CORRECTING FEDERAL RULE OF EVIDENCE 404 TO CLARIFY THE INADMISSIBILITY OF CHARACTER EVIDENCE

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Courts misinterpret Federal Rule of Evidence 404(b)(2) as an exception to Rule 404(b)(1)'s prohibition on character evidence rather than a mere clarification that emphasizes the permissibility of other-acts evidence whose relevance does not rely on propensity reasoning. This misinterpretation turns the rule against character evidence on its head by effectively replacing Rule 404 with a Rule 403 balancing—and one that incorrectly treats character inferences as probative rather than prejudicial, thereby favoring admissibility rather than exclusion. Consequently, as currently interpreted, Rule 404(b)(2) generates substantial unpredictability and verdicts based on conduct not at issue in a case.

I therefore propose that the Advisory Committee on Evidence Rules amend Rule 404(b)(2) to clarify the meaning of this rule as permitting only other-acts evidence whose relevance does not rely on a character inference—that is, whose chain of inferences is free of propensity reasoning. I show how the Advisory Committee can restore Rule 404's logic and effectiveness through a straightforward modification in the language of Rule 404(b)(2). I then address the doctrine of chances—which pertains to a uniquely probative form of character evidence offered to prove the absence of chance or accident—and I explain why it should not cause reluctance to adopt my primary proposal. Then, as a secondary proposal (not required for the adoption of my primary proposal), I recommend amending Rule 404(b)(2) to establish a limited exception to Rule 404 for this type of evidence. I argue that my proposals to amend Rule 404(b)(2) would restore Rule 404's meaning and intention to exclude evidence whose relevance relies on

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character reasoning and, in turn, would create fairer and more accurate trials.

INTRODUCTION

Federal Rule of Evidence 404(a)(1) articulates the federal rule against character evidence.[1] It provides that "[e]vidence 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."[2] Rule 404(b)(1) specifies an important application of this rule: "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[3] Rule 404(b)(2) then provides a *clarification* of Rules 404(a)(1) and 404(b)(1) that although other-acts evidence is impermissible if its relevance depends on the character reasoning articulated in Rules 404(a)(1) and 404(b)(1), "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[4]

Notwithstanding Rule 404(b)(2)'s intended meaning as a clarification that other-acts evidence is admissible for other—noncharacter—purposes, courts frequently misinterpret it as an *exception* to the rule against character

1. FED. R. EVID. 404(a)(1).
2. *Id.*
3. *Id.* 404(b)(1).
4. *Id.* 404(b)(2).

evidence.[5] That is, they interpret it as permitting other-acts evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, . . . lack of accident," or another purpose other than to prove guilt or liability directly—*even if such proof involves character reasoning*.[6] However, this interpretation turns Rule 404 on its head: Rule 404 is intended to replace a balancing analysis under Rule 403, which excludes evidence if its probative value is "substantially outweighed" by its prejudicial effect.[7] It thereby aims to predictably exclude character evidence and its overwhelming influence on a case. However, this interpretation effectively reverts the Rule 404 question back to a Rule 403 balancing analysis. This is because almost all character evidence can be (and is) stated as proof of motive, opportunity, intent, identity, or another intermediary aspect of a case.

Moreover, this is not just any Rule 403 balancing. Because Rule 404(b)(2) is read as an exception to Rule 404(b)(1)'s ban on character evidence, courts conduct their Rule 403 balancing by incorrectly treating character inferences as probative rather than prejudicial—thus tipping the scale further in favor of admissibility in the already admissibility-prone Rule 403 balancing analysis.[8]

The consequences of the courts' misinterpretation of Rule 404 cannot be overstated. It has created vast unpredictability in admissibility decisions surrounding character evidence, inconsistency in standards of admissibility across jurisdictions, plea agreements driven by uncertainty regarding the admissibility of prior-bad-acts evidence, and guilty verdicts based on acts not at issue in a case.[9]

Therefore, to address the widespread misinterpretation of Rule 404(b)(2), I propose two sets of amendments to Rule 404. First (and most importantly), I recommend that the Advisory Committee on Evidence Rules (the "Advisory Committee") amend Rule 404(b)(2) to explicitly require a chain

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5. *See, e.g.*, United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015) ("Rule 404(b)(2) functions as an exception to [Rule] 404(b)(1).").

6. FED. R. EVID. 404(b)(2); *see, e.g.*, United States v. Sterling, 738 F.3d 228, 237–38 (11th Cir. 2013) ("[W]here the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test [i.e., relevance to a matter other than character] is satisfied." (quoting United States v. Edouard, 485 F.3d 1324, 1345 (11th Cir. 2007))).

7. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). I use the terms "prejudice" and "prejudicial" to denote unfairness and to also include other components of Rule 403, such as causing confusion and misleading the jury.

8. *See, e.g.*, United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (concluding that "evidence that [the defendant] had previously sold cocaine makes it more likely both that he was aware of the contents of the plastic bags in the briefcase and that he intended to distribute the two bags of cocaine" and weighing this inference for its probative value in the court's Rule 403 balancing); *see also* Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 724 (2021) ("[T]his Rule 403 balancing is hopelessly skewed because courts consider the (unrecognized) character-propensity-based inference as proper, rather than improper, and so place it on the probative-value side of the scale and not on the unfair-prejudice side.").

9. *See infra* Part I.B.

of inferences free of propensity reasoning for admissibility under this rule. Specifically, I propose the following language for Rule 404(b)(2):

> (2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible for a noncharacter purpose—that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character.

This language modifies the current language of Rule 404(b)(2) in various respects (discussed in detail below), with the aim of clarifying that Rule 404(b)(2)'s permitted uses of other-acts evidence cover only purposes that do not involve propensity reasoning impermissible under Rule 404(b)(1). I argue that this straightforward modification in the language of Rule 404(b)(2) would correct the widespread misinterpretation of this rule and, in turn, restore the critical functioning of Rule 404.

Second, I recommend an amendment that, in one view, would be an important complement to my primary proposal above. Specifically, I address the doctrine of chances—a doctrine that pertains to a uniquely probative form of other-acts evidence offered to prove the absence of chance or accident.[10] This evidence—which I call "objective-chance evidence"—is frequently admitted in cases involving drug trafficking, discrimination, fraud, murder, and many other claims or charges.[11] For example, in a murder case in which the defendant claims his spouse died in an accidental fall on a hiking trip, evidence that the defendant's previous two spouses also died in purportedly accidental falls may be admitted to prove that the fall in question was by the defendant's design rather than by chance or accident.[12]

Although this evidence is often understood as a form of character evidence,[13] it is correctly viewed as significantly more compelling than other

10. *See generally* FED. R. EVID. 404(b)(2); Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N.M. L. REV. 1, 2–12 (2020); Paul F. Rothstein, Comment, *The Doctrine of Chances, Brides of the Bath and a Reply to Sean Sullivan*, 14 LAW, PROBABILITY & RISK 51, 51–54 (2015); *see also* Hillel J. Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 140–43 (2022) [hereinafter Bavli, *An Objective-Chance Exception*]; Hillel J. Bavli, *An Aggregation Theory of Character Evidence*, 51 J. LEG. STUD. 39, 43–44, 54–58 (2022) [hereinafter Bavli, *An Aggregation Theory of Character Evidence*].

11. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 130–43, 161–65 (discussing the admission of objective-chance evidence to prove intent, knowledge, and other purposes beyond absence of mistake or accident); Imwinkelried, *supra* note 10, at 9–12 (describing common uses of objective-chance evidence).

12. *See, e.g.*, United States v. Henthorn, 864 F.3d 1241, 1241–47 (10th Cir. 2017); (involving a hiking incident); R v. Smith (1915) 11 Cr. App. 229 (UK) (involving multiple incidents of bathtub drownings).

13. There is disagreement over whether objective-chance evidence relies on character reasoning. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 155–57; Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 434–39 (2006); Imwinkelried, *supra* note 10, at 4–9; Sean P. Sullivan, *Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances*,

character evidence—so much so that it is frequently presumed to be legitimate.[14] Courts often admit objective-chance evidence by relying on their misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1)'s ban on character evidence.[15] In turn, there has been a reluctance to correct the ambiguity in Rule 404(b)(2) that permits this misinterpretation.[16]

Thus, my secondary amendment—although not required for the adoption of my primary proposal—is intended to address arguments that Rule 404 *requires* the current level of flexibility to account for this uniquely probative form of character evidence. As I explain, this is not a good reason to undermine Rule 404 and, in any event, there are far better options than introducing flexibility through misinterpretation.

