementing standard instructions increases the risks of reversal on appeal. On the other hand, trial courts are unlikely to be reversed for refusing to grant a supplemental instruction.”).

¹²⁴ 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.30 (2018) (bracketed text in original).

reasons, that apply], had the state of mind, knowledge, or intent necessary to commit the crime charged in the indictment; or had a motive or the opportunity to commit the acts charged in the indictment; or was preparing or planning to commit the acts charged in the indictment; or acted with a method of operation as evidenced by a unique pattern (describe); or did not commit the acts for which the defendant is on trial by accident or mistake; or is the person who committed the crime charged in the indictment.¹²⁵

Most of the other circuits include a similar caution in their advisory notes or comments but not in the text of the instruction.¹²⁶

Only the Seventh Circuit has altogether omitted the 404(b)(2) list from its pattern instruction. Rather than including some or all of the examples of permitted purposes, the Seventh Circuit's pattern instruction states in part:

You have heard [testimony/evidence] that the defendant committed acts other than the ones charged in the indictment. . . . [Y]ou may consider that evidence to help you decide [describe with particularity the purpose for which other act evidence was admitted, e.g., the defendant's intent to distribute narcotics, absence of mistake in dealing with the alleged victim, etc.].¹²⁷

The advantage of this instruction as compared to the other circuits' is obvious: the trial judge cannot simply recite the pattern instruction as written but must tailor it to the specific facts of the case.

2. Internally Inconsistent Instructions

Several of the circuits courts' pattern instructions include the internally inconsistent direction that jurors may consider other-acts evidence to decide whether the defendant is guilty of some aspect of the charged offense, such as possessing the intent to commit the charged offense or having the opportunity to commit the charged

¹²⁵ 3D CIR. MODEL CRIM. JURY INSTR. § 2.23 (2017) (bracketed text in original).

¹²⁶ For example, the First Circuit pattern instructions state in the comments:

Courts should encourage counsel to specify and limit the purpose or purposes for which prior act evidence is admitted. One or more of the above instructions should be given only for the corresponding specific purpose for which the evidence was admitted. Instructions for purposes other than that for which the specific evidence was admitted should not be given.

1ST CIR. CRIM. PATTERN JURY INSTR. § 2.06 cmt. 3 (2019).

¹²⁷ 7TH CIR. CRIM. PATTERN JURY INSTR. § 3.11 (2019) (bracketed text in original).

offense, but not to decide whether the defendant committed the charged offense. For example, the Eleventh Circuit’s pattern instruction states:

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. *You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment.* This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].¹²⁸

The pattern instructions of the First Circuit and the Fifth Circuit include similar statements.¹²⁹

These instructions are internally inconsistent. On one hand, the jurors are told not to use the evidence to decide whether the defendant “engaged in the activity alleged in the indictment.”¹³⁰ On the other hand, they are also told they may consider the evidence to decide whether the defendant had, for example, the “motive or opportunity to commit the acts charged in the indictment.”¹³¹ It is unrealistic to think that jurors understand the difference between engaging in the alleged activity and having the motive or opportunity to engage in the alleged activity.¹³²

A related problem is found in several other circuit courts’ pattern instructions, which tell jurors that they may use the other-acts evidence for some list of purposes but not “for any other purpose.” For example, the Sixth Circuit’s pattern instruction states in part:

¹²⁸ 11TH CIR. CRIM. PATTERN JURY INSTR. § 4.1 (2019) (bracketed text in original) (emphasis added).

¹²⁹ 1ST CIR. CRIM. PATTERN JURY INSTR. § 2.04 (2019); 5TH CIR. CRIM. PATTERN JURY INSTR. § 1.32 (2019).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 356 (2018) (“Some . . . instructions are outright nonsensical and even self-contradictory.”).

You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. . . . [Y]ou can consider the evidence only as it relates to the government’s claim on the defendant’s [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident]. You must not consider it for any other purpose.¹³³

The Third and Seventh Circuits’ pattern instructions include a direction to trial judges to provide some guidance about the meaning of “any other purpose.” The Third Circuit’s pattern instruction states in part:

You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. [This evidence can be considered by you as evidence that (describe limited purpose)]. It may not be used for any other purpose. [For example, you cannot use it as proof that (discuss specific prohibited purpose)].¹³⁴

The Seventh Circuit’s pattern instruction includes an extensive explanation of what the prohibited purposes are, and also why they are prohibited:

