THE CASE FOR ABOLISHING THE CIVIL CHARACTER-EVIDENCE RULE

STEVEN GOODE*

The Federal Rules of Evidence were enacted fifty years ago. The Advisory Committee charged with drafting the rules successfully reformed a good number of rules and failed in its attempts to reform others. But it did not even attempt significant reform of one of the most troublesome rules – the character-evidence rule. Indeed, it declined to seriously consider even a very modest proposal to reform the way the character-evidence rule applies in civil cases. Those espousing change, it declared, "have not met the burden of persuasion."

This Article takes up that challenge. I argue that Rule 404's categorical exclusion of character evidence is not justified in civil cases. Both the historical origins of the character-evidence rule and the contemporary justifications offered in its support are infused with concerns about criminal defendants. Both largely ignore differences between criminal and civil litigation. An examination of the Federal Rules' other relevancy provisions proves the civil character-evidence rule to be an outlier. And a survey of the case law shows that the rule works far too often to exclude evidence that jurors should be allowed to consider. More than modest change is needed; the civil character-evidence rule should be abolished.

INTRODUCTION

Fifty years ago, Congress enacted the Federal Rules of Evidence.[1] In doing so, it stripped away some of the barnacles that had long encrusted the law of evidence. Gone was the voucher rule;[2] statements against penal interest were finally deemed worthy of inclusion in the declaration against interest hearsay exception;[3] the Dead Man's Rule met its demise,[4] as did the ban on opinion testimony by a lay witness.[5] But attempts by the Rules' drafters to further reform evidence law –

* W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor, University of Texas School of Law.

[1] Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929.

[2] FED. R. EVID. 607 abolished the voucher rule, which prevented a party from impeaching its own witness. The rule's origins were obscure, *see* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 38 (1st ed. 1954), and it was widely criticized. *See, e.g.,* 3A JOHN HENRY WIGMORE, EVIDENCE §§ 898-899 (Chadbourn rev. ed. 1970).

[3] FED. R. EVID. 804(b)(3).

[4] FED. R. EVID. 601.

[5] FED. R. EVID. 701.

for example by significantly[6] loosening the bonds of hearsay law[7] and reshaping privilege law[8] – were stymied.

The drafters, however, declined even to propose meaningful reform of one major area of evidence law. From the outset, they sought largely to codify the traditional approach to character evidence,[9] even though the Supreme Court – the nominal author of the rules it submitted to Congress – had itself decried the common-law approach to character evidence as "grotesque" and "archaic."[10] To some extent, the drafters' reluctance is understandable. They were certainly aware that altering the traditional rules surrounding character evidence in criminal cases would be highly controversial. Both the Department of Justice and the criminal defense bar kept close tabs on the drafting process, and neither hesitated to express its dismay when it thought a change in the rule might prove advantageous to the other side.[11]

What is less understandable is the drafters' refusal to seriously consider changing the character-evidence rule in civil cases. To be sure, the character-evidence rule primarily affects criminal cases. But it applies frequently and in a wide array of civil cases.[12] And in the decades leading up to the drafting of the federal rules, the Model Code of Evidence,[13] the original Uniform Rules of Evidence,[14] and Wigmore's Code of Evidence[15] all provided for expanded use of character

---

[6] The drafters did modestly liberalize hearsay law. They were able to exclude from the definition of hearsay certain types of statements that had traditionally been considered hearsay, *see* United States v. Zenni, 492 F.Supp. 462 (E.D. Ky. 1980), as well as expand the scope of some hearsay exceptions, *see, e.g.,* FED. R. EVID. 803(4), 804(b)(2).

[7] For example, the first published draft of the rules would have allowed courts to admit hearsay where there were sufficient "assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available" and offered an nonexclusive list of 23 illustrations that met this standard. Proposed Rule 8-03, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 345-50 (1969). The rules promulgated by the Supreme Court would have made a witness's prior inconsistent statements admissible as substantive evidence as well as for impeachment purposes. Proposed Rule 801(d)(1)(A), Rules of Evidence for the United States District Courts and Magistrates, 56 F.R.D. 183, 293 (1972). Congress narrowed that rule, allowing the use of only certain kinds of prior inconsistent statements as substantive evidence. FED. R. EVID. 801(d)(1)(A).

[8] The rules promulgated by the Supreme Court eliminated the traditional physician-patient and spousal communications privileges. *See* Proposed Rule 504 and 505 advisory committee's notes, Rules of Evidence for the United States District Courts and Magistrates, 56 F.R.D. 183, 241-42, 245-46 (1972). Congress rejected the promulgated privilege rules. *See* Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929.

[9] The character-evidence provisions that Congress enacted in 1975 were basically the same as those in the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 227-32 (1969). *See* 22A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5231 (2012).

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

[11] *See generally* 22A WRIGHT & GRAHAM, *supra* note 9 § 5231 (discussing controversy over Rule 404); 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE §§ 6111, 6131 (2d. ed), Westlaw database (updated April 2023) (discussing controversy over Rules 608 and 609).