Specifically, I address the doctrine of chances in two ways. First, I explain why amending Rule 404 to address objective-chance evidence is not necessary for courts to admit certain forms of this evidence, and I highlight policy concerns that override its potential accuracy benefits. Second, I argue that because objective-chance evidence is unique in its probative value and the degree to which it can improve the accuracy of a verdict notwithstanding its likely reliance on propensity reasoning,[17] addressing objective-chance evidence explicitly in Rule 404(b) may create a more predictable and logical rule against character evidence, and it would avoid judicial attempts to find ways around Rule 404 for this uniquely probative form of character evidence.

Therefore, to the extent that objective-chance evidence causes reluctance to adopt my primary recommendation to amend Rule 404(b)(2) to require explicitly a chain of inferences free of propensity reasoning, as a secondary proposal, I recommend an amendment to Rule 404(b)(2) to establish a limited exception to Rule 404 for certain evidence falling within the doctrine of chances. Specifically, if the Advisory Committee chooses to amend Rule 404(b)(2) pursuant to my primary proposal, I recommend that it also consider amending this rule to address the doctrine of chances as follows:

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14 LAW, PROBABILITY & RISK 27, 32–43 (2015); Rothstein, *supra* note 10, at 54–62; Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263–65 (1995).

14. *See infra* notes 77–84 and accompanying text.

15. *See* FED. R. EVID. 404(b)(2) (listing "absence of mistake" and "lack of accident" among the rule's permitted purposes); Bavli, *An Objective-Chance Exception*, *supra* note 10, at 130–43, 157–60 ("[C]ourts frequently rely on a misreading of Rule 404(b)(2) as an exception to the rule against character evidence in order to admit objective-chance evidence to prove absence of mistake or accident."); Goode, *supra* note 8, at 714–15, 723–24, 751–59 (highlighting the courts' use of Rule 404(b)(2) to admit character evidence).

16. *See, e.g.*, ADVISORY COMM. ON EVIDENCE RULES, REPORT TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4–5 (2018) ("[A]n attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference—an example would be use of the well-known 'doctrine of chances' to prove the unlikelihood that two unusual acts could have both been accidental."). *See also* United States v. Thorne, No. 18-389, 2020 WL 122985, at *5 n.4 (D.D.C. Jan. 10, 2020) (noting that the Advisory Committee "recently considered but ultimately rejected substantive changes to Rule 404(b)").

17. *See* Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 54–58.

> (2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible only if:
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> > (A) it is offered for a noncharacter purpose—that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character; or
> >
> > (B) based on specific facts and circumstances, it is offered to prove an element of a claim that requires proving an absence of chance or accident, and its probative value in proving an absence of chance or accident substantially outweighs its prejudicial effect.

Below, I explain in detail each component of the proposed language, and I argue that this amendment would serve as a beneficial complement to my primary proposal. Combined, my proposed amendments aim to strengthen the rule against character evidence by, on the one hand, clarifying the rule's meaning and intent to exclude all other-acts evidence that involves character reasoning while, on the other hand, creating an exception for a uniquely probative form of character evidence that underlies much of the confusion and unpredictability surrounding applications of Rule 404.

I proceed as follows: In Part I, I discuss the courts' widespread misinterpretation of Rule 404 and the significant harms that result from it. In Parts II and III, I discuss my primary and secondary proposals for amending Rule 404, and I explain why my proposed amendments would address the source of the harms described in Part I and create a more logical and effective rule against character evidence. I then conclude.

I. UNPREDICTABILITY AND MISINTERPRETATION IN THE APPLICATION OF RULE 404

Rule 404(b)(1) prohibits other-acts evidence that involves a character inference under Rule 404(a)(1), while Rule 404(b)(2) clarifies that other-acts evidence that does not involve a character inference under Rules 404(a)(1) and 404(b)(1) may be admissible if, under Rule 403, its "probative value is [not] substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[18]

Rule 404 "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did [and] not *who* he is."[19] It replaces Rule 403's balancing analysis with a *rule* against character evidence because jurors cannot help but to give this evidence undue weight and to punish a defendant based on past bad acts—that is, because the unfair prejudice associated with the evidence is so significant that, as a general

18. FED. R. EVID. 403; *see id.* 404(a)(1), (b)(1), (b)(2).

19. United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014); *see also* United States v. Gomez, 763 F.3d 845, 861 (7th Cir. 2014).

matter, it substantially outweighs any probative value of the evidence.[20] As one court has stated, "an 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."[21]

A. The Courts' Permitted-Purpose Fallacy Is Inconsistent with Rule 404's Meaning

The plain meaning of Rule 404(b) makes clear that Rule 404(b)(2) constitutes only a clarification of—and not an exception to—the prohibition on character evidence under Rules 404(a)(1) and 404(b)(1). This interpretation is well-supported by Rule 404's common law and legislative history.[22] Most significantly, however, it is supported by logic and common sense because the prohibition on character evidence under Rule 404(b) is vacant, and arguably even meaningless,[23] if Rule 404(b)(2) is read as an *exception* to Rule 404(b)(1).[24] After all, almost all other-acts evidence can be framed in terms of the purposes listed in Rule 404(b)(2).[25] When character evidence is offered, it is always to prove a relevant fact, such as intent, knowledge, identity, or another purpose listed in Rule 404(b)(2). Moreover, Rule 404(b)(2) is "inclusive" in the sense that the purposes listed in the rule are illustrative rather than exhaustive.[26] Therefore, reading this rule as an exception to the prohibition on character evidence eviscerates the rule and effectively replaces Rule 404's strict prohibition on character evidence with judicial discretion under a Rule 403 balancing analysis.

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20. *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997); Michelson v. United States, 335 U.S. 469, 475–76 (1948).

21. United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972); *see also* 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.").

22. *See* FED. R. EVID. 404(a)(1), (b)(1), (b)(2); *id.* 404 advisory committee's note to proposed rule ("Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition."); *id.* 404 advisory committee's note to 2020 amendment ("The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose."); *see also* Dora W. Klein, *"Rule of Inclusion" Confusion*, 58 SAN DIEGO L. REV. 379, 384–85 (2021) ("Prior to the adoption of the Federal Rules of Evidence in 1975, most jurisdictions had developed, either through legislation or judicial decision-making, rules of evidence that prohibited the admission of other acts evidence except if offered for specifically permitted, non-character purposes.").

23. *See infra* note 29 and accompanying text.

24. *See* GEORGE FISHER, EVIDENCE 178 (4th ed. 2023) (emphasizing that references to the enumerated purposes in Rule 404(b)(2) as "exceptions" are in error).

25. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 131.

26. *See infra* notes 30–34 and accompanying text.

For example, interpreting Rule 404(b)(2) as an exception rather than a clarification, a prosecutor may simply reframe evidence of two prior robberies to prove a robbery in question as evidence that is probative of *identity*. Similarly, a prosecutor can easily reframe two prior drug-distribution convictions to prove the drug crime in question as evidence probative of *intent*. Indeed, courts frequently permit evidence of a defendant's prior "drug dealing efforts" to prove knowledge and intent.[27] As the U.S. Court of Appeals for the Seventh Circuit stated in *United States v. Gomez*,[28] "if subsection (b)(2) . . . allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless."[29]

Nevertheless, courts regularly interpret Rule 404(b)(2) as an exception to Rule 404(b)(1). Courts frequently begin their analysis by emphasizing that Rule 404(b) is a "rule of inclusion," a confused phrase that courts have mistakenly interpreted to justify a permissive standard for the admissibility of evidence under Rule 404(b)—and even a presumption of admissibility.[30] As one court recently stated, "We have described Rule 404(b) as 'a rule of inclusion, meaning that evidence offered for permissible purposes is presumed admissible absent a contrary determination.'"[31] Other courts

27. United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996); *see also* United States v. Henry, 848 F.3d 1, 8–9 (1st Cir. 2017); United States v. Wilchcombe, 838 F.3d 1179, 1192 (11th Cir. 2016); United States v. Smith, 383 F.3d 700, 706–07 (8th Cir. 2004).

28. 763 F.3d 845 (7th Cir. 2014).

29. *Id.* at 855.

