AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

June 8, 2021 / 5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Approval of Minutes • *April 13, 2021*	Action	Tab 1	John Lund
Rules back from public comment: • URE 512. Victim Communications • URE 1101. Applicability of Rules	Action	Tab 2	John Lund
Supreme Court Conference Update: • URE 504 (approved for comment) • URE 404 (back to committee)	Discussion	Tab 3	John Lund Judge Welch Teneille Brown
URE 106 Subcommittee Update • Prof. Capra email • Prof. Capra memo to FRE standing committee	Action	Tab 4	Judge Welch
URE 506 Subcommittee Update	Discussion	Tab 5	Sarah Carlquist
URE 412. Admissibility of Victim's Sexual Behavior or Predisposition.	Discussion	Tab 6	John Nielsen

Queue:

- Ongoing Project: Law Student Rule Comment Review

2021 Meeting Dates:
September 14, 2021
October 12, 2021
November 9, 2021

Rule Status:
URE 106 – Subcommittee
URE 404(b) & (d) – Back to Committee
URE 504 – Out for public comment
URE 506 – Subcommittee
URE 507.1 –Waiting on DoH guidelines
URE 512 – Back from public comment
URE 1101 – Back from public comment

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
April 13, 2021
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Melinda Bowen	Adam Alba	Jacqueline Carlton	Keisa Williams
Teneille Brown	Tony Graf		Minhvan Brimhall
Deb Bulkeley	Chris Hogle		
Sarah Carlquist	Jennifer Parrish		
Mathew Hansen			
Ed Havas			
Hon. Linda Jones			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Nicole Salazar-Hall			
Hon. Vernice Trease			
Hon. Teresa Welch			
Hon. David Williams			
Dallas Young			

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1. WELCOME AND APPROVAL OF MINUTES:
John Nielsen moved to approve the February 9, 2021 meeting minutes as written. Dallas Young seconded and the motion passed unanimously.

2. URE 507.1 back from public comment:

Ms. Williams: URE 507.01 is back from public comment. No comments received. SB 53 passed and will go into effect July 1, 2021. The Department of Health is still working on the BEST guidelines. It's unclear at this time whether they'll have those in place prior to July 1st.

Following committee discussion, Mr. Lund asked Ms. Williams to reach out to Nick Stiles to determine whether the Court would prefer to wait on approving the rule until we have a corresponding effective date for the DoH guidelines.

3. Supreme Court Conference update:

- URE 512 (out for public comment)
- URE 1101 (out for public comment)
- URE 106 (SC sent back to Committee)

Mr. Lund: URE 512 and URE 1101 were approved for public comment.

Judge Welch: My email in the meeting materials highlights what happened at the Supreme Court conference.

Supreme Court Conference Summary on URE 106:

- The Court emphasized that they were very appreciative of the memo. They liked having both the majority and minority perspectives.
- The Court doesn't want the Committee to feel wedded to any Utah case law that might be affecting our views or votes. They prefer that the Committee focus on getting the policy of the rule right.
- The Court asked a few main questions:
    1. Should oral and written statements be treated differently?
    2. How much does this rule trump? If it's a trumping rule, is it only allowing inadmissible hearsay, or does it trump other rules such as privileges, etc.?
    3. For what purpose does the remainder come in? Is it for the truth of the matter asserted or for context only? Is that something the trial court judges decide, or will the rule make that explicit?
- The Court seemed to be concerned with the language, "reasonably necessary to qualify, explain, or place into context." I explained that the reason that language is included in the rule is because it's the way caselaw defines fairness. I got the sense they thought it was clunky and it may be partly why they didn't want the Committee to feel wedded to caselaw.
- The Court asked the Committee to find out more about what's transpiring with the federal rule.

Judge Welch: Justice Lee connected me with Professor Daniel Capra, who is the reporter for the federal committee. The federal committee is meeting on April 13, 2021 and will be voting on whether or not to approve a proposed rule and note. If so, it will be sent out for public comment. If approved, it won't be effective until December 1, 2023.

Today's meeting packet includes the federal rules committee meeting notes from their last meeting, and the memorandum that Professor Capra prepared in preparation for their upcoming meeting. The proposed rule is on page 44 of the memorandum. Their rule applies to written and oral statements, and it would permit otherwise inadmissible hearsay. Both the Utah and proposed federal rule allow otherwise inadmissible hearsay, but they diverge as follows:

- The Utah rule addresses what is necessary and sufficient and whether you have to introduce the remainder as an exhibit at trial, or whether it is enough to refer to it in cross-examination.
- The proposed federal rule doesn't get into that issue.
- The federal rule allows oral statements. That's not something we considered.

The note to the federal rule states that the uses to which a completing statement can be put depends on the circumstances. In some situations, it's coming in for context, but in other situations, it's for the truth of the matter asserted. The rule itself doesn't change much, they've just added a sentence at the end regarding oral statements. The note fleshes out what the rule is doing.

Issues that may be relevant to the policy debate the Court would like this Committee to address can be found on pages 27-44 of the memoranda. Are there certain policy considerations that stand out to anyone? If so, the subcommittee can talk through those together and with Professor Capra.

Ms. Carlquist: I would be interested in hearing what Professor Capra thinks of the "subject to rule 403" language in the Utah rule.

Ms. Bulkeley: The federal rule seems too broad. It's important to consider whether we would be letting in statements that have more prejudicial effect or that really should be excluded. The parties could start using this rule of completeness to get in any part of any statement. If it's going to trump the hearsay rule, it should be limited to only what is needed to be fair. I like the 403 limitation.

Mr. Lund: This may be more process than policy, but it's important to recognize that we're ahead of the pack. While adding clarity to the question of the rule of completeness is important, I think ours is a somewhat narrower implementation, which leaves trial courts with the ability to craft a solution around the need to complete the evidence in a way that makes sense in their particular application. Those seem like useful principles to keep in mind.

Let's plan on having a substantive discussion on URE 106 at our next meeting on June 8th. It would be interesting to hear Professor Capra's reaction to some of our proposed language, and how it may correspond with the deliberations that the federal committee has already had. It would be useful for the subcommittee to compare and contrast the Utah rule with the proposed federal rule and meet with Professor Capra to the extent that would be helpful.

4. URE 404(b) Doctrine of Chances:

Judge Welch reviewed the memo and materials in the committee packet. The memorandum explains the rule, the committee note, and the recommendation regarding a model jury

instruction on the doctrine of chances (DoC). The memorandum highlights the debate and differing opinions.

Ms. Brown: I don't support making the change because I think it violates 404(a). The DoC requires propensity reasoning. We can add tests and put a lot of gloss on that, but it's inconsistent with rule 404(a). Narrowing it might provide better guidance for judges, but it also doubles down on, or endorses, the idea that it is a permissible 404(b) use and I don't think it is. I think we're creating more confusion by trying to elaborate on 404(b) exceptions, which are not actually exceptions. We are developing doctrine under 404(b) that doesn't fit under 404(b). If they want to keep it, then we should provide them with tools so that judges in the future have more clarity about what the standards are for the DOC and it's not such a free-for-all. The root of the problem is that it's doctrinally incoherent.

Probability and propensity are predictions about the future, based on how someone has behaved in the past. I don't think there is a logical difference between the two. I think we're parsing words. Objective probability isn't different from propensity because rule 404(a) doesn't distinguish between the two. If we want to provide doctrinal clarity, we should say this is an exception to 404(a), rather than saying it's a permissible non-propensity use and here's the way judges can figure out if it fits. Instead, we say this is a rule that allows propensity reasoning so it's an exception to 404(a), along the same lines as sexual assault history. That would be clear.

I would recommend moving it out from under (c) and creating a new subsection (d): "Evidence of rare events that occur with unusual frequency may be admitted under the doctrine of chances."

Judge Welch: I think there's value in having Ms. Brown flesh that out in the memo.

Judge Williams: If we added a standalone 404(d), we could also move some of the information from the committee note to define "rare events."

Ms. Carlquist: In some ways, that's more intellectually honest. Everybody knows this is just really good propensity evidence. I also like the idea of titling (d) "rare events," to encourage some kind of inquiry into whether the event is actually rare.

Mr. Young: This really boils down to propensity evidence. From a policy standpoint, are we going to continue to acknowledge that a person should be convicted for what he's done, not who he is? I think we ought to stick to that. Does the doctrine still have a place in helping to prove mens rea? The majority of the time, it's going to be used to prove actus reus. You're just dressing up propensity evidence and sometimes bringing in a statistician to put impressive 1 in 50 billion numbers on it.

Ms. Carlquist: I agree. The doctrine really only makes sense when applied to the kind of evidence that's quantifiable or subject to probabilistic reasoning, like lottery fraud cases or accidental fires. If you can't discern any sort of data or quantifiable metric, we're just relying on intuition.

Ms. Brown: Even if it's a statistical probability, you're still drawing an inference that this person is the kind of person who does X, and it doesn't need to be connected to bad character or an immoral character trait. Assuming we had purely statistical data about the likelihood that one individual would be struck by lightning twice or the likelihood that someone would have three wives accidentally drown in a bathtub, there is still a very immediate inference that you're the kind of person who drowns your wife, so it can't be an accident. It's either accidental or intentional. That is a mutually exclusive mens rea. By proving that something is not an accident, you are inferring a mens rea of culpability.

Mr. Nielsen: In response to Mr. Young's comment, I understand the distinction between something that happens to you and something that you do, but often that will be the very question at trial. The bride in the bathtub case is the perfect example. Having your wife die is something that happens to you, in a sense. It's a loss that you suffer. However, if you're the one being accused of killing your wife, then that's something you did. I don't think that distinction breaks down under these circumstances because that's the very question the factfinder needs to decide. It's not the kind of question you can resolve prior to seeing the evidence. It's a jury question. That's why I advocated for including it under 404(b). I understand Ms. Brown's position. It's very much like Judge Harris' position. Judge Harris believes, philosophically, that you can't make non-propensity inferences from statistical evidence. I disagree.

Judge Williams: I am somewhat persuaded by Ms. Brown's comment that while some people may get it, the majority of our jurors may not. I think it opens up the door to appellate arguments about what the jury and/or judge were really doing. From this side of the bench, clarity is more important.

Mr. Lund: Is the committee, as a whole, ready to approve sending this memo and rule draft to the Supreme Court. It will go up along with a resubmission of our 404(d) memo and a brief cover memo. I anticipate a fairly substantive discussion with the Court about the very issues that are being discussed now, and the rule will likely be sent back to us with further direction.

Mr. Neilsen moved to approve the memo and rule draft (as amended) and advance it to the Supreme Court, along with the memo on 404(d) and a brief cover memo. Judge Williams seconded the motion and it passed unanimously.

After further discussion, Mr. Lund asked Ms. Brown and Judge Welch to attend the Supreme Court Conference to present both sides of the issue.

5. URE 504 Subcommittee:

Ms. Salazar-Hall: The subcommittee considered several options, but determined that it was easier to add to the definition of "lawyer" than to add the definition of "licensed paralegal practitioner" (LPP). Removing "lawyer referral service" throughout the rule made it much cleaner. We pulled the definition of LPP from rule 15-701.

Ms. Bowen: Ms. Parrish and I reviewed the rest of the rules to see if "lawyer" was used anywhere else, or whether LPPs might be implicated. Only a couple of other rules include the term "lawyer" and those weren't relevant to LPPs. The language, "any other person or entity authorized by the state of Utah to practice legal services," is meant to cover entities in the regulatory sandbox.

Judge Williams: To the extent there are concerns that the definition of lawyer is being expanded, the purpose of this rule is to try to protect privileged communications. The rule does not attempt to define "lawyer" so much as it attempts to define what's privileged.

Judge Williams moved to recommend URE 504, as drafted, to the Court for public comment. Ms. Brown seconded and the motion passed unanimously.

6. URE 506 Physician and mental health therapist-patient:

Mr. Young: The chair of the Advisory Committee on the Rules of Criminal Procedure, Doug Thompson, reached out to me because he stumbled across a referral to the Evidence Committee in *State v. Bell* regarding an exception to the physician-patient privilege. It looks like this slipped through the cracks.

The issue the court charged us to review concerns the exception to the physician-patient privilege that exists when there's a communication relating to the physical, mental, or emotional condition of the patient, when that condition is an element of any claim or defense. I'm most familiar with that cropping up in a case where an alleged victim has gone to counseling and defense attorneys want to get into it because of the potential for exculpatory information in terms of inconsistent statements or recapitulation. The Utah Supreme Court didn't rule on it in *Bell*, but it discusses a U. S. Supreme Court case where the alleged victim's therapy records were in the possession of the State and delivered to the district court, but the records were never reviewed. The U.S. Supreme Court remanded it back to the district and said, because those records originally came into the State's possession and may have implications, the records must be reviewed for anything that could be helpful to the defense and a determination made as to whether they need to be disclosed.

Not long after that, the Utah Supreme Court decided *State v. Cardall* where they keyed on the *Pennsylvania v. Ritchie* decision and developed the evidentiary standard for access. There are a

couple of steps in the process. If the defense wants to get access to therapy records or physician-patient records, they must file a motion and show, to a reasonable degree of certainty, that the records they're after are going to contain helpful information. The challenge was that that standard is too restrictive, and it poses a due process violation. I think what the Court is grappling with is how to balance the important policy reasons for having a robust physician-patient privilege, as that's defined in the rule, versus a clear explanation for what's required.

The question for us is whether they should stick to their guns or whether we can find a middle ground. They are looking to us to identify a clear definition of "reasonable certainty," while also balancing the defendants' rights. I recommend creating a subcommittee to take a closer look at various approaches. I spoke with Doug Thompson to gauge whether there was any appetite on the part of the Criminal Rules Committee to be involved because of URCrP 14. He was open to it if we felt there was a strong need. Depending on how this goes, it could involve the criminal rules committee as well.

Mr. Lund: Another issue the Court identified was the need for clarification about whether the government is the holder of the records at some particular point. One variable to consider is that this rule would apply in other settings where a subpoena could be issued directly to a therapist's office (perhaps in a family law case). The element of a claim or defense is not necessarily just applicable in a criminal context. That might be something to think through a bit. Victims' rights are an important aspect as well, so the subcommittee might want to reach out to victim advocates and see if they have any input.

Ms. Salazar-Hall: I could see this being relevant to a personal injury case or other civil cases outside of domestic, so we may want to ask someone in the plaintiffs' bar for an opinion.

After further discussion, a URE 506 subcommittee was created with the following members:

- Ms. Salazar-Hall
- Mr. Hansen
- Mr. Nielsen
- Mr. Young
- Ms. Carlquist

The meeting adjourned at 6:45 p.m. **Next Meeting: June 8, 2021, 5:15 pm, Webex video conferencing**

Tab 2

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: April 12, 2021

Utah Courts

Rules of Evidence – Comment Period Closes May 27, 2021

URE0512. Victim Communications (AMEND). Clarifies that URE 510 applies to this rule. Disclosures of the following confidential communications will now waive the privilege: 1) disclosures required under Title 62A, Chapter 4a, Child and Family Services or UCA § 62A-3-305, 2) evidence of a victim being in clear and immediate danger to the victim's self or others, and 3) evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime.

URE1101. Applicability of Rules (AMEND). Amends the committee note following *State v. Weeks*, 61 P.3d 1000. Clarifies that the Utah Rules of Evidence are inapplicable to proceedings for revoking probation, unless the court for good cause otherwise orders.

This entry was posted in -Rules of Evidence, URE0512, URE1101.

« Code of Judicial Administration – Comment Period Closes June 10, 2021

Rules of Appellate Procedure – Comment Period Closes May 23, 2021 »

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

- -Alternate Dispute Resolution
- -Code of Judicial Administration
- -Code of Judicial Conduct
- -Fourth District Court Local Rules
- -Licensed Paralegal Practitioners Rules of Professional Conduct
- -Rules Governing Licensed Paralegal Practitioner
- -Rules Governing the State Bar

UTAH COURTS

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2 thoughts on “Rules of Evidence – Comment Period Closes May 27, 2021”

Nathalie Skibine
May 4, 2021 at 8:11 am

The 2019 advisory committee note to rule 1101 seems aimed at court-ordered restitution but will affect complete restitution. The note quotes the majority opinion in Weeks, but the dissent was concerned that “the restitution ordered by the trial court becomes an enforceable money judgment against the defendant, bearing interest, fully enforceable and collectable with the possible addition of attorney fees, and does not abate on the death of the defendant.” State v. Weeks, 61 P.3d at 1008 (Howe, J., dissenting). “It is incongruous to hold that a money judgment of this nature could be entered against a criminal defendant without according him the same due process that any other debtor would receive in a civil court.” Id. More recently, the Utah Supreme Court expressed concerns that a truncated restitution process “does not work . . . well when there are difficult issues” and would “benefit from the tools we have developed in the civil context to deal with complex questions of causation and damages.” State v. Ogden, 2018 UT 8 ¶ 27 n.5. Ogden stated that if the Legislature does not revisit the statute, the Court might look to amending the Utah Rules of Criminal Procedure “to promote a process that is fair to both victims and defendants in more complex cases.” Id. The advisory committee note seems to be reaffirming the policy arguments in Weeks without addressing the Ogden concerns. I think this creates confusion.

Reply

A.Black
May 10, 2021 at 2:29 pm

Rule 512 states there is an exception to the privilege that exists in the following circumstances: “(d)(4) when the confidential

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
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- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
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- CJA03-0111.04
- CJA03-0111.05

communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;"

The heart of the purpose of the confidential communication is so the victim can seek resources and trust in systems and advocates to keep them safe and certain communications confidential for a reason. If a victim of a crime discloses that they used meth 3 years ago and has struggled with sobriety since getting clean, that crime may not be relevant to what has occured recently. This put those entrusted with confidential communications in a position where they now have to go tell a prosecutor, etc a victim of a crime violated a law a few years ago -therefore injecting bias into an already difficult criminal justice process for a victim who may already fear not being beleived, being blamed, and going through more trauma or retaliation.

This scenario could also apply for someone who wants to tell an advocate that they are wanting to report a sexual assault but afraid to tell police officers that they smoked heroin with the suspect prior to their rapist filming them while unconscious. The victim expressed being afraid of what the drug usage may do if they come forward to the officers about the sexual assault. Many advocates hear confessions like this every day, and they want and help victims to come forward. Part of that is build trust and helping them with informed decisions without simultaneously making their advocates paid informants for the State of Utah.

These same rule requirements are not placed on attorneys or health care or anyone else who has an important client relationship where there is trust built in to it's foundation. This part of the rule contradicts it's entire purpose and is designed as a way to not really give victims the respect of confidential communications. Nor is it urgent for safety, that of a child or elder or vulnerable adult which is already covered in the rule and statute. Finally, this rule was not put out to advocates throughout the state for their review and approval.

Reply

Leave a Reply

Your email address will not be published. Required fields are marked *

Comment

Name *

- CJA03-0111.06
- CJA03-0112
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Rule 512. Victim communications.

(a) Definitions.

(a)(1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a)(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a)(3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a)(4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a)(5) "Mental health therapist" means the same as that term is defined in UCA § 58-60-102.

(a)(6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) Statement of the Privilege. A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) Who May Claim the Privilege. The privilege may be claimed by:

(c)(1) the victim;

(c)(2) ~~engaged in a confidential communication, or~~ the guardian or conservator of the victim ~~engaged in a confidential communication~~ if the guardian or conservator is not the accused; and~~.~~

(c)(3) ~~An individual who is a~~the victim advocate ~~at the time of a confidential communication is presumed to have authority~~ during the life of the victim ~~to claim the privilege on behalf of the victim~~.

(d) Disclosures That Do Not Waive the Privilege. The confidential communication may be disclosed in the following circumstances without waiving the privilege in paragraph (b):

(d)(1) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services, and the disclosure is to a

law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, a member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency, or a parent or guardian if the victim is a minor and the parent or guardian is not the accused;

(d)(2) the confidential communication is with a criminal justice system victim advocate, and the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405.

(e) Exceptions to the Privilege.

(e)(1) In addition to waivers under URE 510, the privilege in paragraph (b) does not apply in the following circumstances:

(e)(1)(A) the victim, or the victim's guardian or conservator, if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(e)(1)(A)(i) the specific confidential communication subject to disclosure;

(e)(1)(A)(ii) the limited purpose of the disclosure;

(e)(1)(A)(iii) the name of the individual or party to which the specific confidential communication may be disclosed; and

(e)(1)(A)(iv) a warning that the disclosure will waive the privilege;

(e)(1)(B) the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(e)(1)(C) the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(e)(1)(D) the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(e)(1)(E) the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(e)(1)(E)(i) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the

admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(e)(1)(E)(ii) the confidential communication is exculpatory evidence, including impeachment evidence.

(e)(2) A request for a hearing and in camera review under paragraph (e)(1)(E) may be made by any party by motion. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.

Effective May 1, 2021

~~(d) **Exceptions.** An exception to the privilege exists in the following circumstances:~~

~~(d)(1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:~~

~~(d)(1)(A) the specific confidential communication subject to disclosure;~~

~~(d)(1)(B) the limited purpose of the disclosure; and~~

~~(d)(1)(C) the name of the individual or party to which the specific confidential communication may be disclosed;~~

~~(d)(2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;~~

~~(d)(3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;~~

~~(d)(4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;~~

~~(d)(5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;~~

~~(d)(6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;~~

~~(d)(7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:~~

~~(d)(7)(A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or~~

~~(d)(7)(B) the confidential communication is exculpatory evidence, including impeachment evidence.~~

~~Effective July 31, 2019, pursuant to 2019 UT H.J.R. 3 "Joint Resolution Adopting Privilege Under Rules of Evidence."~~

URE 1101. Applicability of Rules.

(a) **Proceedings Generally.** These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in subsections (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) **Rule of Privilege.** The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) **Rules Inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:

(c)(1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under URE 104.

(c)(2) **Grand Jury.** Proceedings before grand juries.

(c)(3) **Revoking Probation.** Proceedings for revoking probation, unless the court for good cause otherwise orders.

(c)(~~3~~4) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; sentencing~~, or granting or revoking probation~~; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(d) **Reliable Hearsay in Criminal Preliminary Examinations.** In a criminal preliminary examination, reliable hearsay shall be admissible as provided under URE 1102.

Effective ~~December 1, 2011~~May/November 1, 20__

2019 Advisory Committee Note: Regarding subsection (c)(4): In *State v. Weeks*, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court explained the "wisdom" of not applying the evidence rules to sentencing and restitution hearings. *Id.* at ¶ 17. The breadth of information available at such hearings has always been wide. *See Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). Granting flexibility allows trial courts to fashion just sentences—including court-ordered restitution—based on the facts of a given case. It benefits defendants because one form of punishment (restitution) may allow them to avoid a greater fine, incarceration, or both. Finally, it benefits victims by ensuring that they don't endure a "mini-trial" on restitution, and fines that might have gone to the State may instead go to the victim in the form of restitution. *Weeks*, 2002 UT 98, ¶¶ 17-19.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

~~**Original Advisory Committee Note.** This rule is the federal rule, verbatim, and is substantially the same as Rule 70(2), Utah Rules of Evidence (1971).~~

Tab 3

THE CONTENT OF OUR CHARACTER[1]

Teneille R. Brown[*]

[DRAFT dated June 3, 2021]

[1] "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." - Martin Luther King, Jr. at the March on Washington on August 28, 1963. This article calls for revision to the evidence rules based precisely on the kind of racial prejudice reflected in this famous quote by MLK.

[*]Teneille R. Brown is a Professor of Law in the Center for Law and the Biomedical Sciences at the S.J. Quinney College of Law, and a member of the Program in Medical Ethics and Humanities at the University of Utah. She would like to thank Michael Saks, Emily Murphy, Ed Cheng, and participants in the Biolawlawpalooza conference at Stanford Law School for their feedback on drafts of this project, as well as the members of the Utah Supreme Court Evidence Advisory Committee, who likewise provided excellent comments on this proposal. While writing this article, she was caring for two young children by herself at home.

Abstract

The ban on character evidence responds to a legitimate concern. If jurors learn of the accused's past acts, they will punish him for the kind of person that he is rather than for being proved guilty of this crime. Unfortunately, our attempt to correct this powerful tendency has only made things worse. When jurors cannot hear how someone behaved in the past, they will instead rely on immutable facial features—rooted in racist, sexist, and classist stereotypes—to draw character inferences that are even more inaccurate and unfair. Undisputed findings from social psychology demonstrate that we rely on features like the distance between the eyes, the width of the nose, the angles of the jawline, and the color of skin to spontaneously infer whether someone is threatening, intelligent, or kind. This in turn predicts election outcomes, hiring decisions, teaching evaluations, and even jury verdicts. Because this split-second process is subconscious and pervasive, it is not susceptible to mitigation through jury instructions. Nevertheless, witnesses will be considered untrustworthy based only on their face, and in some cases, justice may require admitting bolstering evidence before their character is technically attacked. I thus propose reversing the ban on character evidence, in favor of a presumption of inadmissibility for immoral traits only. My proposal has a number of benefits, including retethering the rule to its moral, normative roots and acknowledging that not all past act evidence will be unfairly prejudicial. Finally, delivering the greatest balm to judges and attorneys, admissibility would no longer hinge on the gossamer-thin distinction between propensity and non-propensity uses. This is because jurors will automatically use whatever information is available, including evidence of mental states, to infer character traits, predict behavior, and assess blame.