You have heard [testimony/evidence] that the defendant committed acts other than the ones charged in the indictment. . . . You may not consider this evidence for any other purpose. To be more specific, you may not assume that, because the defendant committed an act in the past, he is more likely to have committed the crime[s] charged in the indictment. The reason is that the defendant is not on trial for these other acts. Rather, he is on trial for [list charges alleged in the indictment]. The government has the burden to prove beyond a reasonable doubt the elements of the crime[s] charged in the indictment. This burden cannot be met with an inference that the defendant is a person whose past acts suggest bad character or a willingness or tendency to commit crimes.¹³⁵

The Seventh Circuit recently explained why a trial judge errs by giving a limiting instruction that includes only the “not for any other purpose” language, without the additional explanatory language from the court’s pattern instruction:

In this case, we are troubled by what was omitted from the instructions. The instructions ordered the jury not to consider the testimony of the 404(b) witnesses

¹³³ 6TH CIR. CRIM. PATTERN JURY INSTR. § 7.13 (2019) (some bracketed text in original).

¹³⁴ 3RD CIR. CIVIL JURY INSTR. § 2.10 (2017) (bracketed text in original).

¹³⁵ 7TH CIR. CRIM. PATTERN JURY INSTR. § 3.11 (2019) (bracketed text in original).

“for any other purpose.” But would a lay person on a jury, who would have no reason to know how or why our judicial system struggles with propensity evidence, have any idea what the court means by “for any other purpose?” What it actually means is that the jury should not use the evidence to infer that the defendant is a “bad guy” or the “type of guy who would sell methamphetamine or commit crimes in general.” These are the exact explanations that were excluded from the pattern instructions. *Without them it almost makes it seem as though the jury may use the evidence for propensity purposes.* In other words, how was a jury to know that it could not use the other act evidence to show “Morgan has sold methamphetamine in the past therefore he must be guilty of doing it this time.” We think the omissions from the pattern instructions created an error.¹³⁶

Although the court found that in this case the error was harmless, it also cautioned that trial judges should be careful that their limiting instructions do more than say that the other-acts evidence may be used for one purpose and not for any other: “We note for future trials that we think a jury instruction that does not inform the jury what ‘other purposes’ means is not sufficient to explain forbidden propensity purposes to jurors.”¹³⁷ The desirability of explaining to jurors that their improper use of other-acts evidence can undermine the fairness of a criminal defendant’s trial is examined in the next section.

3. Failure to Explain the Rationale for the Limitation

Generally, jurors are not told why they can use certain evidence for one purpose but not for another. The trial judge tells the jurors how they are and are not allowed to use the evidence, but not why they are not allowed to use the evidence for the prohibited purpose. Jurors are not told about the risk of overweighing other-acts evidence. They are not told, for example, that overweighing evidence of a criminal defendant’s prior conviction threatens fundamental guarantees of fairness, including the presumption of innocence and the due process requirement that the government must prove all elements of the charged crime beyond a reasonable doubt. Providing such explanations could increase the effectiveness of limiting instructions by increasing jurors’ comprehension of the instructions as well as giving jurors reasons for striving to follow them.¹³⁸

¹³⁶ United States v. Morgan, 929 F.3d 411, 431 (7th Cir. 2019) (emphasis added).

¹³⁷ *Id.*

¹³⁸ See *supra* note 120.

Explaining to jurors the rationale for the limiting instruction is important in other-acts evidence cases because jurors are apt to consider evidence of other acts, specifically evidence of a criminal defendant's prior conviction, as the basis for a propensity inference—the inference that because the defendant committed a crime in the past, he likely committed the presently-charged crime. Jurors undoubtedly recognize the relevance of the prior conviction—this is the whole reason for Rule 404(b).¹³⁹ Although it is reasonable to presume that jurors do their best to follow judges' instructions,¹⁴⁰ it is also reasonable to assume that they would be more willing and better able to truly limit their consideration of the prior conviction if they understood why they were being instructed to do so. As one scholar has explained:

One reason why the current character evidence instructions hurled at jurors are so hopelessly ineffectual is that jurors know from their own common sense and experience that truly similar crimes evidence is relevant precisely to demonstrate a general character trait, which in turn is relevant to the likelihood of repeated similar conduct.¹⁴¹

Similarly, the en banc Seventh Circuit explained in *Gomez*:

[W]e see no reason to keep the jury in the dark about the rationale for the rule against propensity inferences. Lay people are capable of understanding the foundational principle in our system of justice that “we try cases, rather than

¹³⁹ See *supra* Section I.A.