30. *See, e.g.*, *Smith*, 383 F.3d at 706 ("Because Rule 404(b) is a rule of inclusion, we presume that evidence of 'other crimes, acts, or wrongs' is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the party seeking its exclusion can demonstrate that it serves only to prove the defendant's criminal disposition."); *see also* United States v. Oaks, 606 F.3d 530, 538 (8th Cir. 2010); Capra & Richter, *supra* note 21, at 787. The phrase "rule of inclusion" seems to have roots in a split among courts in the nineteenth and twentieth centuries as to "whether the list of previously recognized non-propensity purposes was exhaustive (or 'exclusive'), or whether *any* non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the 'inclusive' approach)." United States v. Caldwell, 760 F.3d 267, 275 (3d Cir. 2014) (citing David P. Leonard, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 4.3.2 (2009)); *see also* Capra & Richter, *supra* note 21, at 788. As the U.S. Court of Appeals for the Third Circuit has emphasized, "no one doubted that evidence relevant only for the limited purpose of showing a defendant's general propensity to commit the charged offense was inadmissible." *Caldwell*, 760 F.3d at 275. Some courts have incorrectly inferred an "inclusionary" approach to character evidence from Rule 404(b)'s legislative history involving Congress's modification of the Supreme Court's formulation that the rule "does not exclude the evidence when offered for other purposes" to a formulation stating that evidence "may, however, be admissible for other purposes," arguably indicating a "greater emphasis on admissibility." United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) (first quoting Rules of Evidence for U.S. Cts. & Magistrates, 56 F.R.D. 183, 219 (1972); and then quoting H.R. REP. NO. 650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7081) (concluding that Rule 404(b) is intended as a rule of inclusion rather than exclusion).

31. United States v. Johnson, 860 F.3d 1133, 1142 (8th Cir. 2017) (quoting United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005)); *see* Klein, *supra* note 22, at 389 (citing cases).

indicate that Rule 404(b) "favors admissibility,"[32] "emphasizes admissibility,"[33] or otherwise involves a form of presumption in favor of admissibility.[34]

Regardless of the precise language or the precise test used by courts to justify a permissive approach to evidence under Rule 404(b), many—and likely most—courts incorrectly admit evidence offered for a purpose listed in Rule 404(b)(2) even if the evidence relies on character reasoning.[35] For example, it is commonplace for courts to admit evidence of a defendant's prior drug crimes to prove that the defendant had knowledge of drugs or intent to distribute them—even though this evidence generally relies on the character inference that the defendant has committed drug crimes in the past and is therefore likely to act in accordance with a character to commit such acts and to have knowledge or intent for the act in question.[36] In *United States v. Manning*,[37] for instance, the U.S. Court of Appeals for the First Circuit upheld the admission of prior drug crimes to prove knowledge and intent, explaining that "evidence that [the defendant] had previously sold cocaine makes it more likely both that he was aware of the contents of the plastic bags in the briefcase and that he intended to distribute the two bags of cocaine."[38] While it is true that this evidence is relevant to the defendant's knowledge and intent, its probative value arises from impermissible character reasoning.

Indeed, many courts *explicitly* refer to Rule 404(b)(2) as an exception to Rule 404(b)(1)'s prohibition on character evidence. For example, the U.S. Court of Appeals for the Ninth Circuit has stated that "Rule 404(b)(2) functions as an exception to [Rule] 404(b)(1)."[39] Other courts confusingly interpret Rule 404(b)(2)'s enumerated purposes as involving a list of

32. *See* Klein, *supra* note 22, at 392–93 (citing cases from the U.S. Courts of Appeals for the Third and Eleventh Circuits).

33. *See id.*

34. *See id.* at 395–401.

35. *See generally* Klein, *supra* note 22, at 389–412; Capra & Richter, *supra* note 21, at 778–802.

36. *See, e.g.*, United States v. Henry, 848 F.3d 1, 8–9 (1st Cir. 2017) ("Rule 404(b)(2) specifically permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute."); United States v. Smith, 383 F.3d 700, 706–07 (8th Cir. 2004) (upholding admission of evidence involving prior drug transactions to prove the defendant's knowledge of drug dealing); United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (upholding admission of evidence involving prior drug dealing to prove the defendant's knowledge and intent).

37. 79 F.3d 212 (1st Cir. 1996).

38. *Id.* at 217.

39. United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015); *see also* United States v. Sterling, 738 F.3d 228, 237 (11th Cir. 2013) ("Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose."); *see* Dora W. Klein, *The (Mis)Application of Rule 404(b) Heuristics*, 72 U. MIA. L. REV. 706, 716–18 (2018) (describing the courts' tendency to interpret Rule 404(b)(2) as an exception).

purposes that are non-propensity by definition.[40] In other words, while many courts apply multifactor admissibility tests that ostensibly require offering the evidence for a "non-propensity purpose," they use this term to mean simply that the *ultimate* purpose for which the evidence is offered is one of the purposes enumerated in Rule 404(b)(2)—*regardless of whether it involves propensity reasoning*.[41] But this interpretation is illogical because parties would not offer other-acts evidence to make character inferences in the abstract; rather, all relevant evidence is offered for a material ultimate purpose.

The flawed reasoning underlying the courts' misinterpretation of Rule 404(b)(2) has been emphasized by a small number of jurisdictions that have recently split from this approach. For example, in *Gomez*, the Seventh Circuit rejected the lower court's admission of evidence of a defendant's possession of cocaine to prove his identity as a drug distributor known as "Guero."[42] It held that "Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning."[43] In addition, the court emphasized "that the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference."[44]

Further, in *United States v. Caldwell*,[45] the U.S. Court of Appeals for the Third Circuit articulated the inadequacy of stating a purported non-propensity purpose under Rule 404(b)(2), holding that, instead, "the government must explain how [the evidence] fits into a chain of inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference."[46] Similarly, in *United States v. Hall*,[47] the U.S. Court of Appeals for the Fourth Circuit cited *Caldwell* in rejecting the government's argument that Rule 404(b) is an "'inclusive rule' render[ing] evidence of a defendant's prior convictions presumptively admissible."[48] It clarified that characterizing Rule 404(b) as a "rule of inclusion" refers only to the "determination that the Rule's list of non-propensity uses . . . is not

40. *See, e.g.*, *Sterling*, 738 F.3d at 237; United States v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005); *see also* Capra & Richter, *supra* note 21, at 789–90 (discussing *Matthews*, 431 F.3d at 1313 n.1 (Tjoflat, J., concurring)).

41. *See, e.g.*, United States v. Dupree, 870 F.3d 62, 76 (2d Cir. 2017); *Henry*, 848 F.3d at 8–9; *Sterling*, 738 F.3d at 237; *Manning*, 79 F.3d at 217; *see also* Turley v. State Farm Mut. Auto. Ins. Co., 944 F.2d 669, 674–76 (10th Cir. 1991).

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

43. *Id.* at 856 (citations omitted).

44. *Id.*

45. 760 F.3d 267 (3d Cir. 2014).

46. *Id.* at 276–77 (quoting United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013)); *see also* Klein, *supra* note 39, at 726–28.

47. 858 F.3d 254 (4th Cir. 2017).

48. *Id.* at 276–77.

'exhaustive.'"[49] The court held that, contrary to the government's argument, "under Rule 404(b), evidence of a defendant's prior bad acts is generally inadmissible" unless the government can "present a propensity-free chain of inferences" in support of the purpose for which the evidence is offered.[50]

Unfortunately, notwithstanding a small number of circuits slowly moving in a positive direction to interpret Rule 404(b) in line with its intended meaning and purpose, most courts incorrectly read Rule 404(b) as a "rule of inclusion" that creates a presumption of admissibility for any other-acts evidence that can be characterized as proving one of the broad purposes listed in Rule 404(b)(2)'s non-exhaustive list, regardless of whether the chain of inferences connecting the evidence to this purpose requires propensity reasoning.[51] This misreading of Rule 404(b) is so well-ingrained in the law that it is difficult to reverse absent clarification in the Federal Rules of Evidence. As one court stated, "Although the court is not unsympathetic to [the] argument that Rule 404(b) has been turned on its head by making it a rule of inclusion rather than a rule of exclusion, it is well settled law of this Circuit that Rule 404(b) is a rule of inclusion."[52]

Moreover, compounding the effects of this misinterpretation, courts apply an incorrect Rule 403 balancing that makes it highly unlikely that character evidence would be excluded as unfairly prejudicial. Specifically, because courts read Rule 404(b)(2) as an exception to Rule 404(b)(1)'s ban on character evidence, they incorrectly treat character inferences—which they assume to be permissible—as probative rather than prejudicial.[53] This tips the scale even further in favor of admissibility in the already admissibility-prone Rule 403 balancing.[54] Consequently, the courts' permitted-purpose fallacy—their misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1)—not only has the effect of replacing Rule 404 with a Rule 403 balancing analysis, but it also makes it highly unlikely that the evidence will be excluded as unfairly prejudicial. In this way, as currently interpreted, not only does Rule 404 often fail to protect defendants from false convictions and trial outcomes based on conduct not at issue in a case, but it

49. *Id.* at 276.

50. *Id.* at 277.

51. *See supra* notes 30–50 and accompanying text.