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THE CONTENT OF OUR CHARACTER

I. INTRODUCTION: DIFFICULTY APPLYING THE CHARACTER EVIDENCE BAN

The ban on character evidence has noble origins—to ensure that the accused is punished not for what he has done in the past, or for what kind of person he is, but because the current charges are proved beyond a reasonable doubt.[2] The common law of the United Kingdom thus prohibited evidence of the accused's traits or past actions to predict whether he committed *this* crime.[3] About two hundred years ago this doctrine became universally accepted in the United States. It is now enshrined in the federal evidence rules and those of every state.[4]

Unfortunately, the premise behind the ban on character evidence was doomed from the start. For one, jurors do not restrict their assessment of character to formal, regulated testimony. They will use whatever evidence is available to them, no matter how unreliable, to automatically infer character traits. These traits are then used to do the very thing the rules prohibit—to predict how others will think and act, and whether they deserve blame.[5] They cannot *not* do this.

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[2] see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L. J. 1161, 1167-68 (1998).

[3] see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 IND. L. J. 1161, 1167-68 (1998).

[4] FED. R. EVID. 404(a)(1). There are notable common law and statutory exceptions built into the rule, which will be discussed below.

[5] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, SOC. PSYCH AND PERSON. SCIENCE 1, 1 (2020).; see also Bastian Jaeger, et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* (submitted for review, and available online at https://osf.io/8wejn/, at p. 16

Humans are constantly, subconsciously, inferring character traits.[6] Almost immediately, we move from making a myriad of observations about someone to inferring their stable dispositional traits.[7] Artful attorneys know this. It is why Roger Stone wore a simple navy suit to his arraignment hearing, so he did not look "too rich."[8] It is why jury consultants tell women to smile more, and why witnesses wear glasses if they want to appear smart.[9] It likely also played a role in Harvey Weinstein's use of a walker as he entered his criminal trial.[10] Yet none of these sources of character information are treated as formal evidence or regulated by the rules.

However, this phenomenon goes well beyond manipulating the way you dress or behave in court. It runs much, much deeper. A robust body of research demonstrates that people make *instant* decisions about whether to trust someone

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[6] Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 876–77 (2018); see also Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases,* 2018 WISCONSIN LAW REVIEW 369, 386-87 (2018); see also, Josephine Ross, "*He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 229 (2004); *see* Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, SOC. PSYCH AND PERSON. SCIENCE 1, 1 (2020); see also Alexander Todorov and James Uleman, *Spontaneous trait inferences are bound to actors' faces: Evidence from a false recognition paradigm*. 83 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1051 (2002)

[7] David Hamilton, et al., *Sowing the Seeds of Stereotypes: Spontaneous Inferences About Groups*, 109 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 569, 569-570 (2015)

[8] Vanessa Friedman, *Does This Dress Make Me Look Guilty*?, NEW YORK TIMES, April 25, 2019, available online at https://www.nytimes.com/2019/04/25/fashion/anna-sorokin-elizabeth-holmes-card-b-court-fashion.html

[9]Michael Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, 23 THE JURY EXPERT: AMERICAN SOCIETY OF TRIAL CONSULTANTS (2011), available online at http://www.thejuryexpert.com/wp-content/uploads/TJEMarch2011-Is-Justice-Blind.pdf

[10]"This is what Jasmine Harris referred to as the "aesthetics of disability," as the walker could be used to convey "physical weakness and dependence" and "produce visceral responses in jurors and the public that can lead them to be more (or less) sympathetic when weighing a defendant's liability, public responsibility and, in the end, punishment." See, Jasmine Harris, *The Truth About Harvey Weinstein's Walker,* NEW YORK TIMES, Jan 30, 2020, available online at https://www.nytimes.com/2020/01/30/opinion/harvey-weinstein-walker.html

based *only on the features of their face*.[11] And unlike our clothing or demeanor, we cannot easily change our facial features. Even so, jurors will immediately draw trait inferences based on the distance between our eyes, the angles of our eyebrows and lips, the prominence of our cheekbones, whether our face is symmetric—and of course, glaringly, the color of our skin. These inferences are not diagnostic of personality or how someone actually behaves, but they reliably predict whether we find people to be trustworthy, aggressive, likeable, or competent.[12]

For decades, psychologists have been studying how we form impressions of others. One relevant process, referred to as spontaneous trait inference (STI), has received considerable scrutiny. These inferences occur without our awareness, and enable quick and dirty character assessments, based on limited information. Remarkably, STIs exert long-lasting effects. They have been shown to predict electoral success,[13] job opportunities[14], teaching evaluations[15],

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[11] Tessa Marzi, et al., *Trust at First Sight: evidence from ERPs*, 9 SOCIAL COGNITIVE AND AFFECTIVE NEUROSCIENCE 63, 63 (2012).

[12] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, Soc. Psych and Person. Science 1, 1 (2020).; see also Bastian Jaeger, et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* (submitted for review, and available online) p. 16

[13] Tessa Marzi, et al., *Trust at First Sight: evidence from ERPs*, 9 SOCIAL COGNITIVE AND AFFECTIVE NEUROSCIENCE 63, 63 (2012).

[14] Li Mengzhu, et al., *Influence of Recruitment Decisions in View of Spontaneous Trait Inference of the Job Applicants' Face*, PSYCHOLOGICAL SCIENCE (2019), available online at https://en.cnki.com.cn/Article_en/CJFDTotal-LXTX201903008.htm: "[F]or middle school teacher candidates, the willingness to recruit is higher when the communal trait and agentic trait of faces are high; for judge candidates, the willingness to recruit is higher when the communal trait of faces is low and agentic trait of faces is high; for restaurant server candidates, the willingness to recruit is higher when the communal trait and agentic trait of faces are high." See also *Michèle C. Kaufmann, et al., Age Bias in Selection Decisions: The Role of Facial Appearance and Fitness Impressions*. 8 FRONT. PSYCHOL. *2065 (2017).*

[15] Nalini Ambady and Robert Rosenthal, *Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness*, 64 J. PERSONAL. & SOCIAL PSYCH 431 (1993).

and even guilt and sentencing decisions.[16] Many legally-significant outcomes may be based on nothing more than the facial equivalent of phrenology.[17] And yet, the study of STIs has not yet pierced legal research or doctrine. This is about to change.[18]

A. We Cannot Not Make Character Inferences

Within 0.1 seconds of meeting anyone, including as a juror listening to witness testimony, we have already formed an impression of them.[19] Almost immediately we have decided whether we think this person is honest, clever, likeable or dangerous based on superficial information that is outside of their control. Jurors, like the rest of us, then gather information about how the person has behaved, to subtly update and revise their character assessments.[20]

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[16] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020);

[17] Ram Hassin and Yaacov Trope, *Facing Faces: Studies on the Cognitive Aspects of Physiognomy,* 78 J. OF PERSONAL. SOCIAL PSYCHOL. 837, 837 (2000); Harriet Over and Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From?* 170 COGNITION 190, 190 (2018)

[18] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, SOC. PSYCH AND PERSON. SCIENCE 1, 1 (2020). Describing empirical support for the idea that face impressions have no correspondence with actual personality.

[19] Some are able to form impressions after less than .04 seconds of exposure! See, Sean Baron, et al., *Amygdala and Dorsomedial Prefrontal Cortex Responses to Appearance-Based and Behavior-Based Person Impressions*, 6 SOC. AND COGNITIVE AFFECTIVE NEUROSCIENCE, 572, 572 (2011); see also Thimna Klatt, et al., *Looking bad: Inferring criminality after 100 milliseconds* 12 *Applied Psychology in Criminal Justice*, 114-125 (2016).

Harriet Over and Richard Cook, *Where do spontaneous first impressions of* faces *come from?*170 COGNITION 190, 190 (2018)

[20] *See*, Peter Mende-Siedlecki, *Changing our Minds: the Neural Bases of Dynamic Impression Updating*, 24 CURR. OP. IN PSYCHOL. 72, 72 (2018); *see also* Irmak Olcaysoy Okten, Erica Schneid and Gordon Moskowitz, *On the Updating of Spontaneous Impressions*, 117 J. PERSONALITY OF SOC. PSYCHOL. 1 (2019); *see also* James Uleman, and Gordon Moskowitz, *Unintended Effects of Goals on Unintended Inferences,* 66 J. OF PERSONALITY & SOC. PSYCHOL. 490 (1996)

It turns out that this basic psychological process of forming immediate impressions of others lies beneath *all* of our social interactions. It has enabled humans to cooperate in costly endeavors, and to predict whether people would be good allies or cheats.[21] All day long we are constantly making predictions about others' behaviors and intentions based on their past actions and our assessments of their characters, which we incorrectly assume to be stable[22]. Because this process is spontaneous and subconscious, we cannot stop doing it when we become jurors in trials.

Humans are so motivated to infer people's traits that in the absence of information about how they have behaved, we will instead rely on crude proxies from race[23], dress,[24] accent[25], and facial features[26] to predict their personalities.[27] We spontaneously infer whether someone is threatening, kind,

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[21] *Id.* at 93.

[22] *See* Daniel Ames & Susan Fiske, *Outcome Dependency Alters the Neural Substrates of Impression Formation*, 83 NEUROIMAGE 599, 605 (2013) Indeed, if people are viewed as too inconsistent in their behaviors, this too is considered too indeterminate, which can lead to negative moral inferences. *See*, Peter Vranas, *The Indeterminacy Paradox: Character Evaluations and Human Psychology*, 39 NOUS 1, 29 (2005); Randy McCarthy and John Skowronksi, What Will Phil Do Next Spontaneously Inferred Traits Influence Predictions of Behavior, 47 J. EXP. SOC. PSYCHOL. 321, 330 (2011)

[23]Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases,* 2018 WISCONSIN LAW REVIEW 369, 386-87 (2018)

[24] "[C]lothing is not subjected to evidentiary rules. The smart prosecutor will instruct the victim to dress modestly at trial in order to present the victim as a 'good girl.' By doing so, and without uttering a word, the prosecutor is introducing evidence of the victim's character." See, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 876 (2018)

[25] [25]Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases,* 2018 WISCONSIN LAW REVIEW 369, 386-87 (2018) ("Implicit racial preferences and stereotypes about characteristics of racial groups are used to determine whether the defendant, witness, or victim is (or was) peaceful or honest or dishonest, or a variety of other characteristics."

[26] Alexander Todorov and James Uleman, *Spontaneous trait inferences are bound to actors' faces: Evidence from a false recognition paradigm*. 83 Journal of Personality and Social Psychology 1051 (2002)

[27] Harriet Over and Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From*? 170 COGNITION 190, 190 (2018)

intelligent or trustworthy—based only on the superficial features of their *face*.[28] We make these predictions immediately, unintentionally, and without even realizing we are doing so.[29]

Of course, perceiving someone's mouth and eyes can help to assess their present emotions. However, when drawing character inferences from faces, we cannot easily distinguish transient expressions from permanent facial features.[30] We overgeneralize, and wrongly assume that people's outward appearance reflects their fixed, interior lives.[31]

B. The Character Evidence Rules Prohibit Us from Doing Something We Evolved to Do

Despite providing inaccurate bases for prediction,[32] there is widespread agreement about what makes a face dominant, trustworthy, or agreeable.[33] Indeed, even computers that are trained to classify faces based on a number of

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[28] See Victoria Lee and Lasana Harris, *How Social Cognition Can Inform Social Decision-Making*, 7 FRONTIERS IN NEUROSCIENCE 259 (2013); see also Mark Thornton, ET AL., The Social Brain Automatically Predicts Others' Future Mental States, 39 JOURNAL OF NEUROSCIENCE 140 (2019); Harriet Over and Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From*? 170 COGNITION 190, 190 (2018)

[29] *See* David Pizarro and David Tannenbaum, *Bringing Character Back: How the Motivation to Evaluate Character Influences Judgments of Moral Blam*e, *in* M. Mikulincer & P.R. Shaver, THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 92 (American Psychological Association, 2012); see also Alexander Todorov and James Uleman, *Spontaneous trait inferences are bound to actors' faces: Evidence from a false recognition paradigm*. 83 Journal of Personality and Social Psychology 1051 (2002)

[30] Harriet Over and Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From*? 170 COGNITION 190, 196 (2018)

[31] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, Soc. Psych and Person. Science 1, 1 (2020).

[32] Bastian Jaeger, et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* (submitted for review, and available online) p. 16

[33] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. OF EXP. SOC. PSYCHOL. 104004, at p. 5 (2020).;

objective characteristics can predict personality traits that are consistent with human observation. This is based on the reliable, if inaccurate, perceived correlations between physical features and character traits.[34]

Our human brain evolved to facilitate social interactions by crudely predicting character traits. For example, our brains are wired to prioritize memories of immoral conduct, to help us sort people into those with good and bad characters.[35] Moreover, people with lesions in a specific part of the brain, the medial prefrontal cortex (mPFC), have difficulty forming impressions of others due to deficits inferring character traits.[36] The fact that we have evolutionarily conserved brain architecture for forming character impressions of others tells us something about its importance to our ancestors.[37] Convergent data from behavioral and neuroimaging studies demonstrate the continued social value of being able to make quick character assessments.[38]

In addition to being supported by evolutionary mechanisms, these automatic facial inferences are reinforced by social learning (such as glasses cue intelligence, or Black people are more likely to be violent).[39] This leads to less

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[34] Connor Parde, et al., *Social Trait Information in Deep Convolutional Neural Networks Trained for Face Identification*, 43 COGNITIVE SCIENCE e12729 (2019).

[35] L.J. Chang & Alan Sanfey, Unforgettable Ultimatums? Expectation violations promote enhanced social memory following economic exchange, 3 FRONT. BEH. NEUROSCI. 1-12 (2009)

[36] Chiara Ferrari, et al., *The dorsomedial prefrontal cortex mediates the interaction between moral and aesthetic valuation: a TMS study on the* beauty-is-good *stereotype*, 12 SOCIAL COGNITIVE AND AFFECTIVE NEUROSCIENCE, 707–717 (2017); see also Ning Ma, et al., Spontaneous and intentional trait inferences recruit a common mentalizing network to a different degree: spontaneous inferences activate only its core areas, 6 Social Neuroscience 123-38 (2011)

[37]Behavior-based impression formation is critically dependent on the dorsomedial prefrontal cortex (dmPFC) while making evaluations based on facial characteristics appears to recruit the amygdala. *See*, Mende-Siedlecki, *supra* note 7, at 72 (2018).

[38] Lee and Harris, *supra* note 5, at 11 (2013).

[39] Clare Sutherland, et al., *Individual Differences in Trust Evaluations are Shaped Mostly by Environments, Not Genes*, 117 PNAS 10218, 10218 (2020). But see, Sutherland, et al., *Social Learning and Evolutionary Mechanisms Are Not Mutually Exclusive*, 28 PNAS 16114, 16114 (2020).

accurate predictions about individual's future behavior, and also to systematic discrimination against people with particular, often racialized, characteristics.[40] These heuristics can create a feedback loop where learned stereotypes about difference races or ethnic groups inform character inferences, which then feed back into the negative stereotypes. We reinforce the association between certain facial features and positive or negative traits through political cartoons, news media, criminal prosecutions, or discriminatory propaganda.[41]

The psychological processes facilitating these inferences developed in our deep ancestral past, when we traveled in homogenous groups and rarely intermingled with other races or ethnicities. However, despite greater genetic and cultural diversity, they endure.[42] Psychologists hypothesize this is because 1) the heuristics are fast and efficient, requiring very little cognitive effort, and 2) we implicitly assume facial cues are more predictive of behavior than they are.[43]

Despite the primacy with which humans use character traits to predict how others may have acted at another time, this sort of reasoning is *explicitly prohibited* in civil and criminal trials. As mentioned briefly above, attorneys are not allowed to introduce evidence of someone's past acts or traits for "propensity purposes." That is, attorneys cannot suggest that someone acted in conformity with a trait or behavior on a particular occasion.

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[40] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 1-2 (2020).

[41] Harriet Over and Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From*? 170 COGNITION 190, 195(2018)

[42] *See* Harris, *supra* note 87, at 419. ("Eighty years of social psychological research argues that trait inferences serve as heuristics—spontaneously generated mental shortcuts—to predict behavior, allowing people to generalize from prior behavior to predict future behavior often at the expense of base-rate normative information.")

[43] The belief that personality traits are reflected in a person's facial characteristics is called "physiognomy." See, Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020).

If this tendency to infer character traits is as implicit and ubiquitous as I suggest, then how could courts *possibly* hope to enforce such a far-reaching ban? At the heart of the answer is our magical thinking about jurors and trials. Our rules of evidence presume that jurors can and should suspend the very attributes that make them human—namely, their emotional, social, and in some cases their moral intuitions.[44] The common law rules of evidence and the federal rules of evidence (FRE) imagine that judges can put a halt to many subconscious and automatic human inferences by either explicitly prohibiting any evidence that triggers them, or by issuing limiting instructions that jurors disregard particular inferences.[45] There is abundant research that these limiting instructions do not work, and might actually backfire by drawing attention to the very thing that is meant to be ignored.[46] If a witness is described as a "junkie" or a "racist' the jury is almost certainly going to infer something negative about the kind of person the witness is. This is going to happen regardless of any instruction that the evidence only be used for purposes of assessing impeachment, the accused's motives, etc.[47]

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[44] *See*, Teneille R. Brown, *The Affective Blindness of Evidence Law*, 88 U DENVER LAW REV. 47, 47-48 (2011) ("Contrary to the skeptical view espoused by some of our greatest evidence scholars, emotion is not universally corrupting, nor is it always at odds with reason. Emotion is context-specific and non-linear, and it operates at varying levels of consciousness and subtlety. Further, the cognitive sciences demonstrate that affect and reason are anatomically interconnected and functionally interdependent.")

[45] And of course, on top of our magical thinking about jurors lies the truly aspirational thinking about the capacity of judges. Judges are presumed to be capable of the herculean task of dodging most human cognitive biases, simply by virtue of the robes they wear and experience they have had. *See* Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 790 (1998)

[46] Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 66 (2011)

[47] For example, when jurors heard about the infamous "Mark Fuhrman tapes," where an LAPD detective on the O.J. Simpson case was interviewed for a potential screenplay and repeatedly used racial slurs and casually discussed police brutality, was introduced not to prove the detective was a racist, but to impeach his testimony that he had not used a particular racial slur in over a decade. However, once this evidence was heard, Fuhrman's racism colored every aspect of the prosecution.

Most of our evidentiary rules developed when we had no data on whether jurors *could* be perfectly rational (some might say psychopathic, or robotic) in their legal reasoning. However, the last fifty years have produced a great deal of knowledge about the powerful forces of social psychology and emotion, which operate in the wings of the theater of trials. In many cases, automatic and unconscious psychological inferences—the product of millions of years of evolution and psychology—cannot simply be muted by carefully orchestrated evidence rules. We must revise the character evidence rules to reflect what psychologists already know—that people cannot *not* make character inferences.

The Article will proceed in four parts. The first part is this introduction, which situates the history and problems applying the current rule. The second part will detail why the common law got it right—we do tend to assume that behavior can be explained by people's fixed traits, but that this is not always an error.[48] In the third and most novel part of the article, I describe how humans immediately use spontaneous trait inferences (STIs) to engage in person-centered blame.[49] In the fourth part, I articulate and defend my proposed revisions to the character evidence rules, in light of the undisputed findings from social psychology. Ironically, to achieve the normative commitments of the rule, we must permit more character evidence, rather than less.

> <u>*My proposed rule 404*</u>:
>
> 404(a) Evidence of a person's character, trait, or past acts ("character evidence") may be admissible to prove that on a particular occasion a person acted in accordance with that trait.

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[48] "In other words, evidence of repetition of behavior, or propensity, can be good evidence. People who commit armed robberies on particular occasions are more likely to commit them on other occasions. For other kinds of crimes, such as child molestation or heroin possession, the inference of repetition is even stronger; in fact, it is powerful." Crump, *supra* note 13, at 626.

[49] *See* Samuel Johnson, et al., *Predictions from Uncertain Moral Character*, *in* PROCEEDINGS OF THE 41ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY (2019). Curran Associates, Inc.; *see also* Thornton ET. AL., *supra* note 5, at 140.

> (b) If the judge makes a preliminary determination that the character evidence speaks to a trait that is not considered immoral, the evidence should be admitted subject only to the balancing test of rule 403.
> (c) If the judge makes a preliminary determination that the character speaks to a trait that is considered immoral, it is admissible only if:
> (1) its probative value substantially outweighs its prejudicial effect; and
> (2) if offered against a criminal defendant, the occurrence of the past act is proved by clear and convincing evidence, and
> (A) the proponent gives reasonable written notice to defense counsel of the intent to use it so that the criminal defendant has a fair opportunity to contest its use.
> (B) If contested, the judge should provide a record of the reasoning used to admit or exclude this evidence.

My proposal recognizes that in some cases character evidence can be substantially more probative than prejudicial, and should therefore be admitted. It also permits evidence of past acts that are not considered bad, or immoral, subject only to the balancing test of rule 403.[50] This removes a great deal from the rule's crosshairs, and retethers it to its normative, moral roots. If the character evidence triggers an inference that someone is immoral, my rule adopts a strong presumption against admissibility that can be overcome only if the evidence is substantially more probative than prejudicial. Judges are familiar with this balancing test as it is the one employed under rule 609 for credibility impeachment evidence.[51] Finally, and perhaps delivering the greatest balm to

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[50] FEDERAL RULE OF EVIDENCE 403 states "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."

[51] The arguments I provide here could likewise be used to motivate evidence committees to revise rule 609 as well. Indeed, all credibility impeachment evidence could be treated under the proposal I suggest. However, there is no immediate reason to subsume the credibility impeachment inquiry of FRE 609 into that of FRE 404.

judges and attorneys everywhere, the admissibility of character evidence would no longer hinge on the gossamer-thin distinction between propensity, and non-propensity, uses. This aspect of the rule generates widespread confusion, logical mistakes, and is why it is the most frequently litigated evidence rule and the most likely basis for reversal.[52] My proposed rule will permit the many instances where past acts are critical for demonstrating victim credibility, or to rebut a claim of fabrication, while prohibiting many non-propensity uses that are likely to be more prejudicial than probative.

The ban on character evidence only heightens our reliance on unreliable facial traits. If we deny jurors information about how an accused has behaved in the past, they will instead subconsciously rely on immutable facial characteristics rooted in race, class, or sex, that will be even more inaccurate and unfair. But all hope is not lost. Research suggests that the effects of facial impressions may be mitigated through training. This training does not involve simple instructions about the presence of automatic inferences and the need to silence them. Instead, it involves sharing counter-stereotypical information about how the individual has actually behaved. Quite simply, the effect of automatic face impressions may be mitigated by hearing about a witness's past acts.[53] Counterintuitively, to achieve the goals of the character evidence ban we should permit more character evidence, rather than less.

C. In Practice, Lots of Character Evidence is Admitted

Technically speaking, the ban on character evidence applies to all types of conduct, all types of traits, and to all human beings. Before we think that the

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[52] [52]Edward J. Imwinkelried, *Uncharged Misconduct*, 1 CRIM. JUST. 6, 6, (1986). See also, Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 576 (1990).

[53] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, Soc. Psych and Person. Science 1, 1 (2020).

rule is constantly fighting human nature and losing, however, this is not the case. Because the ban is so incomprehensibly far-reaching, it is simply quite often ignored. Many types of evidence fly under the radar. Character evidence is routinely admitted when the rules, if applied carefully, would preclude it. For example, if a prosecutor referred to the defendant as having purchased a home in a gated community and hiring a driver, to suggest that he acted in conformity with being a posh and snobby person, this would implicate the character ban and the evidence should not be admitted.

Determining whether the character ban is implicated hangs on strategic framing and context, and how clever the attorneys are in filing motions *in limine*, objecting in real-time, and explaining circumstantial evidence as implicating propensity evidence.[54] Unless attorneys astutely raise objections, instances of "character evidence" likely fly under the radar. And if there is no objection made to preserve the erroneous admission, there is no possibility of correcting this on appeal.

There are also examples of where character evidence should be excluded, but it is considered and permitted for policy reasons. A former federal judge and evidence scholar observed, that '[i]f the prior bad acts involve sexual misconduct, or child abuse, or a combination of both, courts generally find a theory of admissibility, even if no specific theory of admissibility makes sense."[55] It is perhaps difficult to know just how often this occurs—that is, attorneys and judges skirting technical application of the character evidence rules. The Advisory Committee to the Federal Rules of Evidence recently discussed, but ultimately rejected, adding a notice requirement to make it harder

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54 Daniel D. Blinka*, Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 89 (2013)

55 *See* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 227 (2018–19 ed.), as cited in *State v. Murphy,* 441 P.3d 787, 802, *reh'g denied* (Jan. 27, 2020) (J. Harris, concurring).

for prosecutors to admit past acts evidence for propensity purposes in criminal cases.[56]

1. Common Law Exceptions Permit Many Forms of Character Evidence

In addition to flat out ignoring the ban, courts have always permitted certain uses. For example, jurors are explicitly invited to make predictions about people's actions according to their character traits when it is an element of the offence, when sentencing, or assessing money damages.[57] Early adultery cases used to (but no longer) require character evidence to vouch for the character of witnesses, even before their character was attacked.[58] If testifying at trial, one's character for dishonesty or bias is considered so relevant that to this day it is almost always admitted.