¹⁴⁰ See *supra* note 26.

¹⁴¹ Melilli, *supra* note 26 at 1623. See also Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 329–30 (2013) (citations omitted) (“[T]he research suggests that explaining the rationale for admonitions to disregard information enhances the effectiveness of the instruction. The possibility of a reinforcement effect for a strong procedural instruction, for example, finds some empirical support in analyses of recorded juror deliberations. When the policy underlying exclusion is explained, jurors better understand the core purposes of trial and their role. And offering logical reasons for exclusion can shape an intuitive acceptance that some evidence ought to be set aside.”); Sklansky, *supra* note 64, at 445 (“In other words, evidentiary instructions work, albeit imperfectly, and they work better when the judge gives the jury a reason to follow them, when they are given at the end of the trial, and when jurors are asked to deliberate before returning a verdict. . . . [I]f we want juries to honor the request or follow the recommendation, we should give them reasons for doing so.”); Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 L. & CONTEMP. PROBS. 341, 353 (1989) (“In addition, an explanation of underlying policy would eliminate most feelings of reactance or resentment toward the judicial system because jurors would view the procedures to be followed as less arbitrary and more reasonable.”).

persons.” The court’s limiting instruction would be more effective if it told the jurors that they must not use the other-act evidence to infer that the defendant has a certain character and acted “in character” in the present case because it does not follow from the defendant’s past acts that he committed the particular crime charged in the case.¹⁴²

Some social science research supports the intuition that jurors are more likely to understand and make an effort to follow a limiting instruction if they are given a reason for the limitation. For example:

[T]heories of social psychology suggest that, even were fact finders able to disregard forbidden information, they may not be willing to do so under the conditions imposed by standard limiting instructions. According to ironic processes and reactance theory, for example, limiting instructions delivered without any supporting rationale may have a backfire effect that underscores inadmissible evidence. Most individuals strongly prefer to maintain their autonomy and, when they feel it to be threatened, may perform the restricted behaviors to reestablish freedom.¹⁴³

In addition to explaining the harm of overweighing character inferences, limiting instructions in criminal cases should address the government’s burden of proof as well as the presumption of the defendant’s innocence. Prior convictions carry all of the risks inherent to other-acts evidence, plus the additional risk of undermining the fairness of a criminal trial.¹⁴⁴ Two aspects of a criminal trial’s fairness are threatened

¹⁴² *United States v. Gomez*, 763 F.3d 845, 861 (7th Cir. 2014) (citations omitted). Given the obvious relevance of the prior conviction to the question whether the defendant committed the presently charged crime, the Seventh Circuit’s observation should be amended so that the limiting instruction tells the jurors that “they must not use the other-act evidence to infer that the defendant has a certain character and acted ‘in character’ in the present case because it does not follow from the defendant’s past acts that he *necessarily* committed the particular crime charged in the case.”

¹⁴³ Griffin, *supra* note 141, at 326. (footnote omitted).

¹⁴⁴ As the Fourth Circuit has explained:

The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except insofar as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence.

Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948).

by the admission of evidence of a defendant's prior conviction. First, evidence of the prior conviction can undermine the presumption of innocence. As the Second Circuit has explained, "[E]vidence of prior convictions merits particularly searching, conscientious scrutiny. Such evidence easily lends itself to generalized reasoning about a defendant's criminal propensity and thereby undermines the presumption of innocence."¹⁴⁵ Similarly, the D.C. Circuit has explained, "[O]nce evidence of prior crimes reaches the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk."¹⁴⁶

Evidence of prior convictions can also undermine the due process requirement that the government must prove every element of a charged offense beyond a reasonable doubt.¹⁴⁷ As one commentator has explained, "The requirement of proof beyond a reasonable doubt is undermined because of the excessive weight that juries give to evidence of a defendant's bad character and the tendency of juries to convict on the basis of the belief that the defendant is a bad person deserving of punishment."¹⁴⁸

These risks should be addressed in trial courts' limiting instructions. Most of the circuit courts' current pattern instructions do include some reference to the prosecution's beyond-a-reasonable-doubt burden of proof. For example, the Sixth Circuit's pattern instruction states in part: "Remember that the defendant is on trial here only for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable

¹⁴⁵ United States v. McCallum, 584 F.3d 471, 476 (2d Cir. 2009). See also United States v. Harris, 117 F.3d 1421 (6th Cir. 1997) ("The rule helps secure the presumption of innocence and its corollary 'that a defendant must be tried for what he did, not who he is.'" (quoting United States v. Vance, 871 F.2d 572, 574 (6th Cir. 1989))).