52. United States v. Cole, 488 F. Supp. 2d 792, 800 (N.D. Iowa 2007).

53. *See, e.g.*, United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004) (upholding admission of evidence involving prior drug transactions to prove the defendant's knowledge of drug dealing, and holding that "[w]ith respect to the question of unfair prejudice, there was little chance that the jury would misuse the testimony in light of the instruction limiting its consideration to the issues of knowledge and mistake—two proper uses of other crimes evidence and two issues made relevant by Smith's defense.").

54. *See, e.g.*, United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996) (concluding that "[t]he evidence that [the defendant] had previously sold cocaine makes it more likely both that he was aware of the contents of the plastic bags in the briefcase and that he intended to distribute the two bags of cocaine," and weighing this inference for its probative value in the court's Rule 403 balancing); *see also* Goode, *supra* note 8, at 724 ("[T]his Rule 403 balancing is hopelessly skewed because courts consider the (unrecognized) character-propensity-based inference as proper, rather than improper, and so place it on the probative-value side of the scale and not on the unfair-prejudice side.").

arguably also puts many defendants in a *worse* position than they would be in if Rule 404 did not exist—that is, if the admissibility of character evidence were determined only through an ordinary Rule 403 balancing.

B. The Permitted-Purpose Fallacy Is Inconsistent with Good Policy

There is no policy rationale for upholding an *exception* to Rule 404(b)(1) for the purposes enumerated in Rule 404(b)(2). In other words, the important policies that underlie the general rule against character evidence apply equally to other-acts evidence used to prove a purpose listed in Rule 404(b)(2) through character reasoning.

Rationales for the rule against character evidence include the tendency of jurors to afford excessive weight to character evidence and to punish a defendant for past bad acts instead of rendering a verdict based on the act in question.[55] In addition, there are arguments that character evidence encourages jurors to rely heavily on stereotypes and implicit biases in interpreting the evidence and determining a verdict based on character inferences.[56]

These risks are particularly concerning for criminal defendants, for whom the risks translate to false convictions based on acts not at issue in a case. Indeed, courts and scholars have frequently emphasized that introducing evidence of prior convictions or other past bad acts causes "the odds of conviction [to] skyrocket,"[57] "almost guaranteeing conviction."[58] Excluding other-acts evidence offered for character purposes has traditionally been understood as essential to a fair criminal trial: "it reflects and gives meaning

55. Michelson v. United States, 335 U.S. 469, 476 (1948) ("[Character evidence] is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

56. Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1025–26 (2023) (arguing that "when a court admits character evidence through exceptions, it invites jurors to rely on their prior beliefs and prejudices when determining a verdict, and that, consequently, judgments based on character evidence are inherently biased against certain groups of people based on their race, sex, appearance, accent, education, economic status, and other background characteristics").

57. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 780 (2013).

58. Capra & Richter, *supra* note 21, at 772. It is highly unlikely that such an effect would be grounded in the probative value of the evidence. The evidence relies on a weak circumstantial inference that a prior similar act suggests a character to commit such acts and action in accordance therewith on the occasion in question. This inferential leap alone introduces substantial uncertainty and weakens any probative value of the evidence, even assuming empirical support for the proposition that there is significant behavioral coherence over changing circumstances. Moreover, no empirical evidence clearly supports such coherence, and, in any event, examinations of behavioral coherence reflect only population-level tendencies that are problematic when applied to an individual criminal defendant. Instead, as courts and scholars have emphasized, once evidence of prior bad acts is introduced, jurors have difficulty evaluating a case based on the evidence, and "the guilty outcome follows as a mere formality." United States v. Burkhart, 458 F.2d 201, 204–05 (10th Cir. 1972).

to the central precept of our system of criminal justice, the presumption of innocence."[59]

Moreover, the unpredictability of admissibility decisions under Rule 404 is alone sufficient to undermine the fairness of our criminal justice system. This is because a court's possible admission of past-bad-acts character evidence is sufficient to cause a criminal defendant—and even an innocent criminal defendant—to accept a plea agreement based on the knowledge that a jury is likely to convict a defendant based on past bad acts.[60]

These severe risks of character evidence underlie the rule against character evidence—that is, the replacement of a Rule 403 balancing for character evidence with a *rule* against it. However, all of these risks apply *equally* to other-acts evidence offered to prove a Rule 404(b)(2) purpose through propensity reasoning. For example, assume that in a drug trafficking trial, the Government's case is relatively weak, and the prosecutor seeks to introduce evidence that the defendant has twice before been convicted of drug trafficking in order to prove the defendant's propensity to commit this crime and a likelihood that the defendant acted in accordance with this propensity on the occasion in question. This is classic character evidence, and it carries all of the risks discussed above. Combined with even weak circumstantial evidence, it has a strong potential to persuade a jury of the defendant's guilt beyond a reasonable doubt. It should be excluded from trial under Rule 404(b)(1).

Now, however, assume that the prosecutor seeks to introduce the same prior-conviction evidence but to prove the defendant's *intent* to distribute the drugs. Assume the relevance of the evidence still relies on propensity reasoning. That is, the prosecutor offers the evidence to prove that the defendant has a propensity to commit drug trafficking and is therefore more likely to have had the *intent* to commit the crime in question. Indeed, as discussed above, courts regularly admit other-acts evidence to prove such intent via propensity reasoning.[61]

This evidence is offered specifically to prove intent but involves the same risks as in the previous scenario. Jurors are likely to give excessive weight to the evidence, and they are likely to punish the defendant for past bad acts rather than the act in question.[62] They are also likely to rely on their implicit biases in arriving at a character judgment and assessing the defendant's intent—and ultimately guilt or innocence—based on this judgment.[63] Moreover, even assuming courts conducted an ordinary rather than slanted Rule 403 balancing analysis, the risks of effectively replacing an exclusionary *rule* with a balancing analysis frequently come to fruition even before the trial begins. This is because the defendant will accept a plea

59. United States v. Dockery, 955 F.2d 50, 53 (D.C. Cir. 1992) (quoting United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985)); *see also Michelson*, 335 U.S. at 476.

60. *See supra* notes 57–58 and accompanying text.

61. *See supra* notes 30–41 and accompanying text.

62. *See supra* note 55 and accompanying text.

63. *See supra* note 56 and accompanying text.

agreement (or a worse plea agreement) based on the knowledge that the defendant's prior convictions may be introduced at trial, subject only to Rule 403's high threshold for exclusion.

Further, a limiting instruction does not help. After all, the court is sanctioning precisely what is inherently the problem—the use of propensity reasoning to prove intent, knowledge, or another purpose listed in Rule 404(b)(2). A court may therefore give an instruction that limits a jury's use of other-acts character evidence to infer, for example, knowledge or intent, but the limiting instruction does not prohibit impermissible character reasoning.[64] This is distinct from a proper use of Rule 404(b)(2) to prove, for example, intent, knowledge, or motive through a non-propensity chain of inferences.

To illustrate, consider evidence that a defendant previously burglarized a home with an advanced alarm system to prove that the defendant knew how to circumvent the same alarm system in the burglary in question. This evidence does not rely on character reasoning: it allows the inference that the defendant knew how to circumvent the alarm system based on evidence that the defendant had done so in the past. This chain of inferences does not, for example, involve the same risks of excessive weight, punishment based on past bad acts, or a juror's reliance on prior beliefs and prejudices. There is no character reasoning—no unique inferential leap based on a presumed propensity that connects the act in question to prior acts. Rather, it involves an ordinary evidentiary inference: the defendant knew how to do it then and is therefore more likely to know how to do it now. Of course, this evidence still risks impermissible propensity inferences—that the defendant has a propensity to commit burglary and is therefore more likely to have committed the act in question. However, the court may be able to address this risk via a limiting instruction because here—as opposed to the drug example above—there is a distinction between a permissible noncharacter inference and an impermissible character inference. And if the risk is still too great, the court may exclude the evidence via a Rule 403 balancing test.

In summary, other-acts evidence can be very helpful or very harmful to our litigation goals. The element that distinguishes harmful from beneficial inferences is whether this evidence relies on propensity reasoning. Unfortunately, this element is not accounted for in most courts' analysis of other-acts evidence under Rule 404(b)(2).

C. Previous Notice-Based Measures Are Insufficient

In 2020, the Advisory Committee amended Rule 404(b) "principally to impose additional notice requirements on the prosecution in a criminal case."[65] Pursuant to the amendment, Rule 404(b)(3) now requires that the prosecutor "articulate in the notice the permitted purpose for which the

64. *See, e.g.*, United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004) (involving an instruction limiting the jury's use of testimony regarding the defendant's prior drug crimes to the jury's consideration of knowledge and mistake).