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[56] See, for example the recent discussion within the Advisory Committee to the Federal Rules of Evidence, which contemplated requiring prosecutors to articulate the "non-propensity purpose for which the prosecutor intends to offer" the past act evidence under 404(b) "and the reasoning that supports the purpose." This language was ultimately not recommended in the amendments to the rule. The Advisory Committee did propose amendments related to the triggering and format of notice requirements for prosecutors in criminal trials. These changes will go into effect Dec. 1, 2020. See, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, May 14, 2019 Report of the Advisory Committee on Evidence Rules (revised July 16, 2018) at p. 40-41. Available online at https://www.uscourts.gov/sites/default/files/2018-08-15-preliminary_draft_rev._8-22-18_0.pdf

[57] See, Chris William Sanchirico, *Character Evidence and the Object of Trial,* 101 COLUM. L. REV. 1227, 1282 (2001). In these instances, jurors are asked to use evidence of someone's past acts or character traits to predict conformity with that trait. *See Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054-55 (2018). For older examples, *see also Umphrey v. Deery*, 78 N.D. 211, 235, 48 N.W.2d 897, 909 (1951); *see also City of Chicago v. Scholten,* 75 Ill. 468, 472 (1874)

[58] "It further provides that the credibility or good character of such witnesses must be personally known to the judge, or to the officer taking the deposition, who shall so certify, or it must be proved. It is insisted that the credibility or good character of the witnesses who testified to the improper conduct of the wife in this case was not certified by the officer taking the deposition; that it was not proved and it was not personally known to the judge." *Colyer v. Colyer*, 233 Ky. 752, 26 S.W.2d 511, 512 (1930)

There are a number of common law exceptions built into the current character rules.[59] The "mercy rule" allows criminal defendants to admit evidence of a "pertinent trait" of the victim or of himself, and the prosecution and the prosecution is then allowed to rebut this. In homicide cases, the prosecution may also introduce evidence of the victim's character for peacefulness to rebut defendant's claim of self-defense.[60] Finally, Congress and state legislators have also passed evidence rules that permit character evidence in sexual assault cases.[61] From the beginning of the common law, there have been many *de facto* and *de jure* exceptions to the bar on the use of character evidence.

2. Demeanor Evidence Invites Unregulated Character Evidence

Character evidence also plays a huge role, explicitly and implicitly, in assessing credibility.[62] Jurors infer witnesses' characters from the way they look, dress, speak, and behave in court. If witnesses fidget too much, we assume they

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[59] The drafters included exceptions that allows homicide defendants to bolster their characters for a pertinent trait, which opens the door for the prosecution to do the same. In self-defense cases, the prosecution may also introduce character evidence of the victim's nonviolence to demonstrate that he was not the first aggressor. Parties may also introduce character evidence in defamation or child custody cases, where it is deemed to be a central issue to the claims.

[60] FEDERAL RULES OF EVIDENCE 404(a)(2).

[61] See R.P. Davis, Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses, 77 A.L.R.2d 841 (Originally published in 1961); see also David Crump, The Case for Selective Abolition of the Rules of Evidence, 35 HOFSTRA L. REV. 585, 630 (2006) ("[T]here is another explanation [for the passage of FRE 412-415]: the lobbying efforts of feminists, who particularly targeted rape, coincided with the inclinations of a Senate Judiciary Committee that favored broad admissibility of evidence in criminal cases. In other words, the difference between the usual character rules and Rules 413 through 415 is the product of political forces.")

[62] "That tension between our reluctance to convict based on character and our recognition of its frequent relevance has led to policies that are sometimes unjust in principle and unworkable in practice." See Deborah L. Rhode, Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole, 45 AM. J. CRIM. L. 353, 357 (2019)

are dishonest, despite this behavior having no connection to honesty.[63] Trial consultants are well aware of the effects of superficial grooming and demeanor. They tell clients to dress in particular ways to communicate character traits, e.g., "wear a suit to directly communicate respect for the court and authority."[64] A nationwide survey of over 3000 individuals found that people are likely to perceive those who wear eyeglasses as smart and sophisticated, dependable and industrious.[65] This is why attorneys frequently counsel their clients to dress professionally, to wear glasses, groom their hair and to even cover tattoos. If the defendant happens to have the good fortune of being attractive, they are less likely to be found guilty, and the recommended sentences are lighter.[66] This is what Bennet Capers aptly referred to as "evidence without rules" as this demeanor evidence is heard by the jury but is not really regulated.[67]

One might then suggest that we blind jurors to *any* identifying characteristics of the witness that could be unfairly used to infer character traits. But this is not a realistic option. Observing the face and demeanor of a witness has been considered so important, that some argue it is required to comply with the criminal defendant's Sixth Amendment right to confront their accusers.[68]

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[63] Blake McKimmie, Barbara Masser, & Renata Bongiorno, Looking Shifty but Telling the Truth: The Effect of Witness Demeanour on Mock Jurors' Perceptions, 21 PSYCHIAT. PSYCHOL. & THE LAW 297 (2014)

[64] Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 876–77 (2018)

[65] Michael Brown, Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions, 23 The Jury Expert: American Society of Trial Consultants (2011), available online at http://www.thejuryexpert.com/wp-content/uploads/TJEMarch2011-Is-Justice-Blind.pdf

[66] Michael Efran, The effect of physical appearance on the judgment of guilt, interpersonal attraction, and severity of recommended punishment in a simulated jury task, 8 JOURNAL OF RESEARCH IN PERSONALITY, 45-54 (1974)

[67] See, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018)

[68] "Live testimony has, since its inception, been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor, and to a belief in the importance of demeanor in the assessment of credibility and character. Demeanor evidence "relies heavily on the interpretation of facial expression and body language." Susan A. Bandes, and Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom,* 68 BUFF. L. REV. 1275, 1283 (2020)

And even if we returned to the dreaded trial by affidavit, jurors would still infer character traits from the wording of the affidavit itself.[69] People cannot *not* infer character traits.[70]

As the Court stated in *Maryland v. Craig*, observing demeanor is indeed one of the key elements to the confrontation right, as it ensures "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings."[71] Accommodations for the COVID-19 pandemic as well as religious free exercise challenge the idea that we must always be able to have unobstructed views of people's faces to respect constitutional guarantees.[72] It may not be that observing demeanor evidence always assists jurors in determining issues of reliability or credibility. Even so, "many observers question the ability of a judge or jury to determine credibility without seeing a witness's face."[73] Given the confrontation clause right and the need for juries to observe demeanor evidence, this problem cannot be solved by removing "facial evidence" from trial. Indeed, if we seek to reduce unfair stereotypes rather than capitulate to them, this is better done through presenting counter-stereotypical information. Removing their presence from the jury may only lead to erasure and an exacerbation of racist, sexist, ageist, and ableist thought.

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[69] "Spontaneous trait inferences are inferences that people form upon reading about or observing other people's trait-implying behaviors." See, SoYon Rim, et al., *Seeing others through rose-colored glasses: An affiliation goal and positivity bias in implicit trait impressions*, 39 J. OF EXP. SOCIAL PSYCH. 1204, 1205 (2013).Frank Van Overwalle, et al, *Spontaneous goal inferences are often inferred faster than spontaneous trait inferences,* 48 JOURNAL OF EXPERIMENTAL SOCIL PSYCHOLOGY 13, 16 (2012).

[70] Spontaneous trait inferences and character assessments rely on the "four horsemen" of automaticity—they occur without awareness, are unintentional, we lack control over them, and they are efficient. *See* Harris, *supra* note 87, at 420. see also Irmak Olcaysoy Okten, Erica Schneid and Gordon Moskowitz, *On the updating of spontaneous impressions*, 117 J PERS SOC PSYCHOL 1-25 (2019)

[71] *Maryland v. Craig*, 497 U.S. 836, 846 (1990)

[72] Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 170 (2020)

[73] Adam Schwartzbaum, *The Niqab in the Courtroom: Protecting Free Exercise of Religion in A Post-Smith World*, 159 U. PA. L. REV. 1533, 1567 (2011)

D. The Broad Scope of the Modern Character Evidence Rule

Despite the many *de facto* and *de jure* exceptions, the scope of the rule is vast and should prohibit a great deal of evidence. Federal Rule of Evidence 404(a), as adopted, merely states that "evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[74] While there is some variation between states on how they phrase this rule, many are identical to the federal version.[75] What is prohibited is the *necessary propensity reasoning* that because someone stole something before and is a thief, they are more likely to have stolen on another date. If propensity reasoning is not required, but is merely possible, then the evidence can be admitted with an instruction limiting the jury to its non-propensity use.

While the common law was principally concerned with jurors hearing about a *criminal* defendant's past *bad* acts, the modern rule bans moral, immoral, and amoral, character traits against any person in civil and criminal trials—parties and witnesses alike.[76] To make it concrete, the ban works this way: if a

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[74] FED. R. EVID. 404(a)(1).

[75] "The rule prevailing in England and in most of the American states, that evidence of character is not usually received when offered for the purpose of throwing light on the probability of the doing of a certain act by the person whose character is in question, is not of force in this state. The contrary doctrine has been recognized in our jurisprudence from a very early date." *McClure v. State Banking Co.*, 6 GA. APP. 303, 65 S.E. 33, 33 (1909) The Utah equivalent states "in conformity" rather than "in accordance" but is otherwise identical. Just because the plain language is often identical, however, states may interpret the rules in unique ways.

[76] *See* 1 FEDERAL EVIDENCE TACTICS § 4.04 Lexis (2020) (Rule 404(b) appears on its face to apply in civil and criminal, but often not taken as seriously or applied at all in civil cases) *See also* Andrew Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 7-8 (2003) ("Note that this definition, contrary to the definition of "character" offered by some commentators, does not necessarily have a moral connotation: the testimony need not concern whether the defendant is in some sense a good or a bad person. This makes sense because a conception of character evidence based solely on morality would be inconsistent with the policy concerns that have

driver wanted to prove that a pedestrian was likely drunk when he crossed the street, and it was his intoxicated state, and not the driver's negligence that caused his injuries, the defense could *not* introduce evidence that the injured plaintiff was a notorious alcoholic. Or, if an executive were accused of defrauding investors at his last two jobs, evidence that he had done so could not be used to suggest he defrauded investors at his current job. To prove that a civil defendant is a compassionate person and this is why he would have behaved in a kind way toward the plaintiff, an attorney could not introduce evidence of this person spending several hours volunteering at a local soup kitchen. It is a really sweeping rule that covers so much more than most lawyers realize.

Character evidence is defined to include traits like being violent, as well as past acts that insinuate that someone is violent, such as having previously started three brawls. *Not* acting in conformity with a trait can also be character evidence. For example, psychiatric evidence that an individual accused of sexually deviant misconduct is *not* a sexual psychopath is typically regarded as character evidence under state and federal evidence rules.[77]

Crucially, it is not evidence of someone's traits or past acts *per se* that is prohibited, but when factfinders are invited to make predictions about how this person will behave in the future or how they have behaved in the past. Evidence that is used for a purpose other than an inference about one's propensity to behave in a certain way is not subject to the ban. This is referred to as a "non-propensity purpose." Unfortunately, given the history behind the rule, attorneys and judges sometimes incorrectly assume that evidence that is immoral in nature implicates the rule, even when there is no propensity reasoning.[78]

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led courts to treat such evidence cautiously.")

[77] *See Freeman v. State*, 486 P.2d 967, at 972 (Alaska 1971)

[78] In *Barry v. Aldridge*, 2016 WL 1060249, at 8 (West 2016), the court erroneously assumed that evidence of the defendant's lack of emotion when her baby had just been murdered was character

FRE 404(b) lists various uses of character or past acts evidence that are thought not to require propensity reasoning. Historically, judges have argued that when attorneys use evidence of someone's past acts to impeach their testimony or prove their *mens rea*, identity, or a *modus operandi,* propensity reasoning is not required. In 1893, in *U.S. v. Moore,* the Court stated that if past acts provide a *motive* for the present charge, then they are competent and admissible.[79]

These uses are permitted, judges have held, because they are thought to avoid making character-based arguments about the defendant being more likely to behave in a particular way. Instead, these arguments ostensibly rely on more "objective" claims of probability that have nothing to do with the individual's character. These uses are commonly referred to as either "other crimes," "uncharged misconduct," or simply "past act" evidence. As you may gather from my framing, with the exception of motive and impeachment uses, these stand on very shaky logical ground.[80] More will be said below about the problems with this sort of reasoning.

E. The Character Evidence Ban Leads to Many Appeals and Acquittals

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evidence, despite the fact that its use did not require propensity reasoning. Focusing on the morality of the evidence, rather than whether it implicates rule 404, has led many courts astray.

[79] "The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent." *Moore v. United States*, 150 U.S. 57, 61, 14 S. Ct. 26, 28, 37 L. Ed. 996 (1893). For a general history of the federal common law related to character evidence, *see also* Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, (1982).

[80] *See* Imwinkelried, *supra* note 19, at 588.

Character evidence has been called "the most important evidentiary issue in contemporary criminal practice."[81] Errors in applying the rule yield more reported decisions than *any other rule of evidence*. In many jurisdictions the admission of someone's past bad acts for character inferences provides the *most frequently litigated* issue in criminal appeals as well as the *most likely basis for reversal*.[82] A recent Westlaw search of state and federal cases for just the last five years resulted in over 800 published appeals based on perceived misapplications of this rule. This rule devours a significant chunk of trial and appellate resources. It is likewise difficult to overestimate how much scholarly ink has been spilled on the topic, as scholars recognize how illogical the rule has become. Hopefully in spilling just a tad bit more ink here, we can gain clarity on why the rule needs revising. We now have the benefit of many more years of robust social psychological research, which points toward a rule that is incoherent and expects results that humans cannot give.[83]

Scholars and judges before me have acknowledged how tricky the character evidence rules are to apply.[84] Even the United States Supreme Court

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[81] Edward J. Imwinkelried, Uncharged Misconduct, 1 CRIM. JUST. 6, 6, (1986). See also, Edward J. Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 OHIO ST. L.J. 575, 576 (1990).

[82] Imwinkelried, *supra* note 19, at 7 (1986).

[83] *See*, Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 730 (1998) (stating that psychology scholarship has little to say about whether to reform FRE 404(a)-(b))). ("For decades law professors have been debating whether social psychology had anything relevant or helpful to say about the character evidence ban. Early studies on the theories of dispositionism or situationism struggled to gain purchase, in part because the research was still developing and the findings were preliminary. This is no longer the case as it relates to impression formation and the role of morality in predictions of others' behavior.")

[84] "[The] rule also has been subjected to withering criticism. But the character evidence rule--which bars the "circumstantial" use of character--is not yet dead. Moreover, the character evidence rule still has many defenders. (Indeed, in the legal community the rule's defenders seem to outnumber its critics.)" *Id.* at 781. See also, Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 776 (2013) (The rule's coherence has degraded so badly that the justifications for the rule and the tools for applying it are anemic in all but the clearest cases.")

has "concur[ed] in the general opinion of courts, textwriters and the profession that much of this [character evidence] law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other."[85] According to many, however, reform is not, and should not be, on the horizon. Conservative scholars and judges contend that the rules are "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions."[86] Reformers have also been told that the rules may be incoherent, but their justifications rest "more in history than in logic."[87] According to the Supreme Court, to reform the rules would be to pull out "one misshapen stone" that might upset the artificial evidence framework we have constructed and cause it to come crumbling down.[88] Evidence law is thus too precarious to be reformed.[89]

Such claims are unnecessarily pessimistic, and reflect a lack of will, rather than a sincere acknowledgment that reforms are impossible.[90] Even in the United Kingdom, from where we borrowed the concept of the ban on character evidence, the character evidence rules have been significantly revised.[91] There,

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[85] *Michelson v. United States*, 335 U.S. 469, 486 (1948)

[86] *U.S. v. Dimberio*, 56 M.J. 20, 25 (2001) (quoting FED. R. EVID. Advisory committee note to Rule 404).

[87] *See* Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 584 (1956).

[88]. *Michelson v. United States*, 335 U.S. 469, 486 (1948)

[89] Mirjan Damaska, EVIDENCE LAW ADRIFT Yale Univ. Press: New Haven (1997) at p. 26-30.

[90] "Yet as weak as the character rule is, there is no apparent political will to simply abolish it altogether and adopt the Continental view, admitting character evidence whenever it is relevant." *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 791 (2013)

[91] The United Kingdom, which gave us the common law ban, has reformed its character evidence rules to admit it in many forms if it will not lead to unfairness in the trial. *See*, Criminal Justice Act 2003 c.44 §§ 98-112.1 (Eng.); *see also* Michael Stockdale, Emma Smith, Mehera San Roque, *Bad Character Evidence in the Criminal Trial: The English Statutory Common Law Dichotomy—Anglo-Australian Perspectives*, 3 J. Intl. & Comp. Law 441, 443-44 (2016) "In the United Kingdom since the passage of the Criminal Justice Act of 2003, 'bad character evidence, or BCE' is presumed inadmissible. There are seven ways that the BCE may be admitted, and once admitted under any of them, use of the BCE is not

the rule now applies only to "reprehensible" conduct,[92] and can be admitted so long as it meets specific criteria. And yet, in the United States the rules of evidence have somehow proved to be "particularly hardy weeds that manage to survive even when there is no good reason for their continued existence."[93]

Judges have rationalized a conservative approach to reform by stating that our current rules are "workable even if clumsy."[94] They are *workable* because of the deference given to trial judges on evidentiary questions. Accountability for imperfections fall most often with individual litigants who may not have the financial means or legal support to appeal. They are *workable* because we have come to expect a system that is slow, wasteful and complicated. They are *workable* because many attorneys and judges find the rules surrounding character evidence so confusing, that they are permitted to employ thin reasoning to justify inclusion or exclusion on these grounds, and their reasoning often goes unchecked. To be sure, this doctrine is not workable at all—it is just insulated from sufficient scrutiny and its normative roots make it resistant to reform. Against those who think we should avoid tinkering with our rules of evidence, lest the walls come tumbling down, a thorough review of the case law suggests that our framework is already crumbling.

F. The Rule's Normative Roots Make It Resistant to Reform

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limited to the gateway through which it was admitted."

[92] CRIMINAL JUSTICE ACT 2003, *supra* note 31, §106(2)(b); *see also* James Goudkamp, *Bad Character Evidence and Reprehensible Behaviour* , 12 INT'L J. EVIDENCE & PROOF 116, 116-17 (2008).

[93] Tillers, *supra* note 9, at 782; *see also* Brown *supra* note 8, at 131.

[94] Michelson v. United States, 335 U.S. 469, 486, (1948); See also, D. Michael Risinger & Jeffery L. Loop, Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence, 24 CARDOZO L. REV. 193, 195 (2002) (As Michael Risinger points out, a lack of enthusiasm for reforming the rules of evidence is not too surprising, given that "judges in general do not depart easily from the way things were done yesterday.")

Despite rampant confusion surrounding the ban, there is a reason we have kept it largely intact for hundreds of years: it has principled roots. As mentioned above, the ban on character evidence is based on the idea that criminal defendants should not be punished for having bad reputations, or for having done bad things in their past. Instead, the jury should only look to what the defendant was accused of doing in *this* case to determine whether the prosecution has met its burden of proof.

The rule echoes, but is not required by, important constitutional guarantees such as the presumption of innocence and protection from double jeopardy.[95] When federal courts began admitting evidence of past sexual assaults under the new FRE 413, appellate courts roundly rejected the arguments that these rules violate the accused's constitutional rights.[96] Indeed, as one federal court stated with reference to admitting evidence of past misconduct in sexual assault cases, "[t]hat the [character evidence ban] is ancient does not mean it is embodied in the Constitution."[97]

Even so, the character evidence ban exemplifies a libertarian spirit of autonomy and rehabilitation: yes, you did bad things before, but there is hope. You can still be reformed.[98] The historical essence of the rule is thus unambiguously moralistic and optimistic about the potential for people to change.

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[95] Kenneth J. Mellili, *The Character Evidence Rule Revisited*, 1998 B.Y.U.L. REV. 1547, 1618 (1998) *See also*, *United States v. LeMay*, 260 F.3d 1018, 1024–25 (9th Cir. 2001) (upholding the admission of past sexual assaults for propensity purposes as constitutional, the Ninth Circuit stated that "the Supreme Court has cautioned against the wholesale importation of common law and evidentiary rules into the Due Process Clause of Constitution.")

[96] Mellili, *supra* note 22, at 1618; *see also U.S. v. Mound*, 157 F.3d 1153 (1998)

[97] *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998), *opinion clarified*, No. 96-2285, 1998 WL 133994 (10th Cir. Mar. 25, 1998).

[98] *See* Tillers, *supra* note 9, at 806.

Unfortunately, the present rule is both overly broad and overly narrow in pursuit of these normative commitments.[99] The rule permits evidence that is quite prejudicial and inviting moral approbation, while excluding highly probative evidence that is either amoral or unlikely to cause unfair prejudice.[100] This Article seeks to retether the rule to its normative justifications, by focusing our attention on the ways character evidence *can* be overly prejudicial, but to permit it in the cases where it is not.

G. What is Character, And How Does it Affect Legal Blame?

Our modern notion of character has been heavily influenced by Aristotle. Aristotle conceived of character traits as being long-term and relatively stable dispositions to act in particular ways. According to his philosophy, without a grounding in morality, character traits such as honesty or kindness could not be virtuous.[101] Put simply, Aristotle found character to be inextricably linked with morality, and this morality must be developed through lived experience and perception, not through memorization or academic learning.[102]

One scholar interprets Aristotelian ethics as embodying a view of moral character as a moderation between extremes. Thus, "[c]ourage is a mean between rashness and timidity…benevolence is a mean between stinginess and

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[99] Other rules of evidence, such as hearsay, also lack a coherent justification, and may rest on outdated assumptions of human behavior (such as people being more honest about their intentions than their memories, or that people are more likely to tell the truth right before they die). To be sure, this problem is not unique to the character evidence rules.

[100] Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994) ("Moreover, the latest psychological research suggests that character evidence may be more probative than we have traditionally assumed it to be.")

[101] *See* Jennifer Ray et al., *The Role of Morality in Social Cognition*, *in* THE NEURAL BASES OF MENTALIZING. (forthcoming Dec. 2020) (manuscript at 2).

[102] Jonathan Haidt and Selin Kesebir, *Morality* in S.T. Fiske and D. Gilbert (Eds), Handbook of Social Psychology (5th ed) at p.3.

profligacy."[103] The extremes constitute the vices, and moderation, the virtue. There is a certain agnosticism to the environment in this account of virtue. Many traits that might have been considered unvirtuous to Aristotle might be better explained today in terms of luck.[104]

Partly in response to a greater sensitivity to the role of the environment, virtue ethics began to fall out of favor. For the last several hundred years, most applied ethicists have championed either the obligations-based account of Immanuel Kant or the outcomes-based account of Jeremy Bentham, or some combination of the two. The former speaks to moral obligations based on the quality of the acts themselves, and the latter speaks to obligations based on the consequences of those acts.

We see a great deal of these two philosophies, and the tensions between them, in our legal systems. Rather than offering a competing view of character, these camps de-emphasized its importance. While the intent of the actor matters a great deal in the Kantian account,[105] in both Kantian and utilitarian views on ethics, the character of the actor should be largely irrelevant. This view of character influenced the thinking of evidence giant, John Wigmore. It is also the view embodied in our U.S. constitution and legal rules.

In the late nineteenth and early twentieth centuries, Wigmore understood character evidence to encompass "the actual moral or psychical disposition or sum of traits" of an individual.[106] To him, there was never an appropriate dispositional inference to be made from "the bad moral character of a

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[103] Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, https://www.princeton.edu/~harman/Papers/Virtue.html (last visited Sept. 16, 2020).

[104] *See* Pizarro and David Tannenbaum, *supra* note 3, at 95 (virtue ethics is experiencing a resurgence called the "Aretaic Turn").

[105] *Id.* at 94.

[106] 1A John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §52, at 1148 (Peter Tillers ed., rev. ed. 1983).

defendant." Character depended too much on circumstance and "human action [is] infinitely varied."[107]

It is clear that Wigmore also assumed character evidence to be moral. This is based on the way he contrasted it with the use of amoral evidence of physical strength. Wigmore argued for the routine admission of evidence that someone had the physical capacity, skill, or means to do an act, and cited favorably to cases that permitted physical evidence for propensity purposes.[108] Here, because physical strength was not considered to be moral or stigmatized, "instances of the person's conduct and acts, manifesting the existence in him of such power and strength, are natural and proper evidence of it."[109]

However, according to Wigmore, when the past acts were immoral, they should never be heard by the jury. To do otherwise discounts people's abilities to be rehabilitated, and thus runs counter to the traditional American ideals of libertarianism, free will, and autonomy.[110] There is no need to be rehabilitated or break free from a past that is morally neutral or even righteous.

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[107] John Henry Wigmore, A Pocket Code of the Rules of Evidence in Trials at Law 64 (1910) ("[I]t must be noted that when the doing of an act is the proposition to be proved there *can never be a direct inference from an act of former conduct to the act charged*; … Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again." *Id.* at 1857.

[108] John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW (revised by Peter Tillers) Little Brown and Co.: Boston (1983) Evidence to Show Physical Condition or Capacity, Volume 2, p. 2, Section 219-220.