¹⁴⁶ United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985).

¹⁴⁷ See *In re Winship*, 397 U.S. 358, 366–67 (1970).

¹⁴⁸ James Landon, *Character Evidence: Getting to the Root of the Problem Through Comparison*, 24 AM. J. CRIM. L. 581, 592 (1997). See also Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 191 (2017) ("[I]nformation about a criminal record has the effect of diluting the state's burden of proof by making jurors willing to convict on less evidence when the defendant has a criminal past."); EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02, at 4 (1995) ("Evidence of uncharged misconduct strips the defendant of the presumption of innocence.") (footnote omitted).

doubt.”¹⁴⁹ The First,¹⁵⁰ Fifth,¹⁵¹ and Tenth¹⁵² Circuit Courts’ pattern instructions are similar.

The pattern instructions of the Third Circuit and the Ninth Circuit both have relatively expansive language on this issue, including references to the government’s burden of proof beyond a reasonable doubt.¹⁵³ For example, the Ninth Circuit’s pattern instructions provide in part:

The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime[s] charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act[s], [he] [she] must also have committed the act[s] charged in the indictment.

Remember that the defendant is on trial here only for [state charges], not for these other acts. Do not return a guilty verdict unless the government proves the crime[s] charged in the indictment beyond a reasonable doubt.¹⁵⁴

¹⁴⁹ 6TH CIR. CRIM. PATTERN JURY INSTR. § 7.13 (2019).

¹⁵⁰ The First Circuit’s instruction provides: “Remember, this is the only purpose for which you may consider evidence of [defendant]’s prior similar acts. Even if you find that [defendant] may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that [defendant] committed the acts charged in this case.” 1ST CIR. CRIM. PATTERN JURY INSTR. § 2.05 (2019).

¹⁵¹ 5TH CIR. CRIM. PATTERN JURY INSTR. § 1.32 (2019).

¹⁵² The Tenth Circuit’s instruction provides: “Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.” 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.30 (2018).

¹⁵³ 3D CIR. CIVIL JURY INSTR. § 2.10 (2017); 9TH CIR. CRIM. MODEL JURY INSTR. § 2.10 (2019).

¹⁵⁴ 9TH CIR. CRIM. PATTERN JURY INSTR. § 2.1 (2019) (bracketed text in original); The Third Circuit’s pattern instruction similarly provides:

The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime(s) charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act, (he)(she) must also have committed the act(s) charged in the indictment.

The Seventh Circuit's pattern instruction is also relatively expansive and has the added benefit of avoiding the legal jargon of "character" and "propensity"; instead, it presents the rationale for the limitation in words that jurors have some chance of understanding:

To be more specific, you may not assume that, because the defendant committed an act in the past, he is more likely to have committed the crime[s] charged in the indictment. The reason is that the defendant is not on trial for these other acts. Rather, he is on trial for [list charges alleged in the indictment]. The government has the burden to prove beyond a reasonable doubt the elements of the crime[s] charged in the indictment. This burden cannot be met with an inference that the defendant is a person whose past acts suggest bad character or a willingness or tendency to commit crimes.¹⁵⁵

V. CONCLUSION

Other-acts evidence is problematic because of its inherent risk of unfair prejudice, based on the ever-present possibility that jurors will use the evidence to make inferences about character. Despite this risk, the federal courts seem insufficiently concerned with ensuring that juries are adequately instructed about the proper use of this evidence. Specifically, trial courts should stop giving—and appellate courts should scrutinize more carefully—limiting instructions that recite all, or some irrelevant subset, of the examples of permitted purposes listed in Rule 404(b)(2). Additional ways of improving limiting instructions in other-acts cases include eliminating internally inconsistent and otherwise needlessly confusing language and providing explanations to juries about why their use of the other-acts evidence is being limited. Such changes would by no means correct all of the problems with other-acts evidence, but they would at least be a few steps in the right direction.

Remember that the defendant is on trial here only for (state the charges briefly), not for these other acts. Do not return a guilty verdict unless the government proves the crime(s) charged in the indictment beyond a reasonable doubt.

3D CIR. CIVIL JURY INSTR. § 2.10 (2017).

¹⁵⁵ 7TH CIR. CRIM. PATTERN JURY INSTR. § 3.11 (2019) (bracketed text in original).