65. FED. R. EVID. 404 advisory committee's note to 2020 amendment.

prosecutor intends to offer the evidence and the reasoning that supports the purpose."[66] The Advisory Committee notes for the 2020 amendment emphasize that based on the amendment, "[t]he prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose."[67] The notes explain:

> The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.[68]

The 2020 amendment is a step in the right direction. However, courts interpret Rule 404(b)(3) in the same way that they interpret Rule 404(b)(2).[69] Therefore, although the amendment is effective in its primary purpose to convey information regarding a prosecutor's intended use of other-acts evidence, it does not address the misinterpretation of Rule 404(b) as a rule of inclusion that permits propensity reasoning as long as it is for an ultimate purpose listed in Rule 404(b)(2), and it has not succeeded in requiring prosecutors to articulate a chain of inferences that is free of propensity reasoning.

The problem is this: Courts and prosecutors identify Rule 404(b)(2) as an exception to the rule against character evidence and therefore view other-acts character evidence as permissible under this rule. Therefore, Rule 404(b)(3)'s requirement that a prosecutor articulate a "permitted purpose" allows notice that involves propensity reasoning—just propensity reasoning that, in the court's view, falls within the purported Rule 404(b)(2) "exception." Moreover, the Advisory Committee notes explaining the requirement to articulate a non-propensity purpose are similarly ineffective in reversing the courts' misinterpretation of Rule 404(b)(2). This is because, as explained above, many if not most courts misinterpret Rule 404(b)(2) to prohibit only an *ultimate* propensity purpose, even if the evidence involves propensity reasoning to show motive, intent, identity, or another purpose listed in Rule 404(b)(2). Therefore, notwithstanding their plain meaning, the Advisory Committee notes that reference non-propensity purposes are interpreted by courts as consistent with their current misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1).[70]

Thus, although Rule 404(b)(3) is both beneficial with respect to notice and a step in the right direction, it does not remedy the widespread misinterpretation of Rule 404(b)(2). Instead, at best, courts require

66. *Id.* 404(b)(3)(B).
67. *Id.* 404 advisory committee's note to 2020 amendment.
68. *Id.*
69. *See infra* note 71 and accompanying text.
70. *See infra* note 71 and accompanying text.

prosecutors to state a Rule 404(b)(2) ultimate purpose while interpreting this purpose as one that permits propensity reasoning. While Rule 404(b)(3) requires prosecutors to articulate the purpose of their other-acts evidence, in the absence of an appropriate amendment to Rule 404(b)(2), this notice requirement is not effective in requiring a true noncharacter purpose.[71] Fulfilling the intended effects of Rule 404(b)(3)—that is, for the prosecution to give notice of the non-propensity purpose underlying its introduction of other-acts evidence under Rule 404(b)(2)—requires amending Rule 404(b)(2) to clarify that it sanctions only the admission of other-acts evidence that does not involve propensity reasoning.

II. A PROPOSAL TO AMEND RULE 404(B)(2) TO CORRECT ITS MISAPPLICATION

The problem described in Part I is both severe in its consequences and widespread and well-entrenched in federal case law. Correcting it requires amending Rule 404(b)(2).

Rule 404(b)(2) provides as follows: "(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[72] As discussed above, the only sensible reading of this rule—and the only interpretation that does not altogether negate Rule 404(b)(1)—is as permitting only purposes that do not involve propensity reasoning. Nevertheless, most courts interpret Rule 404(b)(2) to allow other-acts evidence for any purpose listed in Rule 404(b)(2), regardless of whether it involves propensity reasoning. That is, courts treat this rule as an exception to, rather than a clarification of, Rule 404(b)(1).

To correct this misinterpretation, I recommend that the Advisory Committee amend Rule 404(b)(2) to require explicitly a propensity-free chain of inferences for admissibility under this rule. Specifically, I propose the following language for Rule 404(b)(2):

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71. The ineffectiveness of Rule 404(b)(3)'s notice requirement with respect to the courts' misinterpretation of Rule 404(b)(2) can also be seen in the cases litigated since the 2020 amendment. For example, *United States v. Duggan* involved a typical scenario in which other-acts character evidence was admitted in a drug case to prove knowledge and intent notwithstanding its reliance on propensity reasoning. No. 19-3220, 2021 WL 5745686, at *1–2 (3d Cir. Dec. 2, 2021). The Third Circuit upheld the Rule 404(b)(3) notice in which the government explained that evidence regarding the defendant's prior drug crimes was relevant to the defendant's knowledge and intent and was therefore offered for proper purposes under Third Circuit law. *See id.* at *1–2; Government's Motion in Limine to Introduce Evidence of Other Crimes Pursuant to Fed. R. Evid. 404(b) at 19–20, United States v. Duggan, No. 17-CR-00523 (E.D. Pa. September 24, 2019), ECF No. 175; *see also* United States v. Ward, 638 F. Supp. 3d 686, 692–93 (S.D. Miss. 2022) (holding that "[w]hen a criminal defendant pleads not guilty to a charge of possession with intent to distribute, he necessarily places his knowledge of the drugs found and his intent to distribute at issue," emphasizing Fifth Circuit precedent that the probative value of similar-crime evidence exceeds its prejudicial effect, and finding that the prosecution gave reasonable notice under Rule 404(b)(3)—noting that the prosecution gave notice eight days before trial).

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

> (2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible for a noncharacter purpose—that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character.

The proposed amendment has one important aim—to clarify that Rule 404(b)(2)'s permitted uses of other-acts evidence cover only purposes that do not involve propensity reasoning impermissible under Rule 404(b)(1). Toward this goal, the proposed amendment makes various revisions. It replaces the phrase "may be admissible for another purpose" with the phrase "may be admissible for a noncharacter purpose" and then defines a "noncharacter purpose" as "a purpose . . . that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character." To the extent that the term "another purpose" in Rule 404(b)(2)'s current language is ambiguous, the amendment replaces it with the term "noncharacter purpose." "Non-propensity" purpose is also a good option; however, "noncharacter purpose" is arguably more precise because, as some authors have highlighted, "propensity" can refer to noncharacter propensities, such as those arising from habit or skill.[73] Moreover, because many courts have misinterpreted Rule 404(b)(2) to allow character reasoning as long as the *ultimate* purpose of the evidence is to prove motive, opportunity, or another purpose enumerated in the rule, the proposed amendment defines a noncharacter purpose in line with the language of Rule 404(b)(1)—as one "that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character."

Importantly, the proposed amendment avoids defining a noncharacter purpose as "a purpose other than to prove a person's character," instead using "a purpose . . . that does not involve inferring a person's character." The chosen language seeks to avoid judicial misinterpretation: "a purpose other than to prove a person's character" arguably permits the current incorrect interpretation that only the *ultimate* purpose of the evidence matters, whereas "a purpose . . . that does not involve inferring a person's character" emphasizes that Rule 404(b)(2) permits other-acts evidence only if the evidence is permissible under Rule 404(b)(1)—that is, only if it does not rely on a chain of inferences that involves character-propensity reasoning.

In addition, the proposed amendment places the listed purposes (including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, [and] lack of accident") in parentheses to emphasize the rule's purpose of clarifying the permissibility of other-acts evidence that does not rely on propensity reasoning rather than enumerating exceptions to the rule against character evidence. It retains the "such as" language preceding the listed purposes and indicating that such purposes are illustrative and not exhaustive. Similarly, I recommend replacing the first two words of Rule

73. *See* Rothstein, *supra* note 13, at 1264–65.

404(b)(2)—"This evidence"—with the term "Evidence of any other crime, wrong, or act." Again, the purpose of this revision is to avoid a possible misinterpretation of "This evidence" as referring to evidence falling under Rule 404(b)(1), thereby suggesting an exception to that rule. Instead, the revision clarifies that Rule 404(b)(2) refers to "[e]vidence of any other crime, wrong, or act" and not to evidence covered by Rule 404(b)(1).

If adopted, this amendment would curb the prevalent misinterpretation of Rule 404(b) as a rule of inclusion that favors the admissibility of other-acts evidence through purported exceptions enumerated in Rule 404(b)(2).[74] This would have widespread benefits for civil and criminal trials and the broader U.S. justice system.

First, the amendment would lead to greater predictability. Current misinterpretations of Rule 404 effectively replace the rule against character evidence with an uncertain balancing of probative value and unfair prejudice under Rule 403.[75] This leads to unpredictability in the admissibility of evidence of a defendant's past misdeeds. Because this evidence is so impactful on the outcome of a case, this translates directly to unpredictability in the outcome of a case. Moreover, unpredictability surrounding the admission of other-acts character evidence places pressure on criminal defendants to enter plea agreements regardless of whether a defendant is guilty or innocent.[76] The knowledge that a jury may hear evidence regarding the defendant's past misdeeds—subject only to a skewed Rule 403 balancing—is often sufficient to compel the acceptance of a plea agreement. This pressure on criminal defendants may also translate to harsher plea offers.