[109] John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW (revised by Peter Tillers) Little Brown and Co.: Boston (1983) Conduct to Show Character of a defendant in a criminal case, Volume 2, p. 2, Section 219. So, for example, to prove that the defendant charged with rape "had the capacity to overcome such resistance as the prosecutrix might have offered," evidence was permitted that he had previously "taken a barrel of flour up in his hands before him and carried it several rods." See, *Hilliard v. Beattie*, 59 N.H. 462 (1879)

[110] Perhaps without realizing it, the common law of evidence has waded into deep philosophical waters—where philosophers and psychologists continue to debate whether character traits are real, and whether they can explain moral responsibility intuitions better than other theories. *See*, Shaun Nichols

Despite the essential role of morality to Wigmore's concept of character, by the mid-twentieth century, scholars began shedding it from the definition.[111] Charles McCormick defined character as simply "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."[112] Note that while the examples are highly moralized behaviors, the definition itself is amoral. This permitted later evidence scholars to successfully suggest that character need not be moralized to be excluded under the rule.[113]

The FRE adopted McCormick's definition of character, and the Advisory Committee cited approvingly to him. Today, so long as actions or dispositions are used to argue that someone acted in conformity with them, FRE 404(a) is technically implicated. A minority of states have retained the distinction between moral and immoral acts in practice, if not in their rules. Texas, strangely, finds the morality of the past act to be salient, but to *permit* rather than to exclude character evidence that involves "moral turpitude."[114] However, most states and the FRE adopted a view of character that is facially amoral.

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and Joshua Knobe, *Morality Responsibility and Determinism*, *The Cognitive Science of Folk Intuitions*, 41 NOUS 663, 681 (2007). *See*, Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 796 (1998) ("[T]he use of character as evidence implies that character causes people to act the way that they do, and (ii) people are not autonomous, or self-governing, if their character causes them to act the way that they do.")

[111] Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 89 (2013)

[112] Charles T. McCormick, HANDBOOK ON THE LAW OF EVIDENCE 340-41 (West Pub. Co., 1954).

[113] *See* Taslitz, *supra* note 34, 7-8 ("Note that this definition, contrary to the definition of 'character' offered by some commentators, does not necessarily have a moral connotation: the testimony need not concern whether the defendant is in some sense a good or a bad person. This makes sense because a conception of character evidence based solely on morality would be inconsistent with the policy concerns that have led courts to treat such evidence cautiously.")

[114] 1 TEX. PRAC. GUIDE CIVIL TRIAL § 6:116 ("Tex. R. Evid. 404(a) permits character evidence offered by a party accused of conduct involving moral turpitude.")

H. Labels Matter a Great Deal When Determining Whether Behavior is Viewed as Implicating Character Evidence or Not

Determining whether evidence meets the definition of "character evidence" may depend on whether there is a well-recognized label or adjective that can be used to describe the constellation of traits. Things we don't even consider to be character may indeed be quite revealing about one's personality and how we think they will behave in the future. For example, a prosecutor argued "defendant had planned the robbery, selecting somebody he's got absolutely nothing against, and yet he's *the kind of person* that would pick someone like that to do this to, because he just doesn't care. He's not like you."[115] This is classic character evidence, but it was not recognized as such, because this sort of behavior does not immediately call to mind a one-word trait. It is designed to tell us "what kind of person" the defendant is, but we cannot put our finger on a succinct label other than to suggest that this person is "bad."

There are other examples like this, which might be considered highly diagnostic of character, even though there is not a simple label for this behavior. People with the need for control and who believe they are entitled to wealth are more likely to be reoffending white collar criminals, while people who are "out of control" are more likely to be violent offenders.[116] This evidence, which weakly predicts propensity to commit certain kinds of crimes, might not be treated as character evidence at all because the behavior lacks a neat and concise label.

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[115] *People v. Dykes*, 209 P.3d 1, 38 (2009)

[116] *See* Katie Fredricks, Rita McComas, and Georgie Ann Weatherby, *White Collar Crime: Recidivism, Deterrence, and Social Impact*, 2 FORENSIC RES. & CRIMINOLOGY INT'L. J. 1, at 3 (2016).

Even controlling for whether there is corresponding evidence of antisocial behavior, the chosen label matters.[117] Calling someone an "addict" will affect their perceived culpability more negatively than describing them as having a "substance abuse disorder."[118] The same constellation of behavior, say problem drug use, could be described clinically as a diagnosis, biologically as a neurogenetic mechanism, or colloquially as a moral choice. Each of these frameworks likely elicit very different judgments of character and blame.

I. Attorneys Are Allowed to Paint A Picture of People's Characters Without Referring to Well-Recognized Traits

While attorneys cannot use traits or past acts to explicitly draw character inferences, they are often allowed to "paint a picture" of the parties or victims. Artful attorneys take advantage of this grey area to share selected details about someone's life, to encourage the jury to connect the dots and use this to predict how they likely behaved. Often, the desired inference is precisely the one drawn by the jurors, without the attorney having to spell it out explicitly, which might backfire and be recognized as improper. These unregulated sources of character evidence are no less powerful for their invisibility. In fact, the inferences we draw ourselves from implicit cues might be stronger than those that are explicitly drawn for us.

Here are some examples. A man who claimed he was wrongfully denied social security benefits was described by an evaluator as "able to drive but has little or no inclination to assist with household chores. He has substandard concern for hygiene and substandard motivation and self-direction. More

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[117] See Bernice Pescosolido, The Public Stigma of Mental Illness: What Do We Think; What Do We Know; What Can We Prove? 54 J. OF HEALTH & SOC. BEHAV. 1, at 11 (2013).

[118] John Kelly and Cassandra Westerhoff, *Does it Matter How We Refer to Individuals with Substance-Related Conditions? A randomized study of two commonly used terms*, 21 INT'L. J. OF DRUG POL'Y 202, at 206 (2010).

recently, [he] has developed a variety of obesity-related disorders."[119] What sort of character inference might you draw from this description, despite no trait being explicitly mentioned? Might you reasonably infer that this man is lazy or malingering?

The court nowhere considered this evidence as implicating rule 404. Instead, the court assumed it was competent evidence of whether the individual had a qualifying disability, and indeed it might be relevant to this purpose. However, it still could run afoul of the ban on character evidence, as fact-finders will use this evidence to draw a character inference that will affect whether the individual is entitled to benefits, despite this not being a case where "character" is an element of the claim. This sort of use calls into question how the character evidence rules ought to treat psychological diagnoses. Psychiatric diagnoses and mental illnesses are often nothing more than clinical character traits, which can, and will, be used by factfinders to predict future behavior.

For another example, consider a man accused of murder. He was described as a polite man who "moved back home to assist his family when his father became ill" and "was one of nine children in a large, church-going family" "and his fiancée…still intended to marry [him]."[120] Not only was this not considered impermissible character evidence, but its introduction was thought to bolster the claim that the accused's counsel had not been ineffective. The obvious character inference the defense counsel sought to draw was that the defendant was an honorable man who would not have committed cold-blooded murder. Character inferences like these are often allowed at the guilt phase, and are required at sentencing.

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[119] *Stockford v. Soc. Sec. Admin. Com'r*, No. 1:11-CV-00076-NT, 2012 WL 528128, at *3 (D. Me. Feb. 15, 2012).

[120] *Brecheen v. Reynolds*, 41 F.3d 1343, 1367 (10th Cir. 1994)

Evidence in the form of possessions, jewelry, or tattoos likewise generate automatic character inferences.[121] For example, the prosecution in a terrorism case was allowed to introduce evidence that a Muslim defendant had a note in his pocket in Arabic. The prosecution interpreted the note to mean that the accused was a jihadist.[122] The court did not treat this as character evidence, despite it being used to draw the explicit inference about the "kind of person" the defendant was. If they had, then the defense would have been able to introduce evidence to contradict this interpretation, as he argued the note was instead a blessing, or Ta'wiz.

Many other cases involve the use of gang-related tattoos to suggest that witnesses were the kinds of people who would have engaged in other violent acts.[123] For example, a police officer was able to testify that the defendant's teardrop tattoo meant that he likely killed someone in a rival gang. This was allowed because the jury heard a limiting instruction that they were only supposed to use this tattoo evidence for a non-propensity purpose, and not to suggest that the defendant had killed a member of a rival gang.[124] Sometimes these types of proof are found by courts to cross the line into impermissible character evidence.[125] But often they escape scrutiny as mere biographical or background evidence, or are considered to be harmless on appeal.[126] Despite

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[121] *People v. Zackowitz*, 254 N.Y. 192, 196, 172 N.E. 466 (1930)

[122] *United States v. Hayat*, 710 F.3d 875, 901 (9th Cir. 2013)

[123] "A murder victim's gang tattoos are considered highly inflammatory character evidence and extremely prejudicial." See, *Taylor v. State*, 2018 WL 3640467, at *18 (Tex. App. Aug. 1, 2018)

[124] *Roy v. State*, 997 S.W.2d 863 (Tex. App. 1999); see also *People v. Vinson*, 2015 WL 1008087, at *6 (Cal. Ct. App. Mar. 5, 2015)

[125] See, *State v. Hart*, 584 N.W.2d 863, 869; see also Tiffani K. Landeen-Hoeke, *State v. Hart: Tearing the Heart Out of Rules 404(a) & 405(a),* 45 S.D. L. REV. 130, 134–35 (2000); *State v. Renneberg*, 83 Wash. 2d 735, 737–38, 522 P.2d 835, 836 (1974)

[126] *See, Spencer v. McDonald,* 705 F. App'x 386, 388–89 (6th Cir. 2017). In the case *Spencer* analogized to, the appellate court reasoned that even if the bolstering biographical narrative were considered "character," the plaintiff in the earlier case had opened the door to positive evidence by the defense, as the plaintiff had introduced evidence that he "was the star of the family."

often being allowed, these forms of evidence trigger precisely the kinds of inferences the character evidence rule seeks to prohibit.

II. THE COMMON LAW GOT IT *MOSTLY* RIGHT: PEOPLE ARE PRONE TO EXPLAINING BEHAVIOR IN TERMS OF DISPOSITIONS, BUT THIS IS NOT ALWAYS AN ERROR

The ban on character evidence reflects a folk psychological notion that if the jury hears that the accused had stolen property, it may be too quick to assume he had stolen in *this* case, without the prosecution proving this beyond a reasonable doubt. Or, even if the jurors do not find that the accused certainly stole in the present case, because they have heard that he is a "bad man," they may feel anger toward him and think that he deserves to be punished for *something,* even if he may not be guilty of this crime. These are thought to be errors of attribution: the first mistakenly attributes behaviors to someone based on a fixed trait (once a thief, always a thief), and the second attributes desert based on this trait (once a thief, you deserve to be punished now).[127] It is our tendency to over-attribute behaviors to fixed dispositions that led common law judges to ban character evidence.

The common law got it right. People *are* prone to explaining other people's behavior by their "allegedly enduring dispositions and intentions than by other plausible accounts, for example, the circumstances."[128] As a cognitive bias researcher put it, "[observers] infer wrongly that actions are due to distinctive and robust character traits rather than to aspects of the

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[127] Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1006 (1984); see also Park, supra note 21, at 720.

[128] Lasana Harris, Alexander Todorov, & Susan Fiske, *Attributions on the Brain: Neuro-Imaging Dispositional Inferences, Beyond Theory of Mind*, 28 NEUROIMAGE 763, at 763 (2005); see also Gopal Sreenivasan, Errors About Errors: Virtue Theory and Trait Attribution, 111 MIND. 47, at 47 (2002) ("[P]eople are remarkably liable to be overhasty in their everyday attributions of character traits…").

situation…such opinions are firmly held quite independently of their truth (they are known to be false) and can be explained in terms of confirmation bias."[129]

This powerful tendency provides the basis behind the ban on character evidence, even though the folk intuition preceded any empirical support.[130] Numerous psychological studies have now confirmed that when people hear about someone's behavior, they will tend to infer something about this person's character, and will use that dispositional inference to predict how the person will later behave.[131] While the reasons for this vary, it appears that most people do this because we think character traits and dispositions *cause* behavior, rather than being derived from it.[132] This tendency has been dubbed the "correspondence bias," or the "fundamental attribution error."[133]

Attribution errors are likely when we assume that there is greater "temporal stability" or "cross-situational consistency," between behavioral traits than we should[134.] Temporal stability is present when we do the same thing in similar circumstances (i.e., stealing money from a tip jar whenever no one is looking). Cross-situational consistency is present when we do the same thing in very different environments (i.e., stealing from tip jars, family members' purses,

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[129] Gilbert Harman, *The Nonexistence of Character Traits*, 100 PROC. OF THE ARISTOTELIAN SOC'Y. 223, at 223 (2000).

[130] See Miguel A. Mendez, Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters," 49 HASTINGS L.J. 871, 888–89 (1998).

[131] See Bertram Gawronski, *Theory-based bias correction in dispositional inference: The Fundamental Attribution Error is Dead, Long Live the Correspondence Bias*, 15 EUR. REV. OF SOCIAL PSYCHOL., 183 (2004).

[132] See Christopher Bauman and Linda Skitka, *Making Attributions for Behaviors: The Prevalence of Correspondence Bias in the General Population* 32 BASIC & APPLIED SOC. PSYCHOL. 269 (2010); *see also* Randy McCarthy and John Skowronksi, What Will Phil Do Next Spontaneously Inferred Traits Influence Predictions of Behavior, 47 J. EXP. SOC. PSYCHOL. 321, 330 (2011)

[133] Daniel Gilbert and Patrick Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 22 (1995)

[134] Sreenivasan, *supra* note 64, at 50.

neighbors' yards, etc.), whenever we have the opportunity.[135] If these two types of consistency are present, the dispositional inference may be warranted.

Assuming behaviors are caused by fixed traits gives us a sense of agency and predictability in the world. It is psychologically soothing, and generally adaptive.[136] We would be stifled into inaction if we could never predict how others would behave.[137] Put simply, assessing others' characters and using this information to predict why or how they behaved allows us to plan our social interactions: "[a] bird is likely to fly; a snake is likely to be venomous. A good person may lend a helping hand; a bad person may stab you in the back."[138]

The correspondence bias is well-documented across multiple settings and age groups.[139] Despite being quite common, however, its incidence varies. It is more prevalent in older people,[140] and in individualistic, Western cultures such as the United States,[141] especially among those who live in the South,[142] and those with Protestant religious beliefs.[143] These groups may seek to explain

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[135] *Id*. at 48, 49

[136] *See* Ames & Fiske, *supra* note 2, at 605.

[137] *Id.* at 599.

[138] Samuel Johnson, Gregory Murphy, Max Rodrigues, & Frank Keil, *Predictions from Uncertain Moral Character, in* PROCEEDINGS OF THE 41ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY, at 506 (2019).

[139] *See* Jennifer Stanley and Fredda Blanchard-Fields, *Beliefs About Behavior Account for Age Differences in the Correspondence Bias*, 66(B) J. OF GERONTOLOGY: PSYCHOLOGICAL SCIENCES 169, at 169 (2011).

[140] Id.

[141] See Douglas Krull, ET AL. The Fundamental Fundamental Attribution Error: Correspondence Bias in Individualist and Collectivist Cultures, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1208 (1999); see also Incheol Choi, Richard Nisbett, & Ara Norenzayan, Causal Attribution Across Cultures: variation and universality, 125 PSYCHOL. BULL. 47 (1999)

[142] M.C. Angermeyer & S. Dietrich, Public Beliefs about and Attitudes Towards People with Mental Illness: a review of population studies, 113 ACTA PSYCHIATRICA. SCANDINAVICA. 163, 172 (2006)

[143] *See generally* Yexin Li, et al., *Fundamental(ist) Attribution Error: Protestants are Dispositionally Focused*. 102 J. OF PERSONALITY & SOC. PSYCH., 281 (2012) (Protestant individuals tend to be more internally focused on the causes of behavior rather than on communal or collective causes,

behavior and their own identities in terms of what makes them distinctive and autonomous, rather than what environmental factors they share with the larger community.[144]

Our desire for predictability and coherence can go awry when we put people into buckets that do not capture their remarkable behavioral variability—both in different situations and across time.[145] Intuitively, we understand that humans are not perfectly predictable. Even very young children can attend to situational constraints when reasoning about others' actions.[146] It is not as if we *never* consider the situation; it's just much easier and automatic for us to assume the behavior flows from a stable trait.

However, when people do exactly what their social situation demands, inferences about their enduring character or traits are logically unjustified.[147] For example, "one should not conclude that a balloon that rises on a windy day is filled with helium."[148] Someone who is speeding is not inherently selfish, because they might be rushing to an emergency room to save a passenger. If I shoot someone who broke into my house at 2am and was about to kill me, the situation may have called for it, and it does not reveal much about my character.

Usually, specific behaviors cannot be predicted with high levels of accuracy from character traits.[149] In interactive social decisions, evidence for

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thus focusing on individual responsibility for the welfare of the soul).

[144] *See* Bauman and Skitka, *supra* note 68. Indeed, the spontaneous trait inferences that lead to stable predictors of personality are more robust in European and American cultures See, Jinkyung Na and Shinobu Kitayama, *Spontaneous Trait Inference is Culture-Specific: behavioral and neural evidence*, 22 PSYCHOL. SCI. 1025, 1030 (2011))

[145] *See* Ames & Fiske, *supra* note 2, at 599.

[146] Melissa Koenig, Valerie Tiberius, and J. Kiley Hamlin, *Children's Judgments of Epistemic and Moral Agents: from situations to intentions*, 14 PERSPECTIVES ON PSYCHOL. SCI. 344, 344 (2019).

[147] Id.

[148] Id.

[149] Dylan Cooper, ET. AL, Lay Personality Theories in Interactive Decisions: Strongly Held, Weakly

personality traits such as competitiveness or risk-seeking have not been found to reliably predict behavior, despite people frequently using these constructs to make predictions about how others would behave.[150] Research suggests that using dispositional inferences to make predictions about behaviors like honesty or impulsivity "yields hardly any improvement over guessing." [151] However, traits like empathy might serve as a reliable predictor of future actions, in some cases.[152] More research must be done in this area, but it seems that the more specific the description of the behavior and the situation, the more justified the inference of a dispositional trait.

A. The Correspondence Bias is Greater When Judging the Behavior of People Who Seem Different from Us

The correspondence bias is exaggerated when reflecting on immoral behavior of people who are thought to be different from us. Thus, the moral failures of people of different races or ethnicities are more likely to be attributed to their fixed characters, rather than to their environment, while their successes are more likely to be explained away by the situation.[153] Conversely, we *will* consider situational factors when appraising an individual's negative behavior

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Supported, 28 Behavioral Decision Making 201 (2015)

[150] *Id.*

[151] Harman, *supra* note 38. (It turns out that the correlation between "character" and behavior is quite low: Summarizing a number of studies, the "average correlation between different behavioral measures designed to tap the same personality trait (for examples, impulsivity, honesty, dependency, or the like) was typically in the range between .10 and .20, and often was even lower.") These correlations are so low, they are "below the level which people can detect." Even if predictions are limited to people one takes to be quite high on a particular trait, the correlations are still very low. "Ross & Nisbett observe that people have some appreciation of the role of situation in the way they understand such stories as *The Prince and the Pauper* or the movie *Trading Places*. But for the most part, people are quick to infer from specific actions to character traits.").

[152] *See* Uhlmann, ET. AL., *supra* note 52, at 74.

[153] *See* Miles Hewstone, *The 'Ultimate Attribution Error'? A Review of the Literature on Intergroup Causal Attribution*, 20 EUROPEAN. J. OF SOC. PSYCHOL. 311, at 311 (1990) (i.e., the "explaining away outgroup success to good luck, high effort or an easy task")

who is a member of our relevant "in-group," or resembles us in some important way. It is an interesting question as to which features are required for someone to receive "ingroup" treatment. People may resemble us in some ways that trigger an in-group reaction (such as race) but may differ from us in other more fundamental ways (such as sex), which triggers the bias.

B. Correcting the Correspondence Bias Takes Effort

Because the correspondence bias can occur spontaneously, unintentionally, and outside of our control, mitigating it takes time, attention, and cognitive effort.[154] Its effects can be mitigated if we are aware of its existence and motivated to account for situational factors.[155] It also seems that mindfulness practices can help.[156] Being trained to take the perspective of others, or adopt their viewpoint, has been found to significantly reduce dispositional inferences.[157] However, when subjects are mentally taxed, such as when jurors are hearing hours of conflicting testimony in a complicated trial, or when they lack the personal motivation to change their minds, they are more likely to rely on sticky character evidence.[158]

C. Is It Always an Error?

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[154] Duane Wegener ET. AL, Not all Stereotyping is Created Equal: Differential Consequences of Thoughtful Versus Nonthoughtful Stereotyping, 90 J. of PERSONALITY & SOC. PSYCHOL. 42, at 42 (2006); see also Lasana Harris, ET. AL, *Exploring the Generalization Process from Past Behavior to Predicting Future Behavior,* 29 J. OF BEHAV. DECISION MAKING 419, (2016).

[155] See, Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020).

[156] Tim Hopthrow, ET. AL, *Mindfulness Reduces the Correspondence Bias*, 70 Q. J. OF EXPERIMENTAL. PSYCHOL. 351, at 358 (2017).

[157] *See* Nic Hooper, ET. AL, *Perspective-taking Reduces the Fundamental Attribution Error*, 4 J. of CONTEXTUAL BEHAV. SCI. 69 (2015).

[158] See Bret Wells, ET AL., Inference Making and Linking Both Require Thinking: Spontaneous Trait Inference and Spontaneous Trait Transference Both Rely on Working Memory Capacity, 47 J. OF EXPERIMENTAL SOC. PSYCHOL. 1116 (2011)

1. The Predictive Value of Character Traits for Specific Behaviors Is Not Zero

The correspondence bias does not render all past acts to prove future conduct *overly* prejudicial or insufficiently probative. If someone openly mocked a disabled person on public television, this might be relevant in a future charge of intentional discrimination of people with disabilities. Or, for example, the jury might be aided by knowing that someone who was convicted of stealing identification to impersonate others might be much more likely to do that again. Sometimes the past act is diagnostic of an enduring character trait. Thus, solid recidivism data can support the use of past act evidence. But even in the absence of empirical data, common sense tells us that if someone was previously convicted of bribing an official, this conviction is highly probative of whether they bribed an official on another occasion.

The proper use of past acts or character traits depends on the cross-situational and cross-temporal consistency of the trait or action in question. Where someone has done something *distinctive, highly unusual, compulsive, or diagnostic of a specific type of immorality* this might be quite probative of whether he would do this thing again, and perhaps not unduly prejudicial. Concerns of weak probative value may be corrected with more precision in describing the type of trait stability in question.

For example, someone who has intentionally under-reported income for federal tax purposes for the last 15 years has expressed temporal stability for this trait, so the predictive value of the past acts is high. Someone who has intentionally committed corporate fraud in very different institutions and roles has demonstrated cross-situational consistency. In these cases, it might not be overly prejudicial to infer something like a character trait for corporate dishonesty. Indeed, justice might require the jury to hear about these past actions.

2. The Perfect Should Not Be the Enemy of the Good

Attributions of behavior need not be perfect to have probative value that substantially exceeds any potential for prejudice.[159]

The key question is *just how predictive* this past act behavior needs to be, to not be substantially more prejudicial than probative. People who purchase child pornography (i.e., rape) have crossed a moral boundary, which does make it more likely they will cross it again. Someone who steals a car is more likely to do so again[160], and someone who sells drugs is also more likely than the rest of the population to do this again. Just how likely they are to repeat these acts depends on several factors, but we can use recidivism data to make some imperfect predictions.[161] So, *should* we? The respected Wigmore treatise says "no," arguing that a "man may do the act once and may never do it again, and not only may he not do it again, but it is in *no degree probable* that he will do it again."[162] This view, embodied in rule 404(a), may be true for some acts. However, it swings the pendulum too far in favor of situationism, as some behaviors can be weakly, or even strongly, predicted by past actions.[163]

Another problem with the outright ban on character evidence is that in some cases, the line between traits and environment is fuzzy. We might exercise

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[159] 7 IA. PRAC., EVIDENCE § 5.404:6 (West 2020)

[160] For certain property crimes, recidivism rates are sizeable, and make it much more likely that if someone was convicted of theft once, they were likely to do this again. *See* Joshua A. Markman, ET AL., *Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patterns from 2005 to 2010*, U.S. DEP'T. OF JUST. OFF. OF JUST. PROGRAMS BUREAU OF JUST. STAT. (2016), https://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf

[161] "[T]raits only correlate with behavior across situations atr= +.30. Empirical results suggest methodological improvements could increase traits' predictive power if they are used to predict behavior in a specific enough social context; if the social context from which the trait is inferred (previous context) and the social context that was being predicted (future context) are similar enough, then correlation coefficients rise above the modest mark of +.30,and traits become better predictors." *See* Harris, ET AL., *supra* note 87, at 419; *see also* Crump, *supra* note 13, at 626.

[162] *See* Wigmore, *supra* note 43, at 1160.

[163] *See*, Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 535-36 (1991); *see also* Park, *supra* note 21, at 729.

our agency to choose certain kinds of environments, and environments might be chosen for us, based on our traits.[164] Most behaviors are also a complex, interactive mix of our nature and our nurture. This blurs the boundaries between saying behaviors are caused either by one or the other; it's likely both. Indeed, a recent review of white-collar crime recidivism data found that reoffending could not be explained completely by the situation, and likely included some dispositional factors.[165]

3. Great Prejudice Could Result if We Do Not Ensure the Act Actually Occurred

For fairness purposes, we must ask the extent to which the predicate acts were proved to have actually occurred. To do so, not only should parties be permitted to introduce specific instances of conduct on direct, but it might be prudent to permit extrinsic evidence as to whether the past act occurred, if this extrinsic evidence could be procured and admitted easily. The present federal rule 405 does not allow this.[166] Indeed, court records or video footage might be quite useful to expeditiously resolve whether the past act occurred. Once we are confident, either by clear and convincing evidence, or beyond a reasonable doubt, that the individual in fact committed the original bad acts, the likelihood of his doing them again is not just possible, but in some cases quite probable.[167] The probability of recurrence varies a great deal by the type of past act and its similarity to the present act, the total number of previous offenses, and things

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[164] *See* Harman, *supra* note 38, ("[I]n everyday experience the characteristics of actors and those of the situations they face are typically confounded--in ways that contribute to precisely the consistency that we perceive and count on in our social dealings. People often choose the situations to which they are exposed; and people often are chosen for situations on the basis of their manifest or presumed abilities and dispositions.").

[165] *See* Fredricks, ET. AL. *supra* note 53*,* at 3.

[166] FED. RULE EVID. 405.

[167] "In other words, evidence of repetition of behavior, or propensity, can be good evidence." *See* Crump, *supra* note 13, at 626.

like the age of the offender.[168] Someone who commits violent crimes is much less likely to recidivate than someone who robs someone, commits pedophilia or sells drugs, but the likelihood is still greater than for the general population.[169] Rather than using the presence of correspondence bias to reject all past acts evidence, we should permit some past act evidence when the recidivism rate, or propensity to reoccur, is quite high, there is high cross-temporal or cross-situational consistency, and the potential for unfair prejudice is low.[170]

4. Prejudice Should Not Be Conflated with Probative Value

Recall that the original justification for the character evidence ban was that the use of character evidence was considered substantially more prejudicial than probative *in every case*. Following Wigmore's guidance, the drafters stated that character evidence always flunks the traditional balancing test of 403, which is the rule permitting the judge to exclude evidence that is too prejudicial. Every state has a nearly equivalent counterpart to the federal rule, which states:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

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[168] See Charles H. Rose III, Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules, 36 N.M. L. REV. 341, 365 (2006)

[169] "People who commit armed robberies on particular occasions are more likely to commit them on other occasions. For other kinds of crimes, such as child molestation or heroin possession, the inference of repetition is even stronger; in fact, it is powerful… If we truly needed to hide the facts from jurors to prevent erroneous inferences from this kind of information, then I would argue that we would be forced to conclude that our entire jury trial system would be suspect: too unreliable to trust." Crump, *supra* note 13, 626–27.

[170] Of course, there are several problems with the way recidivism data are currently collected, as they put too much weight on whether there is an arrest and prosecution, outcomes which are not racially neutral. *See also* Rose III, *supra* note 105, at 365.

> unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[171]

It is *this* concept of prejudice that should be used by courts when evaluating character evidence.[172] It simply is not the case that character evidence always flunks the balancing test between probative value and prejudice. Highly probative evidence that favors one party will almost always injure the opposition's case. This does not mean it should be excluded as prejudicial. Prejudice under the evidence rules refers to something being *unfairly* or unnecessarily prejudicial, such as evidence that is misleading, that triggers an irrational or inaccurate response, is given more weight than it deserves, wastes too much time, or distracts from the primary facts of a case. In many cases, judges appear to conflate prejudicial value with evidence that is highly probative, and have stopped requiring that the prejudice be unfair. This is deeply unfortunate. Jurors might be giving the evidence great weight because it *deserves it*.

For example, testimony that Larry Nassar molested several young gymnasts while pretending to be giving them physical therapy makes it much more likely that he molested a particular gymnast. This testimony about his past acts can be quite useful testimony if he claims, as he did, that an individual victim was fabricating her account. Conversely, evidence that someone had a generally immoral behavior, or had communicated racist thoughts prior to a homicide may be largely irrelevant, if it does not speak to making a material fact

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[171] FED. R. EVID. 403

[172] Indeed, judges should already be applying Rule 403 to past acts that are admitted under 404(b) or an exception such as the mercy rule. In these instances, judges must still assess the probative value of these past acts, to determine whether the evidence should still be excluded as unfairly prejudicial, despite clearing the hurdles of 404. Unfortunately, while we have a well-developed notion of prejudice under rule 403, the nuance is often lost when we apply this rule to character evidence.

more or less likely.[173]But we simply must stop referring to evidence as prejudicial merely because it is necessary to one side and damning to another.

For example, evidence of past acts that are strikingly similar to the crimes charged are deemed unfairly prejudicial based on this alone. In other cases, the same quality of similarity renders them highly probative.[174] However, there must be some independent argument—aside from similarity—that makes the evidence misleading or overly confusing. Whether the evidence of the past act is unduly prejudicial will depend on factors such as a) whether it goes to a peripheral point and is just meant to denigrate the defendant's character in the eyes of the jury, b) whether there is low confidence that the past act indeed occurred as described, c) how much time has passed, d) whether the act speaks to an immoral character trait, e) how unique or distinguishing the situation was that gave rise to that past act, f) how common this sort of behavior is, such that it is not diagnostic of an enduring negative trait, and g) whether there is an incorrect folk assumption that people who do this sort of thing are much more likely than they actually are to repeat it.[175] If the answer to these questions suggests that the jury is being told this evidence to smear a witness, rather than to provide essential evidence that might be necessary for their fact-finding, then it might be too prejudicial to be admitted. Likewise, if the past act evidence is the only incriminating evidence, and there is no other physical evidence suggesting guilt, its admission could be too prejudicial. The point here is merely that judges should be able to balance this based on the facts of each case, rather than incorrectly assuming that all past act evidence is unfairly prejudicial.

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[173] See, for example, *State v. Williams*, 87 S.W.2d 175, 180 (1935); *Taylor v. State,* 262 S.W.3d 231, 243 (Mo. 2008)

[174] *See* Crump, *supra* note 13, at 626 ("The result is that other crimes are excluded if they are similar--but not if they are closely similar!")

[175] If jurors correctly infer "temporal stability" or "cross-situational consistency," then it is probably not that prejudicial. It is only prejudicial if jurors presume that someone who steals to buy drugs is also likely to steal to hurt someone, and this turns out to be false. *See* Sreenivasan, *supra* note 64, at 50.

The business of jury decision-making is the business of making predictions. Predicting the actions and mental states of someone may in fact be aided by knowing how they have behaved under very similar circumstances. Keeping this information from the jury in all cases unnecessarily hinders their ability to assess whether the eyewitness was lying, or whether the defendant is credible when he says that the victim fabricated her story. Social science data suggests that "the jury's learning of prior crimes directly through the evidence is not the inflammatory, unfairly prejudicial, conviction-ensuring information it is often depicted as being."[176] Moreover, the opposing side can always offer their account of why the past act is not predictive, or why it does not speak to an enduring trait. If judges do not think that the opposing side can competently counter, because the jury will give too great of weight to the past act, then it is their job to exclude it. This is something thing they are quite practiced at doing.

III. WE WILL USE WHATEVER INFORMATION IS AVAILABLE TO INFER CHARACTER TO ASSESS BLAME

According to the prevailing view of legal philosophers, blame ought to be an ascription of responsibility for a morally bad action.[177] The emphasis on *actions* as a basis for legal responsibility reflects the theories of normative ethics, consequentialism and deontology.[178] Consequentialism prioritizes the outcomes of acts to determine whether they are good or bad, while deontology asks whether the actor adhered to a set of moral obligations or rules while acting.[179] These philosophies have dominated the normative ethics literature for the past 100 years.

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[176] Larry Laudan & Ronald J. Allen, The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process, 101 J. CRIM. L. & CRIMINOLOGY 493, 497–99 (2011)

[177] *See* Pizarro and Tannenbaum, *supra* note 3, at 95.

[178] "Morality ultimately lies in action and that the study of moral development should use action as the final criterion." Augusto Blasi, *Bridging Moral Cognition and Action: a critical review of the literature,* 88 PSYCHOL. BULLETIN 1, 1 (1980).

[179] *See* Uhlmann, ET. AL., *supra* note 52, at 73.

However, it turns out that when we make moral judgments, humans are neither pure consequentialists nor deontologists. We often blame people not for just what they have done in this instance, but for *who* they are, and everything they've ever done. Rather than asking "is this act right or wrong", we are primarily asking "is this person good or bad?"[180] People "quickly and easily attribute morally good or bad traits to others, and they often do so early in an interaction and with limited information."[181] This is referred to as the person-centered approach to blame.

Regardless of whether it *ought* to, character assessments play a major role in assessments of blame and responsibility. We are thus "intuitive virtue theorists"[182]—using character inferences to guide our assessments of moral blame. This has led to a comeback in Aristotle's virtue ethics (called the "Aretaic Turn").[183] Indeed, diverse research teams, focused on different aspects of psychology, have converged on this finding: morality drives our perceptions of people, and thus whether they are deserving of moral blame.[184]

We likely disagree with this *normatively*, given the correspondence bias and the belief that situations are more predictive than dispositions in many cases.[185] We might also worry that the heuristics we use to infer moral character

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[180] Uhlmann, ET. AL., *supra* note 52, at 72; *see also* Jennifer Siegel, Molly Crockett, and Raymond Dolan, *Inferences About Moral Character Moderate the Impact of Consequences on Blame and Punishment*, 167 COGNITION 201, 202 (2017)

[181] Eric Luis Uhlmann, David Pizarro, and Daniel Diermeier, *A Person-Centered Approach to Moral Judgment*, 10 PERSPECTIVES ON PSYCHOL. SCIENCE 72, 72 (2014).

[182] Uhlmann, ET. AL., *supra* note 52, at, 73.

[183] *Id.* at 95 (According to Pizarro, virtue ethics is experiencing a resurgence. Empirical evidence demonstrates lay people place a great deal of value on moral character when determining who ought to be responsible and who ought to be blamed).

[184] *See* Ray ET AL., *supra* note 37 (manuscript at 10).

[185] *See* Harman, *supra* note 65, at 224. *Contra*, Maria Merritt, *Virtue Ethics and Social Psychology of Character*, PhD Dissertation, UC Berkeley, (1999), available online at

are too simplistic, as people are typically neither completely good or bad, but are rather indeterminate. That is, most people "would behave deplorably in many and admirably in many other situations."[186] The use of a person-centered approach to blame may often lead to unfair outcomes. It might only be useful when "we can reliably distinguish the really bad actors and really good actors from the majority who are more complex and indeterminate."[187] Even so, given how quickly we form character assessments to steer our assessments of blame, the rules of evidence must at least acknowledge this powerful tendency. So long as we rely on humans to deliver judgments of moral and legal blame, our rules cannot be naïve about how humans actually perform this function.

Despite its normative problems, there is a growing body of evidence that Aristotle's virtue ethics was *descriptively* correct. Most of us judge people not for what they do or cause, but because of the kinds of people they are. We think that "good" people deserve less punishment, and "bad" people deserve greater punishment, for the same bad acts.[188] When deciding how much blame someone deserves, humans typically seek information about whether the actor is good or bad to determine how to view the actor's culpability—and his intentionality or causal role.[189] A negative evaluation of character "may cause 'inflated' judgments of intentionality, causality, and control in cases where an agent seems particularly nefarious."[190]

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https://jhu.pure.elsevier.com/en/publications/character-6.

[186] Peter Vranas, The Indeterminacy Paradox: Character Evaluations and Human Psychology, 39 Nous 1 (2005)

[187] Peter Vranas, The Indeterminacy Paradox: Character Evaluations and Human Psychology, 39 Nous 1 (2005)

[188] Pizarro & Tannenbaum, *supra* note 3, at 97.

[189] "[P]articipants' judgments about the controllability of the harm and the transgressor's responsibility--as well as the responsibility of other parties involved--vary extensively depending on the perceived moral character of the transgressor." *See* Janice Nadler, Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 279–82 (2012)

[190] Pizzaro & Tannenbaum, *supra* note 3, 98; see also Rajen Anderson, Molly Crockett, and David Pizarro, *A Theory of Moral Praise*, 24 TRENDS IN COGNITIVE SCIENCES 694, 694 (2020

A. Character Inferences Cannot be Isolated: There is a Positive Feedback Loop Between Ascriptions of Mental States, Causation, and Character

Robust findings from social psychology demonstrate that we use predictions about intent to assess character, and use character to predict intent.[191] And we use evidence of someone's past acts to inform both character and intent. Thus, past acts, character, and mental states exist in a positive feedback loop, where one automatically feeds into predictions of the other.[192] They cannot be easily isolated, despite legal requirements to do so. We will infer future intent based on evidence of past actions, and will infer character from both. As one team put it, agents that are judged to have good character have "moral-cognitive machinery" that works well, by perceiving and interpreting the inputs correctly, and responding with appropriate mental states and actions. This works in both directions.[193] If we have already decided someone has a bad character, we will infer conforming mental states, and if the circumstantial evidence points to intentionally harming someone, we will assume this person has a bad character. A recent review of the role of morality in social cognition demonstrates that there is a "close, bi-directional relationship between inferring mental states and attributing stable traits."[194] We cannot treat mental state inferences as wholly separate from character inferences. In practice, the two are tightly interrelated.

The positive feedback between trait inferences and mental states exists at the neural level, too. When we think about others, the activation patterns in

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[191] *See* Ray ET AL., *supra* note 37 (manuscript at 13).

[192] *Id.* (manuscript at 3). ("There is a close, bi-directional relationship between inferring mental states and attributing stable traits.")

[193] Clayton Crithcer, Erik Helzer, David Tannenbaum, Moral character evaluation: testing another's moral-cognitive machinery, 87 J. of Exp. Soc. Psych. 103906, *1 (2020)

[194] Ray et al., *supra* note 37 (manuscript at 3).

our brain reflect the mental states we believe they habitually experience.[195] And when we try to understand how someone might behave in the future, we automatically activate these schemas to infer their mental states and their character traits. These "judgments interact and inform one another," and so to understand how we perceive short-term mental states like intent carelessness, we must also consider character assessments.[196]

B. The Person-Centered Approach to Blame Reconciles Many Social Psychology Findings

A robust body of moral psychology research explains many findings that at first seemed like cognitive errors, but which reinforce a person-centered account of blame. It does so by recognizing the powerful role of emotions and intuitions in moral judgments. While deliberative processes can influence moral decisions, in many instances the intuitive, emotional reaction drives our *ex post* rational justifications.[197] Emotions such as disgust, which might have developed to encourage us not to eat spoiled food or to discourage inbreeding, may spillover into more complex social settings. The same may be true for anger or jealousy. Emotions may generate feelings of moral outrage, which then bias us to seek someone to blame.

1. Moral Character Impacts Ratings of Causation

If the cause of an accident is ambiguous or not known, people will rate someone with a "bad character" as more likely the cause. For example, when we hear that a driver was speeding home to hide cocaine (rather than speeding home

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[195] Mark A. Thornton, Miriam Weaverdyck, and Diana Tamir, *The brain represents people as the mental states they habitually experience,* 10 Nature Communications 2291 (2019).

[196] Ray ET AL., *supra* note 37, (manuscript at 4).

[197] Jonathan Haidt, *The Emotional Dog and Its Rational Tail: a social intuitionist approach to moral judgment*, 108 PSYCHOL. REV. 814 (2001).

to hide a gift), we are more likely to think that he caused the accident. His reason for speeding should have no bearing on the physical cause of the crash, but it does. This is because hiding drugs suggests an immoral character while the latter does not.[198]

When people violate even more benign social norms, this can also increase the degree to which we attribute causation and moral blame to them.[199] Take for example, two people who engage in nearly identical conduct, such as taking pens out of a stocked cabinet. Only one is said to be violating a norm (the faculty member) and the other is not (an administrative assistant). When there are no more pens, it will be the faculty member who is thought to have caused this result because she is the one who violated the arbitrary norm. This body of research into "culpable causation" demonstrates that causation is not an objective, discoverable act of nature, but is influenced by social norms and character assessments.[200]

This should be shocking to any student of tort or criminal law. If we think the actor is a bad person or did a bad thing, then controlling for all other variables, *we are more likely to say that he caused and intended the harm*. This is fascinating, revolutionary stuff. Social psychology data are eviscerating the very idea of a sharp distinction between assessing a defendant's mental states, the cause of the victim's injury, and his character.[201] Once we have determined someone's character to be bad, it creates a jaundiced lens through which we will view all other aspects of their case. This includes whether we think they deserve blame.

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[198] Mark Alicke, *Culpable Causation*, 63 J. OF PERSON. SOCIAL PSYCHOL. 368 (1992)

[199] *See* Nadler ET. AL, *supra* note 118, 279–82; *see also* Joshua Knobe and Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, [xx] U CHICAGO LAW REV. (2020)

[200] Joshua Knobe and Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, [xx] U CHICAGO LAW REV. 17 (2020)

[201] *See* Ray ET AL., *supra* note 37 (manuscript at 9).

When an actor is labeled "bad," we blame them for bad outcomes that they intend or desire but did not cause. Even where an actor could not have acted otherwise and thus was coerced to kill, respondents found the actor to be more morally responsible for an act if he "identified" with it, meaning that he desired the compelled outcome. These findings do not fit with our typical model of blame, which requires freedom to act in order to assign responsibility.[202] However, they make sense if we adopt a character-based approach to blame.

2. Moral Character Impacts Ratings of Intent

Previous models of intentionality held that for an act to be considered intentional, three things had to be present. The actor had to believe that an action would result in a particular outcome, the actor must desire this outcome, and have full awareness of his behavior. Research now challenges this account, as individuals have been found to "attribute intentions to others even (and largely) in the absence of these components."[203] We are quick to infer a bad character and intent when there is very little evidence of it.[204]

An example of this is the hindsight bias called the "praise-blame asymmetry," where people blame actors for accidental bad outcomes that they caused but did not intend, but do not praise people for accidental good outcomes that they likewise caused but did not intend.[205] The classic example is the CEO who considers a development project that will increase profits. The CEO is agnostic to its environmental effects, and gives the project the go-ahead. If the

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[202] Robert Woofolk, et al., Identification, situational constraint, and social cognition: studies in the attribution of moral responsibility, 100 COGNITION 283, 283 (2005)

[203] Micaela Maria Zucchellia, et al, *Intentionality attribution and emotion: The Knobe Effect in alexithymia,*191 COGNITION 103978, 103978 (2019)

[204] Pizarro & Tannenbaum, supra note 3, at 100.

[205] Joshua Knobe, *Intentional action and side effects in ordinary language*, 63 Analysis 190-193 (2003); Joshua Knobe, Intentional action in folk psychology: An experimental investigation. 16 Philosophical Psychology 309-324. (2003)

project's outcome turns out to harm the environment, people say the CEO intended the bad outcome and they blame him for it. However, if instead the project turns out to benefit the environment, the CEO receives no praise. Our folk conception of intentionality is tied to morality and aversion to negative outcomes.[206] If a foreseen outcome is negative, people will attribute intentionality to the decision-maker, but not if the foreseen outcome is positive. Thus, the over-attribution of intent only seems to cut one way.[207] Mens rea ascriptions are "sensitive to moral valence...If the outcome is negative, foreknowledge standardly suffices for people to ascribe intentionality."[208] This effect has been found not just in laypeople, but in French judges.[209] If an action is considered immoral, then our emotional reaction to it can bias mental state ascriptions.[210]

This occurs not just when the outcome is bad, but also when the actor is seen to be immoral. For example, in economic trust games, "the untrustworthy agent was more likely to be evaluated as intending negative outcomes than the trustworthy agent."[211] This is consistent with the idea that our representations of others reflect the mental states we imagine they habitually experience.[212] It

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[206] Markus Kneer & Sacha Bourgeois-Gironde, Mens rea ascription, expertise and outcome effects: Professional judges surveyed, 169 Cognition 139, 139 (2017)

[207] Jenifer Siegel, Molly Crockett, and Raymond Dolan, Inferences about Moral Character Moderate the Impact of Consequences on Blame and Praise, 167 Cognition 201, 206-207 (2017).

[208] Markus Kneer & Sacha Bourgeois-Gironde, *Mens rea ascription, expertise and outcome effects: Professional judges surveyed*, 169 COGNITION 139, 144 (2017)

[209] Markus Kneer & Sacha Bourgeois-Gironde, *Mens rea ascription, expertise and outcome effects: Professional judges surveyed*, 169 COGNITION 139, 144 (2017)

[210] See, Janice Nadler, Mary-Hunter McDonnell, Moral Character, Motive, and the Psychology of Blame, 97 CORNELL L. REV. 255, 279–82 (2012); see also Thomas Nadelhoffer, Bad Acts, Blameworthy Agents, and Intentional Actions: some problems for juror impartiality, 9 PHILOSOPHICAL EXPLORATIONS 203, 203 (2006).

[211] Jennifer Siegel, Molly Crockett, and Raymond Dolan, *Inferences About Moral Character Moderate the Impact of Consequences on Blame and Punishment*, 167 COGNITION 201, 202 (2017)

[212] *See* Jennifer Ray et al., *The Role of Morality in Social Cognition*, *in* THE NEURAL BASES OF MENTALIZING. (forthcoming Dec. 2020) (manuscript at 2).

also is consistent with how we use character to infer intent and blame. If someone left a store without paying for merchandise at the bottom of their cart, we are likely to use character traits to predict whether they intended to shoplift, or merely forgot the item was there. Unfortunately, even when the actions are less ambiguous as to intent, bad character can bias whether people rate it as intentional.

3. Person-Centered Blame Explains Why We Want to Punish Harmless Transgressions

The person-centered approach to blame, and the emotional response that triggers it, can explain why certain fairly innocuous acts elicit such strong moral judgment.[213] For example, small misdeeds that are seen to be highly diagnostic of an immoral character elicit powerful social condemnation. When given the hypothetical task of hiring a corporate executive, participants favored paying one candidate $1 million more in salary than another candidate who requested a $40,000 marble desk table as a hiring perk. The request for the perk was given great weight because it appeared to say something about the kind of person the candidate was—an entitled jerk.[214] We have a strong negative disdain for this sort of behavior.

The person-centered approach to blame also helps to explain why we have negative visceral reactions to "harmless transgressions such as eating a dead dog that had been hit by a car."[215] People routinely rate this behavior as disgusting and wrong, but struggle to explain why, given that the dog was not physically harmed by being eaten. We cannot condemn the behavior by the outcomes, as the dog was already dead. We also cannot condemn the behavior

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[213] *See* Uhlmann, ET. AL., *supra* note 52, 72-81.

[214] David Tannenbaum, Eric Uhlmann and Daniel Diermeier, *Moral Signals, Public Outrage, and Immaterial Harms*, 47 J. OF EXPER. SOC. PSYCHOL. 1249 (2011).

[215] Uhlmann, ET. AL., *supra* note 52, at 75.

based on a principle that we should never eat a living being, or that we should never hurt a dog, because the actor did not injure the dog. This inability to explain our negative gut reactions has been referred to as "moral dumbfounding."[216] Our intuitions here may be guided not by consequences or by rule violations, but instead by a sense that this behavior is particularly diagnostic of a disturbed individual, one who has an immoral character. Because these behaviors are rare and unambiguous, they have even greater informational value about someone's character.[217] This will be discussed in greater detail, below.

When information is presented in a way that permits multiple inferences, but the neutral non-trait reason or the amoral trait reason is described as more likely, participants still placed greater weight on an immoral intent.[218] For example, even when it was more probable that a driver forgot to turn on her lights or did not realize that the road was one-way, participants were still much more likely to infer that the driver definitely intentionally hit a cyclist. Researchers suspect when you must consider two distinct possibilities at once, this uncertainty is computationally difficult. Because this is cognitively taxing, people do not integrate relative probabilities, and instead select the possibility with the most moral valence and treat it as if it were certain.[219] Therefore, when

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[216] Jonathan Haidt, Fredrik Bjorkland and Scott Murphy, *Moral Dumbfounding: when intuition finds no reason*, Unpublished manuscript. (2000)

[217] *See* Lee & Harris, *supra* note 5, at 4 (2013) (If the behavior is reliably expressed in different contexts and across time, in addition to not being part of typical social behavior, knowing about it is likely to create an enduring inference about someone's character.) For example, if your behavioral response is a social outlier (you laugh at a joke when no one else does) and this trait is persistent, observers will find that there is "something about you as a person that caused this strange behavior."

[218] *See* Johnson ET. AL., *Predictions from Uncertain Moral Character,* PROCEEDINGS OF THE 41ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY, CURAN ASSOCIATES (2019) at p. 506

[219] *See* Johnson ET. AL., *Predictions from Uncertain Moral Character,* PROCEEDINGS OF THE 41ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY,

the situation is ambiguous, we are quick to infer intentional action and a bad moral character.

C. Resolving the Tension in Applying 404(b)

Recall that rule 404(b) permits the use of past actions so long as propensity reasoning is not technically required. This is the trickiest part of the character evidence rules, and is why it leads to the most appeals and acquittals. Evidence experts observe that "[t]he borderline between propensity uses and non-propensity uses is ill-defined and indeterminate…the decision is heavily subject to non-doctrinal influences like the judge's idiosyncratic personal views and the skills of the lawyers at marshalling facts and engaging in rhetorically persuasive forensic argument."[220] In criminal cases, there is an understandable appetite to introduce evidence of a defendant's past immoral acts, especially when these acts seem to speak directly to a material point in the case.[221] Given this, judges sometimes fudge their application of 404(b), and strain common sense to suggest that the past act is being used for something other than an inference about how the defendant was likely to have behaved.[222]

However, courts routinely permit the use of a defendant's past bad acts, let's say his previous arson conviction, not to prove that the defendant was likely to burn another house down, but to prove that the it *could not have been a mistake* when the second house burned down—the defendant *must have*

[220]Risinger & Loop, *supra* note 32, at 206.