By correcting the misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1), the proposed amendment restores Rule 404 as a *rule* against character evidence rather than just a loose policy statement that courts should consider in their Rule 403 balancing analysis. It thereby creates predictability in a critical component of a case, leading to fairer plea agreements, better case strategy, more predictable verdicts, and ultimately, greater accuracy in case outcomes.

Second, consistent with Rule 404's meaning and purpose, the proposed amendment ensures a greater focus on the act in question, and it dramatically lowers the risk of verdicts based on a defendant's character or past misdeeds. As discussed above, the common misinterpretation of Rule 404(b)(2) as an exception to Rule 404(b)(1) sanctions precisely the type of evidentiary inferences that Rule 404 is intended to prevent. It detracts from evidence regarding the act in question and shifts focus to a defendant's character and past misdeeds—although for the specific purpose of proving identity, intent, or another important factual element of a case. For example, when a court permits other-acts *character* evidence to show intent under Rule 404(b)(2) in

74. *See supra* Part I.
75. *See supra* Part I.
76. *See supra* notes 55–60 and accompanying text.

a drug case, the jury's determination to convict or acquit may well hinge on impermissible propensity reasoning.

The proposed amendment avoids this misinterpretation. It clarifies that other-acts evidence is inadmissible for any purpose that involves character reasoning—that is, a chain of inferences that involves an impermissible propensity inference under Rules 404(a)(1) and 404(b)(1)—while permissible for purposes that do not. This clarification returns the rule to its intended meaning in line with its critical policy objectives. Indeed, it is precisely character reasoning that generates the severe risks that Rule 404 aims to protect against. For example, other-acts evidence offered for a non-propensity purpose does not carry the same risks of a jury excessively weighting the evidence, punishing a defendant for past misdeeds, or relying on implicit biases in determining a verdict. But propensity reasoning creates these dangers wherever it exists in a chain of inferences—whether as the ultimate purpose or an intermediary purpose. The proposed language thus preserves the admissibility of other-acts evidence offered for non-propensity purposes while clarifying and emphasizing the inadmissibility of character reasoning. In turn, by ensuring a greater focus on the act in question and reducing the risk of verdicts based on a defendant's character or past misdeeds, the proposed amendment will improve accuracy, prevent false convictions, and protect the other critical policies underlying Rule 404.

III. ADDRESSING THE DOCTRINE OF CHANCES

Under the doctrine of chances, courts admit evidence of other similar acts to prove that the act in question did not occur by chance or accident. This evidence—objective-chance evidence—can be described as "evidence regarding events of the same general kind as the event at issue, offered to prove that the event at issue, in light of the number of similar events evidenced, did not occur randomly but rather occurred in accordance with the events evidenced."[77] It may be offered for any of the purposes listed in Rule 404(b)(2)—most prominently, to prove the absence of mistake or lack of accident, but also to prove motive, opportunity, intent, preparation, plan, knowledge, or identity. For example, in a murder case in which the defendant claims that his spouse's death was the result of an accidental fall on a hiking trip, evidence that the defendant's previous two spouses also died in allegedly accidental falls may be admitted to prove that the fall in question was by the defendant's design rather than by chance or accident.[78]

There is debate over whether objective-chance evidence involves character reasoning.[79] Regardless, it is generally viewed as valuable evidence and significantly more probative than ordinary character evidence.[80] Indeed, objective-chance evidence is often presumed to be admissible under Rule

77. Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 54–55.

78. *See, e.g.*, United States v. Henthorn, 864 F.3d 1241, 1241–47 (10th Cir. 2017).

79. *See supra* note 13.

80. *See* Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 57–58; Imwinkelried, *supra* note 10, at 3–9; Rothstein, *supra* note 13, at 1259–70.

404, and as I have argued previously, it may be a root cause of confusion and misinterpretation surrounding the rule against character evidence.[81] Specifically, its highly probative nature seems to place significant pressure on courts to admit it notwithstanding Rule 404.[82] This, in turn, erodes the rule against character evidence and promotes further exceptions and departures in the federal common law.[83] Moreover, the presumed acceptability of this evidence, and its complex relationship to character reasoning, may have caused previous reluctance to clarify Rule 404(b)(2)'s meaning. For example, in response to earlier proposals, the Advisory Committee commented that such clarification "ignor[es] that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference—an example would be use of the well-known 'doctrine of chances' to prove the unlikelihood that two unusual acts could have both been accidental."[84]

In this part, I address the doctrine of chances in two ways. First, I explain why the amendment proposed in Part II does not require also explicitly addressing the doctrine of chances. Second, although not necessary for my primary proposal, I recommend an amendment that creates a limited exception to Rule 404 for objective-chance evidence.

A. Correcting the Permitted-Purpose Fallacy Does Not Require Addressing the Doctrine of Chances

As suggested above, there is debate surrounding whether objective-chance evidence involves propensity reasoning. For example, Professor Edward Imwinkelried has argued that the improbability of multiple accidents of a certain kind leads to the conclusion that at least one of the incidents was not an accident, an inference that does not require reference to the "accused's personal, subjective bad character."[85] On the other hand, Professor Paul Rothstein has argued that this evidence involves propensity reasoning because the improbability of multiple accidents or random occurrences suggests guilt "only because a guilty person would have the *propensity* to repeat the crime."[86]

I have argued that objective-chance evidence should be understood as involving propensity reasoning because although it involves one chain of inferences that does not rely on propensity reasoning, its unique probative

81. *See* Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 41; Bavli, *An Objective-Chance Exception*, *supra* note 10, at 125.

82. *See* Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 58.

83. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 125.

84. ADVISORY COMM. ON EVIDENCE RULES, *supra* note 16, at 4–5. More than just an example, however, the doctrine of chances seems to be the primary—if not the sole—driver of this position. *See id*. Indeed, it stands alone as a category of uniquely probative evidence that arguably involves character reasoning. *See* Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 54–58.

85. Imwinkelried, *supra* note 10, at 7.

86. Rothstein, *supra* note 13, at 1261.

value arises from a second chain of inferences that does.[87] Specifically, the improbability of multiple improbable events occurring randomly leads to the more probable conclusion that at least one of the events was by design and therefore that the event at issue is more likely to be by design rather than accidental. Pursuant to a propensity chain of inferences: at least one of the improbable events is by the defendant's design; therefore, the events are better explained by the defendant's propensity to commit such acts than by randomness; therefore, the defendant is more likely to have acted in accordance with this propensity and to have committed the act in question. For example, evidence that the defendant's two previous spouses also died in falls on hiking trips with the defendant screams that these incidents are due to the defendant's *propensity* to murder rather than due to chance and that the defendant is therefore more likely to have committed the crime in question.[88]

However, there is also a non-propensity chain of inferences: at least one event is likely by the defendant's design; therefore, as a member of the class of events, at least one of which is likely by design rather than random, the event in question has a greater likelihood of being by the defendant's design.[89] In other words, without relying on the defendant's propensity, because it is more probable that at least one of the improbable events was due to the defendant's design rather than chance, the event in question has a greater probability of being due to the defendant's design rather than chance. Although I argue that this non-propensity chain of inferences is greatly overshadowed by the substantial probative value of the propensity chain of inferences, it may provide flexibility for courts to weigh the probative value and the risk of unfair prejudice (and with respect to the propensity chain of inferences in particular) in limited circumstances involving objective-chance evidence.[90] This is not to say that courts should necessarily admit this evidence: in light of a weaker non-propensity chain of inferences and a more dominant propensity chain of inferences, it is crucial for a court to determine the admissibility of objective-chance evidence under Rule 403. However, the Advisory Committee could adopt the amendment proposed in the previous part while preserving judicial discretion under a Rule 403 balancing to analyze the admissibility of objective-chance evidence.[91]

Moreover, to the extent that the proposed amendment forecloses the admission of objective-chance evidence in certain cases, the policies underlying the rule against character evidence and the law's interest in preventing false convictions arguably supersede the potential accuracy benefits of the evidence.

87. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 155–57.
88. *Id.*
89. *Id.* at 156.
90. *Id.*
91. Under a Rule 403 balancing analysis, a court may, for example, be more likely to admit objective-chance evidence in cases in which the evidence does not necessarily involve past misdeeds of a defendant but rather only past misfortunes that may be due to chance.

B. Amending Rule 404(b) to Address the Doctrine of Chances: A Secondary Proposal

As discussed above, my primary proposal does not require addressing the doctrine of chances explicitly. The benefits of the proposal for civil and criminal cases follow from the recommended clarification regardless of whether the Advisory Committee decides also to adopt the secondary proposal in the current section regarding the doctrine of chances.