[221] For an example of a case where the trial judge went to great lengths to permit evidence of previous sexual assault for propensity purposes under the state's version of 404, see *State v. Kirsch*, 139 N.H. 647 (1995).

[222] For a discussion of the difficulty determining whether 404(b) evidence under the "doctrine of chances" actually requires propensity reasoning or not in particular situations, see *State v. Lane*, 2019 444 P.3d 553, 565–66 (J. Harris, concurring).

intended it.[223] Indeed, evidence scholar Ed Imwinkelried, perhaps the most respected supporter of the doctrine of chances, argues that when jurors hear that a defendant has had three of his wives die in a bathtub, they are not "compelled to focus on the accused's past" and thus do not address "the type of person the accused is."[224] Rather than relying on a character theory, Imwinkelried argues the jury is making an "objective" calculation about the likelihood that his wives would all have accidentally died.[225] There is a logical problem with this, however. Because the wives could not simultaneously have accidentally died and also have been intentionally murdered, proving that three of the defendant's ex-wives had died in a bathtub suggests that these were not accidents: the defendant intentionally killed them. The two potential mental states in this case are mutually exclusive. A careful study of the doctrine of chances reveals that it indeed requires propensity reasoning. If the reader is interested in going down this logical rabbit hole, there is a great deal of content to explore elsewhere.[226] Suffice it to say that attorneys and judges have become exceedingly frustrated with the difficulty applying 404(b) in a principled way.[227]

1. Jurors Will Use 404(b) Evidence to Infer Moral Character

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[223] For example, if a prosecutor uses evidence of a defendant's previous bad acts to prove that the victim is not lying when she says that he did the same thing again, this is often permitted under 404(b) as it is presumed not to require a propensity inference.

[224] Imwinkelried, *supra* note 19, at 587.

[225] Id.

[226] "In the first place, the distinction between 'propensity' and 'intent or identity' as the object of proof here is unclear; in fact, it is a metaphysical conundrum." Crump, *supra* note 13, at 628.

[227] "[T]he distinction between 'propensity' and 'intent or identity' as the object of proof here is unclear; in fact, it is a metaphysical conundrum. Inferences of intent or identity, in such a case, are founded on inferences about propensity to commit similar acts. Inferences of intent or identity are inferences about propensity. In the second place, and more importantly, the admissibility judgment required of the court is so imprecise that it necessarily will be determined more by the judge's idiosyncratic preferences than by the underlying rules." Crump, *supra* note 13, 628–29.

In cases where attorneys articulate a non-propensity use of past acts, judges are required to issue a limiting instruction telling the jury that they are not permitted to use the evidence to suggest the likelihood that the person would act in conformity with the implied trait. Jurors are only allowed to use it for its permitted, non-propensity purpose. Assuming we *could* separate out the two types of inferences, and exclude those that require propensity inferences while permitting those that do not, jurors will not be capable of keeping them separate in their minds. Jurors are constantly, implicitly making character assessments to determine if others are good or bad—trustworthy, or not. Many 404(b) uses of character evidence that are thought not to require an inference about someone's *propensity* to behave in a particular way, likely require—or at the very least invite—exactly this sort of inference.

Consider a typical case where someone past drug use or addiction is introduced for some purpose other than to show propensity to use drugs.[228] In *State v. Alston*, a woman was allowed to testify that in the days following a murder, the accused was making large purchases of drugs with change that he ostensibly stole from a tip jar in the murder victim's bedroom[229]. In presenting this circumstantial evidence, the defendant's addiction was somewhat irrelevant, but openly discussed before the jury. Imagine being a juror and hearing a limiting instruction that you were not supposed to use evidence of the defendant's cocaine addiction to suggest he was a bad person who was likely to use drugs in the future. There are too many cases like this one to perform an exhaustive review here. But we ought to be very worried about the inadequacy of limiting instructions to remove potential prejudice to the defendant in these instances. Whether a propensity inference is technically required has no bearing on whether it will be automatically inferred, given the person-centered account

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[228] *See United States v. Sutton*, 41 F.3d 1257, 1259 (8th Cir. 1994); *see also People v. Watkins*, No. B174012, 2005 WL 1208306, at *3 (Cal. Ct. App. May 23, 2005); *see also State v. Costello*, 159 N.H. 113, 122, 977 A.2d 454, 459-460 (2009)

[229] *State v. Alston*, 461 S.E.2d 687, 707 (1995)

of blame. Indeed, in one study that compared spontaneous with intentional trait inferences, the strength of the inferences between the two conditions were similar or identical.[230]

The data summarized above on our use of STIs and person-centered approach to blame demonstrate that the limiting instruction will not work. Because addiction is considered immoral, the jury will spontaneously use this information, regardless of whether there is a required propensity inference, to increase the defendant's blame. Character inferences that we draw subconsciously and implicitly are no weaker or extreme than those we draw deliberately, and they recruit the same neural network,[231] though to a different degree.[232]

2. Past Acts Evidence is Often Highly Probative, and Not Necessarily Unfairly Prejudicial

Many molestation and sexual assault cases flounder because past act evidence cannot be introduced. For example, consider the case of Bill Cosby, who was accused of drugging and raping dozens of women he claimed to mentor. When one woman finally decided to go on the record as a witness, Cosby predictably said she was lying.[233] It is of considerable probative value to introduce the contemporaneous accounts of the many other women who claimed he did the same exact thing, under very similar circumstances.[234] Pennsylvania

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[230] *See* McCarthy & Skowronksi, *supra* note 68, at 330.

[231] *See* McCarthy & Skowronksi, *supra* note 68, at 330.

[232] Ning Ma, et al., Spontaneous and intentional trait inferences recruit a common mentalizing network but to a different degree, 6 Social Neuroscience 123 (2011)

[233] Sherry Colb, Bill Cosby and the Rule Against Character Evidence, VERDICT, Jan 16, 2016, available online at https://verdict.justia.com/2016/01/15/bill-cosby-and-the-rule-against-character-evidence

[234] Holly Yan, Elliot McLaughlin and Dana Ford, *Bill Cosby admitted to getting Quaaludes to give to women*, July 7, 2015 available online at https://www.cnn.com/2015/07/07/us/bill-cosby-quaaludes-sexual-assault-allegations/index.html

has not adopted a version of FRE 413, which permits past sexual assaults to be admitted for propensity purposes. Thus, because rule 404 does not allow any propensity inferences, in the first prosecution of Cosby, the jury could not hear about the dozens of other rape accusations.[235] The jury was deadlocked and this resulted in a mistrial.[236] Reports suggest that the reason for the mistrial was that a few jurors questioned the victim's credibility. This is a common problem in sexual assault cases that often leads to non-prosecution or acquittal.[237] When Cosby was prosecuted a second time, for unknown reasons the state was allowed to introduce the testimony of five other women who said they were also sexually assaulted by Cosby. This evidence bolstered the victim's credibility and likely made all the difference, because he was convicted on these charges.[238]

Character evidence related to domestic violence can also be quite probative and not unfairly prejudicial. Consider the O.J. Simpson case, where a husband was accused of murdering his ex-wife. Past acts of domestic violence would have been highly probative to put the escalating abuse in context. Indeed, the *omission* of past act evidence would have been potentially misleading and unfair to the prosecution, as data shows that someone who beats his wife repeatedly is more likely to murder them when they try to finally leave.[239] There

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[235] On an unrelated point the difficulty finding jurors who were not aware of the multiple other accusations against the defendant also poses problems of justice and juror competence.

[236] Lawrence Crook III; Walter Imparato; Eric Levenson, *Bill Cosby Juror Speaks: "we had no real new evidence"*, CNN, *June 23, 2017, available online at https://www.cnn.com/2017/06/23/us/bill-cosby-juror-speak/index.html*

[237] Stephen Carter, *Bill Cosby's 'prior bad acts' — what will a jury hear*?, CHICAGO TRIBUNE, Jan. 5, 2016, available online at https://www.chicagotribune.com/opinion/commentary/ct-bill-cosby-sexual-assault-case-jury-20160105-story.html; see also, Paul Cassell, Testimony to the Supreme Court Utah Evidence Advisory Committee, Oct. 2020, notes on file with author.

[238] Graham Bowley, Bill Cosby Returns to Court. Here's Why His Retrial Is No Repeat. NEW YORK TIMES, April 8, 2018, https://www.nytimes.com/2018/04/08/arts/bill-cosby-retrial.html

[239] Douglas A. Brownridge, *Violence against women post-separation*, 11 AGGRESSION AND VIOLENT BEHAVIOR 514, 516-519 (2006).

are countless other examples where evidence of someone's past acts or traits are appropriately and fairly used for propensity purposes.

D. Trait Inferences from Behavior are Spontaneous, Sticky, and Sensitive to Immoral Conduct

Even though it might not always be unfairly prejudicial, we are right to be worried that jurors will use character evidence to draw an unfair inference about the kind of person that someone is. This tendency must be reflected in the evidence rules. Humans *are* "highly motivated to explain and predict others' behavior" through forming impressions of their characters.[240]

Because we are an incredibly social species,[241] it is crucial for us to predict others' behavior in order to choose partners, not be vulnerable to exploitation, and survive.[242] As a result, as early as 12 months old, infants will automatically evaluate others on their "goodness or badness".[243] These impressions can be formed after observing or trying to comprehend someone's behavior, or based on their demeanor, dress, facial features, and affect. This social, psychological process has been rigorously studied, and is referred to as "impression formation" based on "spontaneous trait inferences" (STIs). These STIs occur "even if people do not intend to infer trait information and can even occur without awareness that such an inference has occurred."[244]

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[240] Lee & Harris, *supra* note 5, at 3 (2013).

[241] *See* Thornton, et al., *supra* note 5, 140-48 (2019)

[242] *See* McCarthy & Skowronksi, *supra* note 68, at 321.

[243] "Given the likelihood that infants' social perceptions are spontaneous STI may be fundamental and universal for humans." See, Yuki Shimizu, Hajin Lee & James S. Uleman, *Culture as automatic processes for making meaning: Spontaneous trait inferences*, 69 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 79, 83 (2017)

[244] *See* McCarthy & Skowronksi, *supra* note 68, at 321.

There are multiple steps to forming impressions of others. The first involves categorizing people into social groups.[245] When we form an impression of someone based on their behavior, our brains recruit the dorsomedial prefrontal cortex (or dmPFC). When we form impressions based on physical features such as skin color or the appearance of the eyes and lips, we rely more on the amygdala, a complex neural structure mediating emotional and fearful responses.[246]

Traits are spontaneously inferred during the encoding of behavioral information, and the inferred character traits become properties of the actors, rather than simply an association based on co-occurrence.[247] This multi-dimensional process results in inferring demographic characteristics with "near-perfect" accuracy.[248] Even ambiguous categories like sexual identity, social class or political orientation can be predicted quickly at rates higher than chance.[249] Reliably, if not accurately, encoding and recalling character traits has permitted researchers to use patterns of brain activation to reliably decode the *specific identity* of someone a subject is thinking about, based just on the subject's recall of that person's character traits.[250]

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[245] Jasmine Norman and Jacqueline Chen, *Consequences of being unable to categorize: the impact of racial ambiguity on spontaneous trait inferences*, (unpublished). At p. 3. Fascinating research suggests that when target faces are racially ambiguous, rather than relying on individuating attributes, raters simply do not put forth the cognitive effort to form spontaneous trait inferences. It seems that race might be a critical category for forming impressions of others.

[246] *See*, Peter Mende-Siedlecki, *supra* note 7, at 74 (2018).

[247] David Hamilton, et al., *Sowing the Seeds of Stereotypes: Spontaneous Inferences About Groups*, 109 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 569, 569-570 (2015)

[248] Bastian Jaeger, et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* (submitted for review, and available online) p. 16

[249] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 1 (2020).

[250] Simon Eickhoff and Robert Langner, *Neuroimaging-based Prediction of Mental Traits: road to utopia or Orwell*? 17 PLOS BIOL. E3000497 (2019); AD Nostro, et al., Predicting Personality From

After we have socially categorized someone based on their race, sex, class, or age, we use both engrained and learned stereotypes to sort them into buckets of how we think they are likely to think and behave. Only if we are motivated to look to individuating factors do we integrate attributes specific to the person. Because this individuating process takes much more effort and cognitive resources, most of us avoid it. Once we have formed an impression of someone's character, it tends to be quite sticky and resistant to change.

1. When Past Behavior is Unknown, Traits Are Automatically Inferred Based on Superficial Appearance

Now let's dig a little deeper into the process of spontaneously trait inferences (STIs). It is important to underscore that this process occurs really fast. Most of the information we need to make character assessments is obtained within as little as 40-100 milliseconds of encountering someone, and is not improved with more time.[251] In an eyeblink, we have already conducted a "character diagnosis."[252] We immediately draw inferences based on whatever

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Network-based Resting-state Functional Connectivity, 223 BRAIN STRUCT. FUNCT. 2699 (2018) *See* Ames & Fiske, *supra* note 2, at 601; Demis Hassabis, et al, *Imagine All the People: how the brain creates and uses personality models to predict behavior*, 24 CEREBRAL CORTEX 1979, 1983 (2014) ("Clusters in anterior and dorsal mPFC (superior to that observed for agreeableness) reliably discriminated between four protagonists. Different personality models are therefore associated with unique and detectable patterns of brain activity in the mPFC. In other words, based on brain activation patterns alone, we were able to infer which of the 4 protagonists the participants were imagining.") See also Bastian Jaeger, et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* (submitted for review, and available online) p. 16

[251] Alexander Todorov, Manish Pakrashi, and Nicholaas Oosterhof, Evaluating Faces on Trustworthiness After Minimal Time Exposure, 27 SOCIAL COGNITION 813, 819 (2009)

[252] Michael Lupfer, Matthew Weeks, and Susan Dupuis, *How Pervasive if the Negativity Bias in Judgments Based on Character Appraisal?* 26 PERSON. AND SOC. PSYCHOL. BULL. 1353, 1363 (2000) ("People, upon first exposure to others, promptly appraise their character if provided even a modicum of morally relevant information about them") see also, Clayton Critcher, et al., How Quick Decisions Illuminate Moral Character, xx Social Psych. And Person. Science xx (2012)

information is available, regardless of how reliable it is.[253] Identity categories such as race, gender, age, attractiveness, nationality and religion shape spontaneous character assessments.[254] We are very good at categorizing people into groups, even if the categories are terrible predictors of behavior.[255]

We "use low-level perceptual cues such as facial appearance to make character-trait attributions…neutral expression faces with wider jaws, heavier brows, and smaller eyes tend to be judged as more dominant; similarly, neutral-expression faces with high brows and upturned lips tend to be judged as more trustworthy.[256] The neural basis of these processes has been investigated, with studies showing bilateral amygdala damage to impair discrimination of trustworthy and untrustworthy-looking faces. Consistent with this, functional neuroimaging studies show that untrustworthy-looking faces evoke greater activity in the amygdala than trustworthy-looking faces. [257] The role of emotions in STIs is still being explored, as recent studies suggest that people in a bad mood are less likely to draw trait inferences.[258]

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[253] Uhlmann, ET. AL., *supra* note 52, at 74 ("[E]valuating others on the dimensions of trustworthiness and warmth is something that individuals do almost immediately.").

[254] Neil Hester & Kurt Gray, *The Moral Psychology of Raceless, Genderless Strangers*, 15 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 216, 218-219 (2020).

[255] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. OF EXP. SOC. PSYCHOL. 104004, at p. 1 (2020).; *see also*, David Hamilton, et al., *Sowing the seeds of stereotypes: Spontaneous inferences about group*s, 109 J PERS SOC PSYCHOL 569, 569 (2015)("[A]bundant research has shown that people also spontaneously infer trait dispositions simply in the process of comprehending behavior. These spontaneous trait inferences (STIs) can occur without intention or awareness.)

[256] See, Evan Westra, *Character and Theory of Mind: an integrative approach*, 175 PHILOS. STUD 1217, 1221 (2018); *see also*, Uhlmann, ET. AL., *supra* note 52, at 72 ("humans "quickly and easily attribute morally good or bad traits to others…with limited information.").

[257] Alexander Todorov, Manish Pakrashi, and Nicholaas Oosterhof, *Evaluating Faces on Trustworthiness After Minimal Time Exposure*, 27 SOCIAL COGNITION 813, 814 (2009)

[258] Meifang Wang, Jing Xia, and Feng Yang, *Flexibility of Spontaneous Trait Inferences: the interactive effects of mood and gender stereotypes*, 33 SOCIAL COGNITION 345, 345 (2015)

There appear to be three key dimensions of facial first impressions: trustworthiness, dominance, and youthful-attractiveness, with the first two relating to assessments of threat, and the third relating to sexual selection.[259] Put simply, these dimensions have helped our ancestors determine whether we might want to approach or avoid another human being.[260] While they were developed for simpler times, they continue to be powerful means of sorting people today.[261] Research suggests that trustworthiness is the most salient of these primary traits. Judgements of trustworthiness *can explain almost all of the variance* in ratings of faces by a principal component analysis.[262] This process has enormous impact on trials, as much of what jurors do is assess the credibility of witnesses.

Again, we spontaneously infer traits because our mentalizing frameworks were engineered for simpler times, to create coherent assessments of what were once fairly homogenous peer groups.[263] This may be why, even when we lack sufficient data and are uncertain about people's characters, we are likely to draw assumptions about the "kinds of people" that they are, especially when they are different from us in some deep or obvious way.[264] This overlaps

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[259] See, Evan Westra, *Character and Theory of Mind: an integrative approach*, 175 Philos. Stud 1217, 1221 (2018); see also, Eric Uhlmann, David Pizarro, and Daniel Diermeier, *A Person-Centered Approach to Moral Judgment* 10 Perspectives on Psychological Science 72, 72 (2015) ("humans "quickly and easily attribute morally good or bad traits to others…with limited information.")

[260] Manuel Oliveira, et al., *Dominance and competence face to face: dissociations obtained with a reverse correlation approach*, 49 EUROPEAN J. OF SOC. PSYCHOL. 413, 413 (2018) https://doi.org/10.1002/ejsp.2529

[261] Nikolaas N. Oosterhof and Alexander Todorov, The functional basis of face evaluation, 105, PROC. NATIONAL ACAD. SCI.11087, 11091 (2008) "These compelling impressions are constructed from facial cues that have evolutionary significance. The accurate perceptions of emotional expressions and the dominance of conspecifics are critical for survival and successful social interaction."

[262] Alexander Todorov, Manish Pakrashi, and Nicholaas Oosterhof, Evaluating Faces on Trustworthiness After Minimal Time Exposure, 27 SOCIAL COGNITION 813, 814 (2009)

[263] *Id.* at 604. The need for coherence is even greater for those who score highly on the Personal Need for Stability (PNS) scale, and they also have greater relative activation in the dmPFC when the new trait information they're hearing about someone does not fit with what they already know about them.

[264] *See* Johnson ET. AL, *supra* note 74, at 506.

with some of the research on the ingroup impacts on the correspondence bias. These systems both perpetuate learned social prejudices and fuel conflict, increasingly in covert and unconscious ways. The fact that the stereotypes that fuel this have gone "underground" only makes them more difficult to detect and mitigate.[265] Few people want to admit, even to themselves, that they are racist sexist, classist, or ableist. Preliminary research suggests that people who are high in dispositional ratings of power are more likely to rely on stereotypes when inferring traits.[266] The use of stereotypes may be a means of policing social hierarchy.

Subtle facial features influence character assessments.[267] When we see people with babyfaces, we infer that they are more submissive and trustworthy.[268] The "babyface" effect is powerful enough to mitigate racial stereotypes about Black men being physically threatening.[269] Further, having a babyface predicted outcomes in small claims court rulings.[270] Conversely, faces that appear dominant are more likely to generate trait inferences of being impulsive, careless or aggressive.[271]

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[265] David Amodio, *The neuroscience of prejudice and stereotyping*, 15 NAT. REV. NEUROSCIENCE 670 (2014)

[266] Meifang Wang and Feng Yang, *The Malleability of Stereotype Effects on Spontaneous Trait Inferences: the moderating role of perceiver's power*, 48 SOCIAL PSYCHOL. 2151, 2151 (2017).

[267] Bastian Jaeger, et al., *Who Judges a Book By Its Cover? The Prevalence, Structure, and Cortex relates of Lay Beliefs in Physiognomy* (under review), available online at https://psyarxiv.com/8dq4x.

[268] Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. OF EXP. SOC. PSYCHOL. 104004, at p. 5 (2020).;

[269] Ryan Stoller, et al., *The Conceptual Structure of Face Impressions*, 115 PNAS 9210, 9210 (2018); see also Neil Hester & Kurt Gray, *The Moral Psychology of Raceless, Genderless Strangers*, 15 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 216, 218-219 (2020).

[270] Leslie. Zebrowitz and Susan McDonald, *The Impact of Litigants' Baby-facedness and Attractiveness on Adjudications in Small Claims Courts*, 15 Law and Human Behavior 603, 603 (1991). (As plaintiffs increased in attractiveness, defendants were more likely to lose their case. As defendants increased in baby-facedness, they were slightly, though insignificantly, more likely to win in intentional wrong cases, and significantly more likely to win in negligence cases. This was independent of age and the other variables)

[271] Connor Parde, et al., *Social Trait Information in Deep Convolutional Neural Networks Trained*

How we rate a face can predict how we interpret ambiguous behavior—"the same behavior can be interpreted as assertive or unconfident depending on the perceived dominance of an accompanying face."[272] Sexism plays a powerful role too. Having a "resting bitch face" leads to automatic negative inferences about one's character.[273] Women's faces that do not conform to gender-stereotypical traits, and that are rated as more "masculine-looking" are also assumed to be more unfriendly, cold, serious, and strict.[274]

The STIs we form are so sticky, that sometimes we transfer the trait being described to someone else, rather than to the actor.[275] For example, if I am frequently describing individuals with reference to how intelligent they are, the trait of intelligence will be automatically reassigned to me. This is referred to as "spontaneous trait *trans*ference."

This too has racialized effects. When white individuals are told about a bad act that a Black person has committed, they formed a negative attitude toward this person. And then if a new person was introduced to the group that was Black or biracial, the white subjects "transferred these [negative] attitudes to the new group member."[276] Just as with the correspondence bias, STIs will be formed differently depending on both social stereotypes and engrained biases.

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for Face Identification, 43 COGNITIVE SCIENCE e12729 at p. 10 (2019)

[272]Ran Hassin and Yaacov Trope, *Facing faces: Studies on the cognitive aspects of physiognomy*. 78 J PERS SOC PSYCHOL 837–852 (2000).

[273] Neil Hester & Kurt Gray, *The Moral Psychology of Raceless, Genderless Strangers*, 15 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 216, 218-219 (2020).

[274] Clare Sutherland, et al., *Face gender and stereotypicality influence facial trait evaluation: counter-stereotpical female faces are negatively evaluated*, 106 BRITISH J OF PSYCHOLOGY 186, 190 (2015).

[275]JJ Skowronksi, et al., *Spontaneous trait transference: communicators taken on the qualities they describe in others*, 74 J. PERSON. & SOC. PSYCHOL. 837, 837 (1998).

[276] Jacqueline Chen & Kate Ratliff, *Implicit Attitude Generalization From Black to Black–White*

Facial beauty also influences moral judgments, as people reflect the "Beauty-is-Good" stereotype, and conflate physical attractiveness with moral goodness.[277] In this fascinating area of research, neuroimaging has revealed that activation in the medial orbitofrontal cortex (mOFC) is collectively modulated by facial beauty (such as having a symmetrical and statistically average face) and moral beauty (such as watching a boy cover an injured pigeon with a blanket).[278] Both images are aesthetically beautiful, though only the latter is actually based on virtues and morality. Researchers hypothesize that when we see physically attractive individuals, our brains experience beauty, and confuse physical beauty for moral beauty. Interestingly, there is no overlap in brain activation when viewing physically ugly and morally "ugly" scenes.[279]

To see how individuals can confuse physical beauty with "goodness" or "competence," one pioneering study had participants rate a teacher's effectiveness, while only *watching 10 second video clips where the sound was off*. These silent videos of instructors delivering their lectures positively predicted actual students' end-of-semester evaluations of the instructors, which was found to be mediated by the physical attractiveness of the instructors.[280] In another study, attractive candidates in Italian elections were more successful; perceived competence or trustworthiness did not predict electoral success.[281]

Biracial Group Members. 6 SOCIAL PSYCHOLOGICAL AND PERSONALITY SCIENCE. 544, 544 (2015).

[277]. See, Quiling Luo, et al, The Neural Correlates of Integrated Aesthetics Between Moral and Facial Beauty, 9 Scientific Reports *1 (2019)

[278] This region of the brain is also implicated in many other forms of reward as well as appreciating music, food, or art.

[279] See, Quiling Luo, et al, The Neural Correlates of Integrated Aesthetics Between Moral and Facial Beauty, 9 Scientific Reports *7 (2019)

[280] Nalini Ambady and Robert Rosenthal, Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness, 64 J. Personal. & Social Psych 431 (1993).