However, the admission of evidence under the doctrine of chances has caused significant problems for the rule against character evidence, and although not necessary to achieve the benefits of my primary proposal, amending Rule 404(b) to address the doctrine of chances would improve accuracy and reduce the unpredictability of all admissibility decisions under Rule 404.[92] First, objective-chance evidence is more common than is currently recognized. This is because it includes not only evidence that is offered for the ultimate purpose of proving the absence of mistake or lack of accident but also many other forms of evidence offered under Rule 404(b)(2) to prove motive, intent, knowledge, or another purpose that may provide an alternative explanation to an event occurring by chance or accident.[93] For example, in addition to the lack-of-accident evidence in the hiking example above, objective-chance evidence could include evidence of prior drug convictions offered to prove that the defendant had the requisite knowledge and intent rather than simply being in the wrong place at the wrong time by chance.[94] It could also include, for example, anecdotal evidence involving similar prior acts in an intentional discrimination case to prove that a defendant had discriminatory intent rather than conduct that was only incidentally, or randomly, consistent with such intent.[95]

Second, objective-chance evidence is often highly valuable for achieving an accurate case outcome. Specifically, I have argued that two features of this evidence make it uniquely valuable: First, it generally speaks to matters for which there is little other evidence.[96] Because objective-chance evidence involves rejecting a hypothesis of chance in favor of one of design (of some sort), it is often offered to prove a mental state, such as intent, knowledge, motive, or purpose—a notoriously difficult thing to prove.[97] Moreover, even when it is offered to prove conduct (e.g., that a victim's fall was the result of a push by the defendant rather than an accidental slip) it often relates not to who committed a crime but rather to the more difficult-to-prove question of whether there was a crime in the first instance.[98] Second, relative to other

92. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 157–65.

93. *See id.* at 130–43, 161–65 (discussing the admission of objective-chance evidence to prove intent, knowledge, and other purposes beyond absence of mistake or accident); Imwinkelried, *supra* note 10, at 9–12 (describing common uses of objective-chance evidence).

94. *See generally supra* note 27 and accompanying text.

95. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 158.

96. Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 57.

97. *Id.*

98. *Id.* When objective-chance evidence is offered to prove identity, it often involves unique circumstances in which there is similarly a dearth of other evidence.

forms of character evidence, it is generally highly probative of the matter in question. This is because it involves events that are often relatively rare or uncommon, discrete (and often binary), uniform relative to the event in question, multiple in number, and easily ascertained.[99]

For example, in a case involving an allegation that the defendant's home burned down due to arson rather than by accident, evidence that the defendant's two previous homes burned down under similar circumstances is highly valuable in that (1) it speaks to a matter that is difficult to prove and (2) it is highly probative of that matter.[100] Specifically, it is relevant to the defendant's intent, which requires understanding the defendant's state of mind, a notoriously difficult element to prove. Moreover, it is highly probative of the defendant's intent. Because the evidence involves multiple rare events that are uniform, discrete (and binary), and easily ascertained—that is, they are similar to each other and to the event in question, they either happened or they did not, and there is little or no uncertainty surrounding the events' occurrence—it is highly probative in that it conveys a precise informational signal regarding the probability that the events, and the event in question in particular, occurred by the defendant's design rather than by accident.[101]

I have argued that the combination of these two features of objective-chance evidence—its highly probative value for matters for which there is otherwise scarce evidence—makes it seem counterintuitive (and sometimes patently incorrect) to exclude this evidence.[102] In turn, this has placed pressure on courts to create ways to admit objective-chance evidence notwithstanding Rule 404.[103] Indeed, for some types of objective-chance evidence—such as anecdotal evidence in antidiscrimination cases—courts resort to common law to admit it, and they rarely acknowledge Rule 404.[104] In addition, the probative force of this evidence often contributes to a presumption that it is admissible notwithstanding Rule 404.[105]

Thus, because of the unique accuracy benefits of objective-chance evidence, courts regularly depart from Rule 404 to admit this evidence using a combination of Rule 404(b)(2) and common law. In turn, such departures

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99. *Id.* at 58.

100. *Id.*

101. There may also be valuable evidence rebutting objective-chance evidence—for example, evidence that the defendant has a bad habit of falling asleep with a lit cigarette in hand.

102. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 153–55; Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 57–58.

103. Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 58.

104. *See* Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1065–66, 1071–74 (2005); *see also* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 58–65. *See generally* Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285–86 (11th Cir. 2008) (upholding other-acts evidence to prove intent); Fudali v. Napolitano, 283 F.R.D. 400, 402–03 (N.D. Ill. 2012) ("The cases are basically uniform in holding as a general principle that discriminatory intent or the pretextual nature of an employment related decision may be proven by 'other acts' of discrimination or retaliation.").

105. *See supra* note 84 and accompanying text.

erode Rule 404's exclusionary force—and not only for objective-chance evidence but also for character evidence more broadly.

Therefore, as a secondary proposal, although addressing the doctrine of chances is not necessary for the adoption of my primary proposal above, I recommend that if (and only if) the Advisory Committee adopts my primary proposal, it should also consider establishing an explicit exception to Rule 404 for objective-chance evidence. To make admissibility decisions under Rule 404 more logical and predictable, my proposal aims to simultaneously strengthen Rule 404's exclusionary force for most types of character evidence while creating a limited exception for a category of character evidence—objective-chance evidence—that is uniquely valuable and underlies many departures from Rule 404.

To accomplish this, I recommend that if the Advisory Committee decides to amend Rule 404(b)(2) to explicitly require a propensity-free chain of inferences for admissibility under this rule, then it should also consider creating a limited exception to Rules 404(a)(1) and 404(b)(1) for objective-chance evidence using the following form and language for Rule 404(b)(2)[106]:

> (2) *Permitted Uses*. Evidence of any other crime, wrong, or act may be admissible only if:
>
> > (A) it is offered for a noncharacter purpose—that is, a purpose (such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) that does not involve inferring a person's character to show that on a particular occasion the person acted in accordance with the character; or
> >
> > (B) based on specific facts and circumstances, it is offered to prove an element of a claim that requires proving an absence of chance or accident, and its probative value in proving an absence of chance or accident substantially outweighs its prejudicial effect.

The aim of the proposed amendment is to establish an "objective-chance exception" to Rule 404, but one that does not open the door for courts to admit ordinary character evidence (i.e., character evidence that does not constitute objective-chance evidence). Toward this goal, the proposed amendment to Rule 404(b)(2) creates two avenues of admissibility. First, Rule 404(b)(2)(A) provides that other-acts evidence may be admissible for noncharacter purposes. Pursuant to my primary proposal in Part II, the language of the rule makes clear that Rule 404(b)(2)(A) is a clarification of Rule 404(b)(1) and not an exception to it. That is, it explicitly requires a non-propensity chain of inferences for admissibility under this rule.[107]

106. In a series of recent articles, I recommend such an exception for objective-chance evidence and describe its benefits with respect to accuracy and other policies. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 155–68; Bavli, *An Aggregation Theory of Character Evidence*, *supra* note 10, at 58–61.

107. The proposed rule includes a reference to evidence offered to prove absence of mistake or lack of accident, but under Rule 404(b)(2)(A) in particular, only to the extent that it does not involve propensity reasoning. *See supra* Part II.

Second, Rule 404(b)(2)(B) establishes an *exception* to Rule 404(b)(1) for other-acts evidence offered to prove an absence of chance or accident.

Thus, Rule 404(b)(2)(B) creates an objective-chance exception to Rule 404(b)(1). At the same time, however, it includes two safeguards against its misuse to admit ordinary character evidence. First, the exception requires that the element that the evidence is offered to prove must involve proving an absence of chance or accident. This requirement significantly limits the breadth of the exception and protects against its misuse. For example, it would permit evidence in the arson illustration above because inherent in proving the intent element of the arson claim, a prosecutor must show that the fire did not occur by chance or accident but rather occurred by the intent of the defendant.

However, consider an example in which a prosecutor attempts to incorrectly frame ordinary character evidence as evidence offered to prove the absence of chance or accident. Suppose a prosecutor in a robbery case attempts to introduce evidence of two separate incidents in which the defendant was accused of and arrested for robbery.[108] This is classic character evidence: it is offered to prove that the defendant has a propensity to commit such acts and is therefore more likely to have committed the robbery in question.[109] However, what if the prosecutor frames the evidence as tending to prove the absence of chance or accident in that the probability of being accused of robbery three times would be very low if the defendant is not in fact committing robbery? The language of the proposed Rule 404(b)(2)(B) prevents the admissibility of this evidence under the objective-chance exception. Specifically, although disguised as objective-chance evidence, the evidence is not offered to prove an element of a claim that requires proving an absence of chance or accident. Instead, it is offered to prove identity only through ordinary character reasoning: that because the defendant has been suspected of robbery in the past, the defendant is more likely to have committed the robbery in question.[110]

More specifically, distinguishing objective-chance evidence from ordinary character evidence involves balancing the probative value of the evidence for the question of chance versus design against the unfair prejudice associated with ordinary character reasoning. Objective-chance evidence is uniquely probative for the former question and involves low probative value via ordinary character inferences.[111]

Thus, the proposed rule does not limit the applicability of the exception to evidence that is offered to prove an element that explicitly requires a showing of absence of chance or accident. Rather, it permits a court to decide based on the facts and circumstances of a case. For example, the prior-event evidence in the arson case is highly probative of intent only through an inference of absence of chance or accident, whereas the prior-event evidence

108. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 162–63.
109. *See generally supra* Part I.
110. *See* Bavli, *An Objective-Chance Exception*, *supra* note 10, at 162–63.
111. *See supra* notes 95–102 and accompanying text.

in the robbery illustration is probative of identity only (or at least primarily) through ordinary character reasoning. Indeed, prior-crime evidence that is reframed as objective-chance evidence through the injection of uncertainty (or "suspicion") will generally involve low probative value for the question of chance versus design and a high degree of unfair prejudice arising from ordinary character reasoning.

Second, the proposed amendment requires that the evidence satisfy what is known as a reverse–Rule 403 balancing to be admissible under Rule 404(b)(2)(B)'s objective-chance exception. This safeguard reflects a combination of two considerations. First, in light of the history of courts misinterpreting Rule 404(b)(2) and expanding the meaning of its permissible purposes (especially for evidence that seems like objective-chance evidence), this safeguard protects against a high danger of courts and attorneys misusing the proposed objective-chance exception to admit ordinary character evidence. Second, it reflects the recognition that true objective-chance evidence that is both highly probative and probative of a matter for which there is otherwise scarce evidence will satisfy a reverse-403 balancing test.

This safeguard aims to protect against the admission of ordinary character evidence disguised as objective-chance evidence while allowing for the admission of true objective-chance evidence that involves the features discussed above. Specifically, in conducting a reverse-403 balancing, a court should consider the following features of the prior-events evidence in determining its probative value for the absence of chance or accident: (1) the number of prior events; (2) their improbability; (3) their uniformity with respect to each other and the event in question; (4) the certainty with which they occurred; and (5) the scarcity of alternative evidence regarding the absence of chance or accident.[112] As discussed above, these features are central to the evidence's unique probative value for the question of chance versus design that arguably justifies an exception to Rule 404.[113]

On the other hand, in determining the evidence's prejudicial effect, the court should consider, among other things, the extent to which the jury is likely to use the prior-events evidence to make ordinary character inferences (as opposed to inferring absence of chance or accident in particular), to punish a defendant based on prior events, or to rely on stereotypes or preconceptions to interpret the evidence. For example, evidence that involves a defendant's prior drug crimes to prove that the defendant had knowledge and intent to distribute drugs in the event in question would likely involve significantly more prejudice than evidence involving prior fires in

112. The probative value of the evidence in light of the *number* of prior events in particular should be evaluated based on the improbability (and uniformity) of the events. For example, one prior house fire may be weak evidence of absence of accident; however, one prior event involving a bathtub drowning of a spouse is rarer and arguably stronger evidence of absence of accident, notwithstanding evidence involving only a single prior event.

113. I considered the possibility of proposing *requirements* to qualify for the objective-chance exception in line with these features. However, a reverse-403 balancing based on these features is simpler and permits an appropriate level of judicial discretion to consider them in the context of the specific facts and circumstances of a case.

the defendant's homes (or prior fatal falls on hiking trips with the defendant) to prove absence of chance or accident. This is because the drug-events evidence involves prior bad acts of the defendant whereas the fire-events evidence only involves prior fires that may or may not be due to an accident.

Indeed, under a reverse-403 balancing, objective-chance evidence involving prior bad acts of a defendant is inherently more prejudicial than objective-chance evidence involving prior improbable misfortunes or accidents that seem like prior bad acts only when combined with other such improbable events. Objective-chance evidence that consists of the prior bad acts of a defendant should often be excluded based on a court's reverse-403 balancing analysis.

Moreover, in contrast with the balancing in the arson case, the disguised character evidence in the robbery illustration easily fails a reverse-403 balancing analysis. For example, considering the factors described above, the prior-suspicion evidence is not uniform with respect to the matter in question, it is not certain or easily ascertained, it does not involve highly improbable events, and its probative value tends to arise from traditional character inferences. In addition, unlike the evidence in the arson case or the hiking case, there is not scarce alternative evidence for proving a robber's identity. This proof can come in many forms (e.g., forensic evidence or eyewitness testimony) and does not generally require proving an absence of chance or accident.

Thus, the reverse-403 balancing is intended to serve as a safeguard that aims to prevent the admission of ordinary character evidence disguised as objective-chance evidence and even some forms of weaker objective-chance evidence. However, true objective-chance evidence that involves the hallmark features of this evidence of the absence of chance or accident—including multiple, improbable, uniform, and distinct prior events, as well as scarce alternative evidence for the matter in question—is uniquely valuable. It is highly probative and arguably involves a relatively low degree of unfair prejudice, and it is therefore unlikely to fail a reverse-403 balancing analysis.

CONCLUSION

Rule 404's exclusion of other-acts character evidence is central to a fair trial, to achieving accurate verdicts, and to preventing false convictions based on the prior acts of a defendant. However, Rule 404 no longer serves these purposes. This is because courts misinterpret the rule in a way that replaces the rule against character evidence with a Rule 403 balancing—and one that treats character inferences in favor of admissibility rather than exclusion. Consequently, courts routinely admit character evidence, and criminal defendants are left unable to predict with any degree of certainty whether a court will exclude their prior bad acts from trial. In addition to harming the fairness and accuracy of a trial, the courts' regular admission of character evidence creates uncertainty in a highly impactful aspect of the trial, which places undue pressure on defendants to avoid trial by accepting a plea agreement.

To correct this central misinterpretation in evidence law, I propose an amendment to Rule 404(b)(2) to clarify the meaning and intention of the rule as permitting only other-acts evidence that does not involve character reasoning. In other words, it clarifies that Rule 404(b)(2) simply indicates the permissibility of non-propensity other-acts evidence not banned under Rule 404(b)(1) rather than creating an exception to Rule 404(b)(1). The proposed amendment is simple and clear, and it has the potential to correct a major source of inaccuracy, unfairness, and inequality in civil and criminal cases.

Further, as a secondary proposal, I address the doctrine of chances. This is important because the doctrine of chances may have caused past reluctance to amend Rule 404(b)(2) to clarify its meaning. Specifically, objective-chance evidence is often seen as more valuable than other forms of character evidence—so much so that it is often presumed to be legitimate and admissible notwithstanding Rule 404. Indeed, as discussed above, there is a logical basis for this distinction between ordinary character evidence and objective-chance evidence.

Therefore, I address the doctrine of chances in two ways. First, I explain why amending Rule 404 to address the doctrine of chances is not necessary for courts to admit certain forms of objective-chance evidence, and that, in any event, there are policy concerns that override the potential accuracy benefits of this evidence. I emphasize that my primary proposal herein is not dependent on the adoption of my secondary proposal regarding the doctrine of chances. Correcting the routine misinterpretation of Rule 404(b)(2) would carry very substantial benefits for the accuracy and fairness of trials regardless of whether the Advisory Committee also decides to amend Rule 404 to address explicitly the doctrine of chances.

Second, however, I argue that addressing the doctrine of chances explicitly in Rule 404(b), if done correctly, would create a more predictable and logical rule against character evidence. I therefore propose a second amendment to Rule 404(b)(2) to establish an exception to Rule 404 for objective-chance evidence that satisfies a reverse-403 balancing analysis. The proposed amendment aims to construct a stronger rule against character evidence by creating a clear general rule that prohibits character reasoning while creating an exception for a form of character evidence—objective-chance evidence—that is uniquely probative and underlies many judicial departures from Rule 404.

Rule 404 is central to preserving a system of justice that produces outcomes based on evidence regarding the act in question and not on a jury's impression of a defendant's character or past acts. As numerous courts and scholars have highlighted, disclosing a defendant's past bad acts to a jury often determines the case in favor of the prosecution. But courts have misinterpreted Rule 404 to permit other-acts character evidence for any purpose other than the most blatant use of it to infer character and action in accordance therewith. Consequently, it has effectively been replaced with a skewed Rule 403 balancing. My proposal to amend Rule 404(b)(2) seeks to restore Rule 404 to its proper meaning and purpose to exclude evidence

whose relevance relies on character reasoning. It thereby promotes evidence-based verdicts and the evidentiary goals of accuracy, fairness, and equality.