[281] Bastian Jaeger, et al., *Facial appearance and electoral success of male Italian politicians: Are trustworthy-looking candidates more successful in corrupt regions*? 51 SOCIAL PSYCHOLOGY, 2151 (2020)

Conversely, presentations of scientific research were viewed more positively when the researchers appeared "competent-looking," as compared to those who did not.[282]

Culture plays a large role in terms of which traits are most salient for a given role, and which stereotypes are activated.[283] In the United States, political success can be predicted by face-based judgments of "power," while in Japan, assessments of politicians' "warmth" predict their election.[284] As one researcher put it, "social outcomes are based on accessible but often invalid visual cues rather than careful consideration of relevant evidence."[285]Another team found that judgments of competence, based solely on viewing photographs of candidates, predicted the outcome of U.S. Congressional elections.[286]

Predictions based on race, religion, gender, height, obesity, skin color, and the size and shape of our eyes, brows, or noses, require no mental state inferences about the individual, and thus can be quite poor predictors of individual character.[287] They can also persevere in the face of new, and presumably conflicting, information. While researchers knew that trait inferences could be spontaneous or intentional, research has now demonstrated that the two do not produce significantly different results in terms of the strength

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[282] Ana Gheorghiu, Mitchell Callan, and William Skylark, A Thin Slice of Science Communication: Are people's evaluations of TED Talks Predicted by Superficial Impressions of the Speakers? 11 SOCIAL PSYCH AND PERSONAL. SCIENCE 117, 118 (2020).

[283] See, Yuki Shimizu, Hajin Lee & James S. Uleman, *Culture as automatic processes for making meaning: Spontaneous trait inferences*, 69 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 79, 83 (2017) "Our results suggest that STIs are universal and culture specific."

[284] Ana Gheorghiu, Mitchell Callan, and William Skylark, A Thin Slice of Science Communication: Are people's evaluations of TED Talks Predicted by Superficial Impressions of the Speakers? 11 SOCIAL PSYCH AND PERSONAL. SCIENCE 117, 118 (2020).

[285] Id.

[286] Alexander Todorov, et al, Inferences of Competence from Faces Predict Election Outcomes, 308 SCIENCE 1623 (2005).

[287] *See* Lee & Harris, *supra* note 5, at 4.

or extremity of the trait inferences. This means that when we automatically infer traits from superficial characteristics, the results are *indistinguishable* from when we deliberately do so. Indeed, in one study that compared spontaneous with intentional trait inferences, the strength of the inferences between the two conditions were similar or identical.[288]

These findings might explain why studies have shown that the defendant's committing prior crimes is the best predictor of conviction, even when juries were not allowed to hear about them.[289] These puzzling results had been difficult to explain. How could the existence of a past act predict a subsequent conviction, if the jury is not made aware of the previous act? It might be that even when past bad acts are kept from the jury, they instead rely on physical features of the defendant, such as his being a Black man or having an untrustworthy face, to infer traits of criminality. Due to systemic racism in policing and prosecution, being Black is disproportionately correlated with having been arrested and convicted.[290] Jurors might implicitly find skin color or Black facial features to reflect something about the person's character, when in reality this is just highly correlated with being arrested or incarcerated.[291]

This must be underscored: physical features and corresponding stereotypes will be used in the absence of information about past behavior.[292]

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[288] *See* McCarthy & Skowronksi, *supra* note 68, at 330.

[289] [H]aving prior crimes turns out to be one of the strongest predictors of a guilty verdict that we have available, stronger even than the testimony of an eyewitness to the crime who fingers the defendant. And it remains a powerful predictor of the jurors' verdict even when the jurors have not been informed of its existence." See, Larry Laudan and Ronald Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. OF CRIM. LAW AND CRIMINOLOGY, 493, 499 (2011)

[290] Michelle Alexander, The New Jim Crow, incarceration in the age of colorblindness (2010). at p. 137-148.

[291] Steve Gugielmo, Moral judgment as information processing: an integrative review, 6 FRONTIERS IN PSYCHOLOGY 1, 7 (2015)

[292] Jonathan Freeman & Kerri Johnson, *More Than Meets the Eye: Split-Second Social Perception*

Thus, the jury does not need to hear formal character testimony to infer that someone is a bad person who likely committed the crime and deserves to be punished. Jurors will infer this on their own, based on observable characteristics.[293] If we ban all use of past acts evidence, we will only galvanize less reliable bases for character inferences.

Using categories like race and attractiveness requires less cognitive effort and is less taxing than forming impressions based upon individual attributes or behavior. Thus, "category-based information is relied upon when possible."[294] Given the person-centered account of blame described above, the reliance on STIs is likely to lead to grave injustices for people with less trustworthy-looking faces. The use of STIs may explain some systemic injustices—i.e., why Black people are given lengthier sentences for the same offenses, and women with identical qualifications are considered less competent than men.[295]

2. Mitigating Spontaneous Trait Inferences Will Be Difficult at Best and Impossible at Worst

The use of STIs may be mitigated if the individual is motivated to deliberately revise her thinking.[296] If we have a personal desire to be accurate, we are more likely to expend the effort to update our character appraisals.[297]

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20 Trends in Cognitive Sci. 362, 362 (2016)

[293] Richard Vernon, et al., *Modeling first impressions from highly variable facial images*, 111 PROCEED. NAT. ACAD. SCI. E3353, 3353 (2014)

[294] Jasmine Norman and Jacqueline Chen, *Consequences of being unable to categorize: the impact of racial ambiguity on spontaneous trait inferences*, (unpublished). At p. 5.

[295] Neil Hester & Kurt Gray, The Moral Psychology of Raceless, Genderless Strangers, 15 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 216, 218 (2020).

[296] Joshua Greene, The rat-a-gorical imperative: moral intuition and the limits of affective learning, 167 Cognition 66, 67-68 (2017).

297 See, Bastian Jaeger, et al., Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020).

Relatedly, we are more likely to update our assessments when we need to work with someone in the future and our success in some way depends on correctly guessing how they will behave.[298]

Unfortunately, most of us do not regularly update the impressions we form of others. We either do not realize we've spontaneously inferred traits to form an impression of someone, or we are not personally motivated to change our perception. Because of this, STIs display significant anchoring effects, exerting a disproportionate influence on downstream decisions.[299] In many cases people continue to rely on STIs even when more individualized cues are available, and even when specific rules prohibit relying on them.[300]

However, we are more likely to use new, positive information to update our evaluations of compatriots, and less likely to do so for people who are not part of our ingroup. This leads to skewed impressions of in-group relative to out-group members. [301] The bias toward ingroups forecasts the powerful role of race in how we evaluate other people's character traits.[302] When white Americans

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298 See, Peter Mende-Siedlecki, Changing our Minds: the Neural Bases of Dynamic Impression Updating, 24 Curr. Op. in Psychol. 72, 74 (2018).

299 Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020).

300 Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 1 (2020).

301 Pascal Molenberghs and Winnifred R. Louis, *Insights From fMRI Studies Into Ingroup Bias* 9 FRONT PSYCHOL. 1868 (2018); see also Jay Van Bavel, et al., *Modulation of the fusiform face area following minimal exposure to motivationally relevant faces: evidence of in-group enhancement (not out-group disregard)*. 23 J. COGN. NEUROSCI 3343–3354 (2011) When subjects were placed in a brain scanner and given new, negative trait information about both ingroup and outgroup members, there was less recruitment of updating-related brain regions for the ingroup, such as the dorsal anterior cingulate cortex (dACC), the lateral prefrontal cortex (lPFC) and the temporal parietal junction (or TPJ.) This suggests that motivational factors influence how we revise character assessments.

302 "Performance on [implicit bias measures] did not differ between the patient with amygdala damage and control subjects…These results indicate that even though amygdala activation to Black versus White faces is correlated with performance on indirect measures of race bias [Phelps et al., J. Cogn. Neurosci. 12 (5) (2000) 729], the amygdala is not critical for normal performance on the IAT.

view Black and white faces subliminally (meaning below the threshold of our consciousness), responses—suggesting fear, or a perceived threat—in the amygdala are *stronger* than when they are presented supraliminally (above the threshold of consciousness).[303] This suggests that our trait inferences might be moderated in part by emotional responses of fear, which occur immediately and without our realizing it. This makes mitigation through jury instruction unlikely.

To correct an implicit bias, "one must be aware of the influence of the knowledge that they possess and also be motivated to correct for its influence."[304] People are not aware of the impact of STIs, and are therefore unable to "fully correct for their influence."[305] The automaticity and pervasiveness of, and our obliviousness to, STIs makes them quite difficult to silence. One study found that if we attempt to correct one type of implicit bias, it might lead to reductions in that bias with countervailing increases in others. Each category of potential bias would need to be addressed separately as a source of bias to be successful.[306]

Therefore, even if a deliberate instruction could work—which current evidence says it cannot—it is magical thinking to assume a quick and authoritative limiting instruction could prevent *all* potentially negative inferences from being drawn.[307] There are too many subconscious inputs we are constantly interpreting, and it would be impossible to mitigate each of these through a deliberative process. Of course, blinding individuals to the faces of

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[303] Jennifer Kubota, Mahzarin Banaji, Elizabeth Phelps, *The neuroscience of race*, 15 Nat. Neurosci. 940, 943 (2012; see also Stanley, D.A. et al. Race and reputation: perceived racial group trustworthiness influences the neural correlates of trust decisions. *Phil. Trans. R. Soc. Lond. B* 367, 744–753 (2012)

[304] Id.

[305] Id.

[306] Jordan Axt, Grace Casola & Brian Nosek, *Reducing Social Judgment Biases May Require Identifying the Potential Source of Bias*. 45 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1232 (2019).

[307] Joshua Greene, *The rat-a-gorical imperative: moral intuition and the limits of affective learning*, 167 Cognition 66, 68 (2017).

subjects, such as criminal defendants, would remove some of the implicit bias. But doing this is often impossible, and certainly so for all witnesses in a trial.[308] Rather than trying to blind jurors to the facial characteristics of witnesses, judges ought to allow the more accurate predictors of behavior[309]—past and future behavior—to be heard.

Since jury instructions are unlikely to work, we must consider other methods to mitigate the effects of facial trait impressions. The possibility I suggest is to permit more character evidence, rather than attempting to ban it outright. Given that jurors will draw character inferences from unregulated character evidence (such as STIs) that they have access to, we should provide them with more evidence of how someone has behaved, rather than less. Common sense, as well as preliminary social psychology research, suggests this could work.

Previous research in non-legal contexts has shown that people update facial impressions when new behavioral information about specific people is shared.[310] One team that was exploring the role of the right amygdala in updating STIs found that "[f]aces that were associated with positive behaviors were judged as more trustworthy than faces that were associated with negative behaviors."[311] Thus, evidence of how someone has behaved in the past can

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[308] See, Bastian Jaeger, et al., *Can We Reduce Facial Biases? Persistent effects of facial trustworthiness on sentencing decisions*, 90 J. of Exp. Soc. Psychol. 104004, at p. 2 (2020).

[309] Sara Verosky, et al., *Robust Effects of Affective Person Learning on Evaluation of Faces*, 114 J. of Personality and Social Psych. 516, 516 (2018) ("A more reliable source of information is affective person learning based on others' past actions.")

[310]Alexander Todorov and Ingrid Olson, *Robust Learning of Affective Trait Associations with Faces When the Hippocampus is Damaged, But Not when the Amygdala and Temporal Pole are Damaged*, 3 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 195, 195 (2008); Eliza Bliss-Moreau et al., *Individual Differences in Learning the Affective Value of Others Under Minimal Conditions*, 8 Emotion 479, 2008; see also

[311] See, Sean Baron, et al., *Amygdala and Dorsomedial Prefrontal Cortex Responses to Appearance-Based and Behavior-Based Person Impressions*, 6 SOC. AND COGNITIVE AFFECTIVE NEUROSCIENCE, 572,

reduce the impact of implicit facial impressions. A recent paper focused specifically on testing an intervention to reduce the impact of STIs. The team compared facial trait assessments when subjects either heard information about past acts or did not. Despite being highly automatized, STIs of trustworthiness *could be updated* if subjects learned about how targets had actually behaved.[312] The behavioral information spontaneously triggered a counter-stereotypical inference that led participants to revise their trait inferences.

One drawback of this study is that it only tested the trustworthiness of white male faces. There is good reason to believe that mitigating STIs will be harder in other racial and gender groups. Even so, other studies have also demonstrated that the biases from STIs can be mitigated with counter-stereotypical information about someone's past acts.[313] While these studies are not conducted in legal settings, it stands to reason that the results would be replicated among juries.

Other studies have shown that knowledge of past acts, if presented, can replace or mitigate impressions from facial impressions, and this comports with common sense as well.[314] As between information about how someone behaved in the past, and trustworthiness information we glean from their face, it is hard to defend requiring jurors to rely just on facial features. Allowing parties to

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579 (2011)

[312] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, SOC. PSYCH AND PERSON. SCIENCE 1, 1 (2020).

[313] Sara Verosky, et al., *Robust Effects of Affective Person Learning on Evaluation of Faces*, 114 J. of PERSONALITY AND SOCIAL PSYCH. 516, 516 (2018)

[314] Kao-Wei Chua and Jonathan Freeman, *Facial Stereotype Bias is Mitigated by Training*, SOC. PSYCH AND PERSON. SCIENCE 1, 1 (2020). ("In the face impressions literature, studies have long examined how trait impressions of a face are updated based on newly learned behaviors related to that trait.") see also, Anna Eiserbeck and Rasha Abdel Rahman, *Visual Consciousness of Faces in the Attentional Blink: knowledge-based effects of trustworthiness dominate over appearance-based impressions*, 83 CONSCIOUSNESS AND COGNITION 102977 *10, (2020)

provide positive, bolstering character evidence might be crucial to justice, to correct subconscious and deeply unfair trait inferences.[315]

E. Immorality Drives Character Assessments

When we assess someone's character, behaviors that are perceived to be immoral are "more heavily weighted than their positive counterparts" and lead to greater changes in our implicit and explicit impressions of them.[316] This is because negative information is considered more 'diagnostic'—that is, it is more readily linked to a category or label, in this case of being a "bad" person.[317] It takes fewer instances of "bad" behavior to label someone's character as bad, than it takes instances of "good" behavior to label someone as good.[318] Having lived through junior high school, we understand this phenomenon: it is easier to move from having a good reputation to a bad reputation, than to move from a

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[315] In some cases, courts have recognized the need for this sort of "humanizing" evidence, despite the fact that it currently violates the rules. See, *Mosley v. State*, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) ("We find appellant's argument that the [character] evidence should have been excluded to be unpersuasive. While the evidence relates to some degree to the character of the victims, it is heavily intertwined with the impact of the victims' loss on family members. Moreover, the evidence appears in this case to serve the function of humanizing the victims rather than drawing unwarranted comparisons between them and other members of society.")

[316] Mende-Siedlecki, *supra* note 7, at 73 (2018). *See also* David Trafinow, et al., The Role of Affect in Determining the Attributional Weight of Immoral Behaviors, 31 PERSON. AND SOCIAL PSYCHOL. BULL. 935, 935 (2005)

[317] David Trafinow, et al., *The Role of Affect in Determining the Attributional Weight of Immoral Behaviors*, 31 PERSON. AND SOCIAL PSYCHOL. BULL. 935, 935 (2005)

[318] Douglas Krull and Jody Dill, Do Smiles Elicit More Inferences Than Do Frowns? The Effect of Emotional Valence on the Production of Spontaneous Inferences, 24 PSPB 289 (1998)

bad reputation to a good one.[319] As Jonathan Haidt said, "[o]ne scandal can outweigh a lifetime of public service."[320]

1. Immoral Traits Have Greater Diagnostic, and Informational Value

Negative, immoral behavior has greater informational value. This is why it is easier to experience a fall from grace than to be rehabilitated. Judgments about immoral conduct appear to be made very quickly, are more extreme, sticky, and lead to more universally prescriptive evaluations than amoral evaluations.[321] Conversely, evidence of amoral or neutral traits are not given the same weight.

The more negative the affect that is evoked by hearing about how someone has acted (e.g., he "pushed other people out of the way") the more attributional weight this evidence is given.[322] Research has also distinguished competence traits (like intelligence or agency) from moralistic traits. When people draw character inferences about others, or reflect on their own identity, they value morality over competence.[323] People also want to be seen as moral, so explicit references to a decision being diagnostic of morality can even reduce

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[319]Michael Lupfer, Matthew Weeks, and Susan Dupuis, *How Pervasive if the Negativity Bias in Judgments Based on Character Appraisal?* 26 PERSON. AND SOC. PSYCHOL. BULL. 1353, 1362 (2000) ("Learning that actors, previously thought to be of good character had committed immoral acts caused respondents to reverse their initial predictions more completely than did learning that actors previously thought to be of bad character had displayed one or more moral acts.")

[320] Jonathan Haidt and Selin Kesebir, *Morality* in S.T. Fiske and D. Gilbert (Eds), Handbook of Social Psychology (5th ed) at p.27.

[321] Jay J. Van Bavel, et al., *The Importance of Moral Construal: Moral versus Non-Moral Construal Elicits Faster, More Extreme, Universal Evaluations of the Same Actions*, 7 PLOS ONE, e48693 at p. 12.

[322] David Trafimow, et al., *The Role of Affect in Determining the Attributional Weight of Immoral Behaviors,* 31 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 935, 945 (2005)

[323] Fe´lice van Nunspeet, et al., *Moral concerns increase attention and response monitoring during IAT performance: ERP evidence*, 9 SCAN 141, 149 (2014).

some forms of implicit bias.[324] Neuroscience research has even identified specific brain regions that are engaged when we update our impressions of others in the face of immoral, but not amoral, trait information.[325] This also suggests that in addition to being socially and psychologically important, the distinction between moral and immoral behaviors was a significant difference evolutionarily, given that different brain regions modulate each.

Experts explain this with reference to the relative occurrence of the traits. Immoral behavior possesses greater informational value—it is more salient—because it is perceived as less common than its counterparts.[326] To give an example, if on one occasion I denied help to a needy friend, this is considered more indicative of my character than if I were to help a needy friend on one occasion.[327] Moral characteristics, "may be of special interest to people precisely because [they are] thought to be diagnostic.[328] If the immoral conduct is rare, outrageous, and deliberate, such as tipping over containers of water that were left in the Arizona desert for dehydrated refugees, then drawing a negative inference about one's character from this action might not be irrational at all. Conversely, we do not assume that those who leave the water containers alone are especially good people. We expect moral conduct. Giving greater weight to immoral conduct may be entirely rational.

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[324] Fe´lice van Nunspeet, et al., *Moral concerns increase attention and response monitoring during IAT performance: ERP evidence*, 9 SCAN 141, 149 (2014).

[325] *See* Mende-Siedlecki, *supra* note 7, at 73 (2018). When we update impressions of others given new immoral trait information, this engages the left ventrolateral prefrontal cortex (vlPFC) and inferior frontal gyrus (IFG). When the inconsistencies between our previous assessments of one's character and new behavioral information are less moralized and more mundane, the dorsal anterior cingulate (dACC), the posterior cingulate cortex (PCC), and the temporal parietal junction (TPJ) are more likely to be involved.

[326] *See* Mende-Siedlecki, *supra* note 7, at 73 (2018). (However, when making assessments of people's physical abilities, evidence of positive behaviors of competence is more powerful than evidence of negative, incompetent behaviors –also because physical strength is not the norm.)

[327] Michael Lupfer, Matthew Weeks, and Susan Dupuis, *How Pervasive if the Negativity Bias in Judgments Based on Character Appraisal?* 26 PERSON. AND SOC. PSYCHOL. BULL. 1353, 1354 (2000)

[328] *Id.* at 210.

The heightened informational value of negative, immoral behavior might relate to our evolutionary past, and signal detection theory. Being able to make predictions about who might cheat us was probably more critical to our ancestors' survival than predicting who was likely to be kind.[329] The risk of getting it wrong was simply greater.

The greater weight given to immoral trait information, but not to amoral or neutral trait information, suggests that our character evidence rules ought not to worry too much about amoral evidence being too prejudicial. While bolstering evidence could surely waste the court's time if it goes to a peripheral point, it may be necessary to correct automatic inferences from someone's face. And jurors are not likely to give too much weight to amoral or positive trait information. This same research also advises that the introduction of past immoral acts will carry great attribution weight, and thus be potentially too prejudicial. Thus, our common law evidence rules were correct to focus on immoral, or bad traits, as my proposal does as well. However, the mere occurrence of this inference is not itself an error. There may be a good normative or social reason that we prioritize negative information. This is why my proposal does not ban all past immoral acts, but merely those that the judge finds to be substantially more prejudicial than probative.

IV. RULE 404 MUST BE REVISED

A. Take-Aways from the Social Psychology Research

As Edward Imwinkelried acknowledged back in 1994, "there is a growing realization that the rigid American character evidence prohibition is out of step with the more liberal doctrines in effect in other progressive common-

[329] H Gintis, et al, *Strong Reciprocity and the Roots of Human Morality*, 21 SOCIAL JUSTICE RESEARCH, 241-253 (2008)

law jurisdictions…and the latest psychological research suggests that character evidence may be more probative than we have traditionally assumed it to be."[330] Since this time, the strength of this argument has only grown. At this point, a tremendous body of psychological research makes several important contributions that undermine our modern character evidence rule. I will summarize these contributions below:

1) People tend to explain behavior with reference to fixed character traits rather than to situational factors.
2) However, if the character inferences are based on rare, highly immoral acts that are quite likely to be repeated, the inference might not be an error and its use in court might be just and not unfairly prejudicial.
3) We are driven to blame people for the kinds of people they are, rather than for the things that they do.
4) This is facilitated by spontaneous trait inferences (STIs) which generate immediate, subconscious, and sticky trait inferences based upon inaccurate social stereotypes and immutable facial characteristics.
5) If we ban testimony of how someone has behaved in the past, jurors will instead rely on these STIs to predict others' characters.
6) We cannot treat mental state inferences as wholly separate from character inferences. Jurors will automatically use evidence of mental states to infer character traits, and vice versa.
7) Subconscious character inferences cannot be successfully mitigated through jury instructions.
8) Conduct that is perceived to be immoral is given greater weight than moral or amoral conduct, but depending on the circumstances this might be rational and just.

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[330] Imwinkelried, *supra* note 33, at 37.

Compared to when the common law adopted the character evidence rule, we now know much more about how people assess blame. We are so motivated to judge people not for what they have done, but for the kinds of people that they are, that we will use whatever information is available to sort individuals into groups of those who are "good" and those who are "bad." Unfortunately, this sorting is often informed by mere split-second observations—based on people's face, race, sex, and class. The processes that developed to facilitate this are crude, but they persist because they require little cognitive effort or reflection.

Whether these mechanisms reflect cognitive biases, confusion, or intuitive competence, the descriptive picture is what it is. To the extent this picture is at odds with legal doctrine, the legal doctrine can either be routinely ignored, or it can change.[331] As Bertram Malle and Sarah Nelson suggested, so long as the law continues to rely on laypeople to assess blame, it should reconcile itself to the layperson's view of behavior.[332] Reforming our legal rules seems particularly important where the intuition the rules are fighting against are automatic, spontaneous, unconscious, and persistent.

B. Specifics of My Proposal

1. The Revised Rule Should Be Limited to Immoral Character Evidence

States and federal evidence advisory committees should replace rule 404 with a simple rule that permits moral and neutral character evidence, and presumes inadmissibility for character evidence indicating an immoral trait.

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[331] For the contrary view that psychology has no place in considerations of character, see Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law,* 37 SEATTLE U. L. REV. 87, 89 (2013). However, the idea that character is a social construct, as articulated in Professor Blinka's article, suggests that social psychology might indeed correctly inform how character is assessed.

[332] Bertram Malle and Sarah Nelson, Judging Mens Rea: The tension between folk concepts and legal concepts of intentionality, 21 BEHAVIORAL SCIENCES & THE LAW, 563–580 (2003)

This seems like a radical idea, but it is not. Indeed, something like it has been proposed by other evidence scholars before me, though based on different sorts of concerns.[333] The common law tradition the United States drew upon, the laws of evidence of the United Kingdom, have now been revised to allow character evidence in many circumstances.[334] Australia as also revised their rule to only apply to "discredited" conduct.[335] Though not without its own critics, the U.K.'s Criminal Justice Act of 2003 likewise restricts its focus to "reprehensible behavior," which may be admitted in courts in the United Kingdom so long as it does not have "an adverse effect on the fairness of the proceedings."[336] The proposal I suggest would take a similar course. However, given some early confusion defining what qualifies as bad enough to be "reprehensible", my proposal would ask judges to consider whether the past act or character trait is considered immoral according to prevailing community views.[337] Judges are well-equipped to perform this function, given their experience with other causes

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[333]A similar reform has been previously discussed by scholars such as Roger Park and David Leonard. *See* Park, *supra* note 21, at 777.

[334] Criminal Justice Act, *supra* note 31, §106;

[335] See David Plater, Lucy Line, Rhiannon Davies, The Schleswig-Holstein Question of the Criminal Law Finally Resolved: An Examination of South Australia's New Approach to the Use of Bad Character Evidence in Criminal Proceedings, 15 FLANDERS LAW JOURNAL 55, 60-61 (2013) (Section 34P(1) of the Evidence (Discreditable Conduct) Amendment Act 2011 (SA) of the Evidence (Discreditable Conduct) Amendment Act 2011 (SA).came into effect in 2012, and allows "the use in criminal proceedings of evidence of bad character where relatively strict standards of probative value are met and where the trial judge has identified and explained to the jury the purpose for which the evidence may and may not be used.").

[336] *Id.* at §101; *see also* Goudkamp, *supra* note 50, at 124.

[337] Here it might be helpful to provide some examples from the United Kingdom, where the term "reprehensible behavior" was considered ambiguous because the behavior was not universally disapproved. In a child molestation case, to prove that the defendant had a sexual interest in young girls, the prosecution introduced evidence of his sexual relationship with a 16 year-old when he was 34. The reviewing court found that this was not "reprehensible" as the relationship was not disapproved of by her parents nor was the girl was intellectually, emotionally or physically immature for her age. It was therefore not reprehensible for him to have a sexual relationship with her. 2005 EWCA Crim. 2866, cited in Goudkamp, *supra* note 50, 122-23.

of action that require inquiries into objective social norms, such as defamation and public disclosure of private, embarrassing facts[338].

Evidence of actions or traits that are deemed by the judge to be virtuous or morally neutral would be admitted subject only to rule 403, as they are not likely to trigger strong dispositional inferences or the person-centered approach to blame.[339] Bolstering evidence would thus be allowed, so long as it did not devolve into a trial-within-a-trial or waste too much time. However, when witness credibility is critical, this would permit witnesses to spend some time bolstering their credibility before it is explicitly attacked.

If an attorney is going to introduce formal testimony that will trigger an inference that the individual is immoral, then the attorney should first file notice with the court of her intention to do so. This would permit a motion *in limine* by the opposing counsel, so that the judge can determine, outside of the hearing of the jury, whether the evidence passes the balancing test of the rule I propose. If an attorney does not do this, and introduces evidence of an immoral character trait without the prior notice and approval by the judge, then this might lead to sufficient harm that the judge might need to declare a mistrial. This will depend on the circumstances and just how prejudicial and sticky the jury's inference will be. However, because there is no requirement that a party "open the door" to a character attack, a witness whose character was attacked could then respond with past act evidence that is not limited to the "pertinent" trait that was heard.

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[338] "Adopting a subjective test based on community standards is not novel in the law." See, Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence,* 121 YALE L.J. 1912, 1953 (2012)

[339] In some early cases, it was recognized that in "close call" cases, the accused's good character evidence should be admitted because of its considerable probative value. *See*, Davison's Trial, 31 How. St. Tr. 99, 216 (K.B. 1808); cited in Wigmore, *supra* note 43, at 1169. (Tillers rev. 1983) (Given that jurors are often suspicious of plaintiffs and victims as malingering, permitting bolstering evidence might be just and not waste too much time.); see also Jennifer Hunt and Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence,* 89 J. APPLIED PSYCH. 347, 354 (2004) ("When mock jurors were given just general statements about a criminal defendant's good character, this did nothing to influence their assessments of the defendant's trustworthiness or intelligence, but general CE (without rebuttal evidence from the prosecution) did increase defendant's warmth ratings.")

Either during a hearing on a motion *in limine*, or in response to an objection by opposing counsel, the judge would need to make a preliminary determination under rule 104 that sufficient evidence exists to support a finding that the conduct or trait in question is immoral. If it is amoral or moral, it would be admitted subject only to 403. If it is immoral, specific requirements would apply to make sure that unfair attributions are not made. This inquiry should not be whether normatively the community *ought* to consider the behavior immoral, only that most members of the community *descriptively* consider it to be so. Even if the offering party could demonstrate, in a motion *in limine,* that the character evidence is substantially more probative than prejudicial, than it could, but not must, be admitted.

In making the threshold decision on immorality, judges should be careful not to use their personal, subjective sense, but to appeal to prevailing social norms that are likely to be reflected in the jury. As social mores are not shared universally, not everyone on the jury would need to find the conduct immoral, only a substantial subsect. The rule is intended to be flexible, and adopt to changing social mores.

There of course may be debate on the margins as to what counts as immoral and what does not. Two judges may disagree about whether the trait is truly immoral or not. This is to be expected, and cannot entirely be avoided when different judges interpret specific words to describe a myriad of behaviors.[340] Even so, this will likely be much less logically difficult than determining whether the evidence implicated propensity reasoning. If challenged, judges may be aided by explaining what is likely to be negatively inferred by the admission of this trait, and why this trait is likely immoral or moral. They may

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[340]In the United Kingdom, for example, evidence that a man shouted at his wife when not taking schizophrenia medications was not considered "reprehensible," so it could come be admitted subject to regular evidence rules. This is certainly not kind behavior, but it is probably not immoral either. See *R v. Osbourne*, as cited in Goudkamp, *supra* note 50, at 126.

also support their finding by referencing our intuitions about immorality. Immoral actions and traits likely trigger the jury to feel blame, shame, antipathy, stigma, or even mild moral outrage, anger or disgust toward the person against whom it is offered. If these are likely, the evidence is likely immoral. Also, the question is not whether they think *this particular witness* is capable of experiencing shame, guilt, etc. Instead, judges should ask whether objectively, by a community standard, these feelings are likely experienced *by the jury*.[341]

In addition to our intuitions about morality, judges may also be guided by the taxonomy developed by Jonathan Haidt and Craig Joseph. These moral psychologists identified five domains, which explain how individuals assess others' behaviors as being moral or not.[342] These domains reflect a thorough and nuanced account of the different types of morality. The first domain is concerned with the suffering of others and would involve character traits of neglecting, scaring, or physically injuring. The second domain is fairness and reciprocity, and would include character traits of unequal treatment or unfair discrimination between groups. This might include mocking those with disabilities or not renting properties to people of color. The third domain is ingroup loyalty, with the negative trait speaking to failures to perform the obligations of group membership. This could include stealing from your business or cheating on your spouse. The fourth is related to respect for social order and authority and includes virtues of obedience or respect. The immoral traits here may include not paying taxes or failing to wear a mask during a pandemic in violation of public health orders. The fifth is purity or sanctity, and this covers virtues such as wholesomeness, chastity, and control of desires. The corresponding immoral traits would be promiscuity, physical squalor, or not taking care of

[341] This is important as people who are dehumanized or socially marginalized are often not perceived to be capable of feeling shame or guilt. Nick Haslam and Steve Loughnan, *Dehumanization and Infrahumanization*, 65 Ann. Rev. Psychol. 399 (2014)

[342] Jonathan Haidt and Craig Joseph, *The moral mind: How five sets of innate intuitions guide the development of many culture-specific virtues, and perhaps even modules*, in P. Carruthers, S. Laurence, and S. Stich (Eds.) THE INNATE MIND, Vol. 3. (2006).

themselves.[343] People who are considered immoral under this domain, such as the unhoused or those with substance use disorder, often engenders feeling of disgust, which can be very difficult to mitigate. Together, these five domains reflect the common ethics of autonomy, community, and divinity. Importantly, we do not all prioritize these domains of morality equally; however, they capture a comprehensive view of morality, keyed to different kinds of moral wrongs.

2. My Proposal No Longer Defines Character to Require Propensity Reasoning

Given what we know from moral psychology and the spontaneity of trait inferences, the focus on propensity in rule 404 is unwise. Jurors will draw negative inferences about witnesses and parties on their own, even if they are not explicitly invited to do so, and will use those inferences to predict behavior and mental states. Further, the reliance on limiting instructions is also misguided. Instructions will not work to focus the jury on the mental state inquiry rather than the propensity to engage in the *actus reus*. Because we use mental state ascriptions to predict behavior, and use behavioral predictions to infer mental states, it is asking too much to expect jurors to keep these interconnected processes separate. Removing all references to propensity reasoning will also remove the need to engage in mental gymnastics to determine whether a propensity inference is merely permitted as opposed to being required. This will simplify the rule and will reduce the many errors applying it.

3. What Are the Likely Impacts of this Rule?

This proposal is motivated by a desire to remove unfair prejudice across the board, to improve accuracy in judgments, and to make the evidence rules

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[343] Jonathan Haidt and Craig Joseph, The *moral mind: How five sets of innate intuitions guide the development of many culture-specific virtues, and perhaps even modules.* In P. Carruthers, S. Laurence, & S. Stich (Eds.), EVOLUTION AND COGNITION. THE INNATE MIND VOL. 3. FOUNDATIONS AND THE FUTURE (p. 367–391). Oxford University Press.

more coherent and easier to apply. These are my priors. I am agnostic about whether the revised rule will help or hurt particular parties, or will be seen as being pro-defendant or pro-prosecution.

It is impossible to know exactly what its impact will be, given uncertainty about how particular judges and courts might apply it. That said, there are a couple of likely outcomes. First, jurors will hear less prejudicial character evidence that is currently admitted under rule 404(b). Judges permit a great deal of highly prejudicial evidence of immoral past acts, subject only to the balancing rule of 403. My rule ratchets up the presumption against admissibility, such that most evidence of past immoral conduct should be excluded, regardless of whether it is technically used for a non-propensity inference. This is based on the data that jurors will automatically infer character traits from past act evidence.

Of note here, evidence of a victim's past sexual history would likewise always be excluded under my proposed rule, even in states that have not passed a specific "rape shield" statute. Given that promiscuity in women is considered immoral, is triggered by hostile sexism, and is not relevant to whether the victim consented to rape in this particular case, evidence of the victim's past sexual history should always be excluded under my proposed rule. Additionally, evidence such as addiction, past unrelated crimes, or other immoral traits should always be excluded if it is of meager probative value and only used to smear the witness's credibility.

Under my proposal there will likely be more prosecutions and civil claims for sexual assault cases. This is notable because at present rape is significantly under-prosecuted.[344] Prosecutors are reluctant to indict, and plaintiffs reluctant to sue, when evidence of the defendant's past sexual assaults

[344] "See, Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 37–38 (2017)

cannot be heard by the jury.[345] This is because defendants often claim that the victim is lying, and the jury is unlikely to believe the victim without corroborating evidence.

There will be far fewer appeals based on the character evidence rules. Even if judges disagree about what counts as immoral, the shift to a balancing test, rather than a mandatory ban, means that judges will have considerable discretion in applying the rule. This is precisely the point, and will reduce the inefficiencies the rule creates.

There may be fewer convictions and findings of liability on the merits, if defendants who have "guilty-looking" faces are allowed to provide bolstering evidence of their good character, that goes beyond the traits directly pertinent to the crime. Conversely, there may be greater convictions and findings of liability if the victim was discredited for having an untrustworthy face. As civil plaintiffs are often thought to be malingering, allowing them to introduce positive character evidence might promote better factfinding and justice. Finally, the bolstering of either side's witnesses might permit them to be more fairly assessed.

While the general rule 403 presumes that evidence is admissible unless it is overly prejudicial, the rule proposed here would posit the reverse if the trait or past act is considered immoral. This is in keeping with the concerns over the correspondence bias, the person-centered approach to blame, STIs and the high informational value of negative traits. Most evidence that is immoral should be excluded under this test, with built in discretion for judges to admit the evidence in a case like Bill Cosby's or Larry Nasser's, where the past act evidence was not unfairly prejudicial and was necessary for justice.

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[345]See testimony of Paul Cassell to the Utah Supreme Court Evidence Advisory Committee, In Support of Amending Utah's Rules of Evidence To Create Presumptive Admissibility [in] Sexual Assault Cases, dated Oct. 13, 2020, on file with author.

Some have argued that giving judges the discretion to admit past acts, subject to an evaluation of its prejudicial effects would be "tantamount to the virtual free admissibility of character evidence."[346] On the one hand, it *will* increase the admissibility of past bad acts, and judge will certainly make mistakes in assessing whether evidence implicates the rule or is too prejudicial to be admitted. However, given that the character evidence rule applies to all witnesses in all cases, the introduction of more character evidence might help as many parties as it hurts. Importantly, we cannot know, *ex ante*, whether increased or decreased liability is a good or bad thing. Unfair outcomes are still possible, however, and can be reduced if judges are required to fully evaluate the proffered evidence and make a clear record of the reasoning behind the court's findings.[347] We cannot remove all judicial error, but my proposal is much less difficult to apply, making errors substantially less likely.

4. A Draft of My Proposed Rule 404

404(a) Evidence of a person's character, trait, or past acts ("character evidence") may be admissible to prove that on a particular occasion a person acted in accordance with that trait.
(b) If the judge makes a preliminary determination that the character evidence speaks to a trait that is not considered immoral, the evidence should be admitted subject only to the balancing test of rule 403.
(c) If the judge makes a preliminary determination that the character speaks to a trait that is considered immoral, it is admissible only if:
(1) its probative value substantially outweighs its prejudicial effect; and

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[346]Mendez, *supra* note 66, at 884.

[347] However, judges ought to "make a reasoned, recorded" statement of its 403 decision when it admits evidence under Rules 413–415…Because of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 [or 414] evidence and make a clear record of the reasoning behind its findings." *See*, *United States v. Castillo*, 140 F.3d 874, at 884 (10th Cir. 1998)

(2) if offered against a criminal defendant, the occurrence of the past act is proved by clear and convincing evidence[348], and
(A) the proponent gives reasonable written notice to defense counsel of the intent to use it so that the criminal defendant has a fair opportunity to contest its use.
(B) If contested, the judge should provide a record of the reasoning used to admit or exclude this evidence.

5. The Benefits of My Proposal

The rule I propose has a number of benefits. For one, it puts morality squarely back into the character evidence rule, where it belongs.[349] We know that morality drives character assessments, so a rule that ignores this is likely to be ignored. Rather than excluding positive traits that are not likely to trigger an unfair sense of blame or correspondence bias, this rule focuses our sights on traits that are immoral.

Second, the rule I propose no longer requires judges to assess whether the evidence is being used to argue conformity with a trait. No longer must attorneys argue about whether the use of evidence for intent, identity, or the doctrine of chances requires propensity reasoning. This simplification will reduce errors in the rule's application. It also provides a more honest account of how jurors will automatically use evidence of past acts to infer character, as well as mental states.

Third, the rule I propose would remove its rigid, mandatory nature, which has been shown to be both overly broad and overly narrow. Instead, just as rule 403 does not require exclusion and merely permits it, this rule would not require admission, but merely permits it. As a result, this would give more

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[348] As discussed briefly above, this proposal invites a revision of FRE 405 as well, to permit specific instances on direct, and to allow extrinsic evidence when efficient.

[349] *See* David Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 451-52 (2001). ("Thus, from the perspective of the law of evidence, it is best to conceive of character as a subset of propensity, embracing only moral aspects of a person.")

flexibility to the trial judge, and reduce the number of appeals when judges make reasonable judgment calls. Of course, if the judge unreasonably permits evidence that is far too prejudicial, or rejects evidence that is not, this can always be challenged on appeal for abuse of discretion.

This proposal will greatly reduce both the burden that rule 404 places on courts, as well as the widespread confusion the rule generates. In addition to being more narrowly tailored and intellectually honest, this proposal better reflects how jurors *spontaneously and unconsciously* infer character traits from whatever information they have available to predict how others will behave. In doing so, the revised rule re-anchors the inquiry to notions of probative value, prejudice, fairness, and morality, rather than to technical adherence to an incoherent rule.

Tab 4

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 106 Subcommittee Meeting Notes (6/4/2021)

1 message

Judge Teresa Welch <twelch@utcourts.gov> Fri, Jun 4, 2021 at 2:29 PM
To: Keisa Williams <keisaw@utcourts.gov>, "JLund@parsonsbehle.com" <JLund@parsonsbehle.com>, Judge David Williams <djwilliams@utcourts.gov>, Teneille Brown <Teneille.Brown@utah.edu>, John Nielsen <johnnielsen@agutah.gov>

Hi John and Keisa,

The Rule 106 Subcommittee met today. Here is a summary of what we discussed, and we can discuss these issues in more detail at the Committee's meeting on Tuesday:

1. At the Supreme Court conference, one of the Justices asked: "What is the extent of Rule 106's Trumping function (i.e., Does Rule 106 trump only the hearsay rules, or does it trump other rules such as the privilege rules?)". The Subcommittee members agree that rule 106 should not trump the privilege rules. Any trumping function of Rule 106 should be limited to the rule trumping the hearsay rules. Note: The Subcommittee members remain divided about whether the rule should trump the hearsay rules, and these arguments have already been fleshed out in detail at the Committee meetings and in the memo that was given to the Justices.

2. Should Utah adopt the proposed FRE 106? Importantly, oral statements are covered under proposed FRE 106, but not covered under the proposed URE 106. The Subcommittee is concerned (for various reasons) about having oral statements covered by URE 106. The Subcommittee believes that it would be helpful if Professor Capra spoke to the Committee as a whole on the issue of why/whether rule 106 should cover oral statements.

3. The Subcommittee noted that the proposed federal rule does not address the split jurisdiction issue of: What is required to trigger Rule 106 (i.e., whether the written statement must be introduced at trial, or whether it is sufficient to have testimony about the written statement to trigger Rule 106)? The Subcommittee recommends that even though the proposed federal rule does not address this issue, the proposed Utah rule (and proposed note) should answer this question (as it currently does in the latest draft of the proposed Utah rule).

Thanks,
Teresa

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule of Evidence 106 (Federal/Utah Rules)

Judge Teresa Welch <twelch@utcourts.gov> Tue, May 18, 2021 at 11:10 AM
To: Keisa Williams <keisaw@utcourts.gov>

FYI- In case you need Professor Capra's latest e-mail (and attachment) regarding the developments re: FRE 106, here it is.

---------- Forwarded message ---------
From: **Daniel Capra** <dcapra@law.fordham.edu>
Date: Thu, May 6, 2021 at 10:59 AM
Subject: Re: Rule of Evidence 106 (Federal/Utah Rules)
To: Judge Teresa Welch <twelch@utcourts.gov>

The Advisory Committee on Evidence Rules approved the attached amendment to FRE 106. It will now be sent to the standing committee with the recommendation that it be released for public comment. The vote was unanimous. Please let me know if you have any questions or if I can help with your efforts in any way. Best regards.

On Thu, Mar 25, 2021 at 7:56 PM Judge Teresa Welch <twelch@utcourts.gov> wrote:
> Thank you for your quick response, and I will contact you again soon.
>
> On Thu, Mar 25, 2021 at 5:17 PM Daniel Capra <dcapra@fordham.edu> wrote:
> > Judge Welch
> >
> > Good to hear from you. Your report on the federal developments is absolutely correct. I understand from your email that you have the minutes and the 106 memo. It is fine for you to distribute them as you see fit. They are public documents.
> >
> > I will report on the April 30 meeting. If you don't hear from me after a few days please feel free to remind me. Thanks for contacting me. I enjoy very much working with state advisory committees on evidence.
> >
> > Daniel J. Capra
> > Reed Professor of Law
> > Fordham Law School
> > 150 West 62nd Street
> > New York, New York 10023
> > (212) 636-6855
> >
> > Sent from my iPhone
> >
> > > On Mar 25, 2021, at 4:07 PM, Judge Teresa Welch <twelch@utcourts.gov> wrote:
> > >
> > > Hello Professor Capra,
> > >
> > > I am Judge Teresa Welch (from Utah's Third District Court), and I received your contact information from Justice Lee (Utah Supreme Court). I am reaching out to you because I am the Chair of a Subcommittee that consists of members of the Utah Supreme Court Advisory Committee on the Rules of Evidence (Committee). Please note that the Chair of the Committee is John Lund, and the Committee's Reporter is Keisa Williams. I have cc'd both of them in this e-mail. The Committee (and Subcommittee) is tasked with looking into whether Utah Rule of Evidence 106 should be amended. The specifics of our rule 106 tasks were outlined by the Utah Supreme Court in note 4 of *State v. Sanchez*, 2018 UT 31. (As a side note: Prior to starting my judgeship, I was the appellate attorney who represented Mr. Sanchez.).
> > >
> > > In examining whether Utah's rule 106 should be amended, our Committee discovered that there is a pending discussion of whether federal rule 106 should be amended. It is my understanding that you are

the Reporter for the Federal Committee that is discussing the federal rule. Our Committee and the Utah Supreme Court Justices are interested in obtaining any information about the latest developments regarding proposed changes to federal rule 106.

It is my understanding that you recently informed Justice Lee (via e-mail) of the following: The Federal Committee has been working for several years on an amendment to Rule 106. Moreover, at an upcoming meeting (to be held on April 30th), the Federal Committee will be voting on whether to recommend to the Standing Committee that the amendment be released for public comment. And if the proposed rule is approved, the date of its effectiveness would be December 1, 2023. The Federal Committee is looking into: (1) whether the rule should allow a completing statement to be admissible over a hearsay objection, and (2) whether the rule should permit completion with oral, unrecorded statements. These proposed amendments are consistent with a recent article in the Utah Law Review on rule 106.

I am now reaching out to you to see if you would be willing to provide our Utah Committee with the following: (1) The Minutes from the last Federal Advisory Meeting (which occurred on November of 2020), at which rule 106 was discussed; (2) A copy of the Memo that you have prepared for the Federal Committee's upcoming April meeting (which includes a draft rule amendment and draft committee note). I noticed that you provided these materials in the e-mail that you sent to Justice Lee, but I wanted to confirm with you whether it is okay for me to forward these materials to the members of our Utah Committee; and (3) Could you update us with the results of the vote at the Federal Committee's April 30 Meeting?

In short, our Utah Committee would benefit from knowing any developments that transpire re: proposed amendments to federal rule 106. We would appreciate any and all information that you could give us!

Please let me know if you have any questions, and I would be happy to discuss rule 106 issues with you in more detail.

Thank you,

Judge Teresa Welch

--
Daniel J. Capra
Reed Professor of Law
Fordham Law School
150 West 62nd Street
New York, NY 10023
212-636-6855

rule 106 to standing committee for public comment.docx
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Rule 106, April 30, 2021

Rule 106. Remainder of or Related ~~Writings or~~ ~~Recorded~~ Written or Oral Statements

If a party introduces all or part of a ~~writing or~~ ~~recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other ~~writing or~~ ~~recorded~~ written or oral statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Draft Committee Note

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime -- when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the

party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial --- where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule. The rule is expanded to now cover all writings and all statements --- whether in documents, in recordings, or in oral form.

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . ., or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value --- in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The intent of the amendment is to completely displace the common law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988), the Court in

dictum referred to Rule 106 as a "partial codification" of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent --- especially when the rule is one, like the rule of completeness, that arises most often during the trial. Displacing the common law is especially appropriate because the results under this rule as amended will generally be in accord with the common-law doctrine of completeness at any rate.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

Tab 5

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 506 Subcommittee Update

Sarah Carlquist <SCarlquist@sllda.com> Tue, Jun 1, 2021 at 3:46 PM
To: Keisa Williams <keisaw@utcourts.gov>

Hi Keisa,

Below is an outline/update that the rule-506 subcommittee was hoping we could have included in the materials for next week's meeting. Hopefully we are getting this to you in time. If not, I think as a long as we are just on the agenda for long enough to get other members' thoughts that would be great.

Rule 506 Subcommittee Update

The Supreme Court in State v. Bell asked the URE Committee to review URE 506 and "consider the importance of maintaining a strong privilege rule, of more clearly defining what is required to qualify for exceptions to the privilege, and of respecting a criminal defendant's constitutional rights." In light of the supreme court's directive and after considering the results of a 50-state survey of our sister states' corollary to Utah's rule 506 (many thanks to John Nielsen for spearheading that effort) we've come up with the following broad-stroke ideas:

- Amend the rule to expressly include the standard a party must meet to overcome the privilege. The standard should be less strict than the standard that currently applies in criminal cases.
    - No current standard exists in the text of the rule.
    - The current standard the supreme court has adopted through caselaw and for criminal cases is that the defendant must establish to a "reasonable certainty" that the privilege does not apply. The supreme court seems concerned that this standard is too stringent.
    - The "reasonable certainty standard" does not apply in civil cases. In civil cases the party seeking documents only needs to establish that the elements of exception to the privilege apply.
    - Amending the rule to include the standard will help ensure uniform application of the rule in civil and criminal cases.
- Possible Standards:
    - Good faith and reasonable probability
    - Probable cause
    - Good cause
    - Reasonably necessary
- Create procedural safeguards for purposes of the in-camera review, dissemination, and appellate review
    - If the standard is made less stringent, we believe that means additional protections need to be implemented on the back-end to govern the scope of the in-camera review, to establish what extent and to whom the documents may be disseminated, and to ensure a complete record for purposes of appeal while respecting the patient's privacy interests.
    - One possibility is that the court issues a protective order to control the dissemination of documents the court, after an in-camera review, determines meet the exception to the privilege.
    - It may be this aspect needs to be tackled through the amendment of other rules such as the URCivP and URCrimP.

Sarah Carlquist

Appellate Attorney

Salt Lake Legal Defender Association

Tab 6

Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition.

(a) **Prohibited Uses.** The following evidence is not admissible in ~~a~~ criminal or juvenile delinquency proceedings involving alleged sexual misconduct:

(a)(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(a)(2) evidence offered to prove a victim's sexual predisposition.

(b) **Exceptions.** The court may admit the following evidence if the evidence is otherwise admissible under these rules:

(b)(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(b)(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(b)(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) **Procedure to Determine Admissibility.**

(c)(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(c)(1)(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(c)(1)(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(c)(1)(C) serve the motion on all parties.

(c)(2) **Notice to the Victim.** The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(c)(3) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.

Effective May 1, 2017

2016 Advisory Committee Note. The 2016 amendment changes the classification of records described in subparagraph (c)(3) from sealed to protected. See CJA Rule 4-202.02.