[12] *See* 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 7:1 Westlaw (database updated January 2024) (listing three dozen types of cases). The rule frequently comes into play in civil rights and employment discrimination cases, *see infra* notes 250, 253-54, 305, and 329-30 and accompanying text, but it also affects suits brought under a wide range of statutes, from the Torture Victim Protection Act, 28 U.S.C. § 1350 note, *see* Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278 (11th Cir. 2022), to the Landrum-Griffin Act, 29 U.S.C. § 153 *et seq*., *see* Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990), to the Trafficking Victims Protection Act, 18 U.S.C. § 1581 *et. seq., see* Roe v. Howard, 917 F.3d 229 (4th Cir. 2019), to the Fair Labor Standards Act, 29 U.S.C. § 215, *see* Kanida v. Gulf Coast Med. Personnel, LP, 363 F.3d 568, 581-82 (2004).

[13] MODEL CODE OF EVIDENCE (AM. LAW INST. 1942). *See infra* Part III(B)(5).

[14] UNIF. R. EVID. (UNIF. LAW COMM'N 1953). *See infra* Part III(B)(5).

[15] JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW (1942) [hereinafter WIGMORE'S CODE]. *See infra* Part III(B)(5).

evidence in civil cases. Respected commentators like Charles McCormick,[16] Fleming James,[17] and Judson Falkner[18] issued similar calls. Yet the drafters brushed aside even a minimal proposal to extend to civil cases two exceptions to the general ban on character evidence that had long been accepted in criminal cases. The drafters offered only a cursory explanation, which concluded, "[i]t is believed that those espousing change have not met the burden of persuasion." [19]

This Article takes up that challenge. I argue that Rule 404's categorical exclusion of character evidence is not justified in civil cases. Neither the historical origins of[20] nor contemporary justifications for[21] the character-evidence rule support its continued application. Both are infused with concerns for the criminal defendant and scarcely acknowledge critical differences between civil and criminal litigation.[22] Moreover, an examination of other evidence rules shows the civil character-evidence rule to be an outlier.[23] Of course, this would all be merely of academic concern if Rule 404 worked well in civil cases. But it doesn't—too often, the rule prevents juries from hearing solidly probative evidence.[24] More than modest change is needed. It is time to abolish the civil character-evidence rule. Character evidence should not be categorically excluded in civil cases; its admissibility should ordinarily[25] be determined under Rule 403 on a case-by-case basis. Part I offers a brief primer on the character-evidence rule. Part II reviews how and why English courts instituted the character-evidence rule. In Part III, I review and assess the contemporary justifications typically offered in the rule's support, and Part IV demonstrates how the civil character-evidence rule is an outlier when compared with other relevancy rules. Part V examines the case law and how abolishing the character-evidence rule would be beneficial. Part VI offers a brief conclusion.

I. A QUICK PRIMER ON THE CHARACTER-EVIDENCE RULE

The character-evidence rule generally prevents a party from offering evidence of a person's character or character trait to prove the person has a propensity to behave in a certain way and so behaved that way on a given occasion. In short, it prohibits the use of such evidence if the probative value of the evidence flows from a character-propensity inference. For example, evidence that a person has a violent character cannot be offered to prove that the person acted in accordance with that violent character and thus committed the charged assault. Rule 404(a)(1) codifies this prohibition.[26] Rule 404(a)(2) then codifies some long-recognized exceptions. Two apply only in criminal cases: First, criminal defendants may offer evidence of their good character, and if they

---

[16] MCCORMICK, *supra* note 2 § 156.
[17] Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).
[18] Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574 (1956).
[19] See FED. R. EVID. 404 advisory committee's note (1972).
[20] *See infra* Part II.
[21] *See infra* Part III.
[22] *See infra* Parts II and III.
[23] *See infra* Part IV.
[24] *See infra* Part V(B).
[25] Abandoning the general rule regarding the admissibility of character evidence in civil cases does not mean that some specific issues, such as evidence of prior sexual misconduct, would not continue to be addressed in other rules. Rule 412, for example, discourages the use of such evidence while Rule 415 encourages it. *See infra* text accompanying notes 239-57.
[26] I focus here and throughout much of this article primarily on Federal Rule 404 and federal case law. Most state character-evidence rules are based on either the original or restyled federal rule, and the issues arising in state court cases closely track those arising in federal courts.

do, the prosecution may introduce rebuttal evidence.[27] Second, in a criminal case, evidence of the alleged victim's character may be offered,[28] usually first by the defendant[29] and then by the prosecution in rebuttal. Under Rule 405, proof of a person's character under these exceptions is limited to reputation and opinion testimony; specific instances from the person's life may not be used to establish the character.[30] For brevity's sake, I will refer throughout this Article to this conclusory type of character evidence offered through reputation and opinion witnesses as "pure" character evidence.

While these Rule 404(a)(2) exceptions authorize the limited use of "pure" character evidence,[31] Rule 404(b) addresses the use of other-acts evidence. By its terms, Rule 404(b)(1) enjoins the use of a person's other crimes, wrongs, or acts if offered for a character-propensity inference – that is, if offered to prove the person's character and that the person acted in accordance with that character on the occasion in question.[32] Rule 404(b)(2) states, however, that such other-acts evidence may be admissible if offered for a different purpose – that is, a purpose that does not require a character-propensity inference. It then provides a non-exclusive list of possible permissible uses. Other-acts evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[33]

Knight v. Miami Dade County[34] illustrates one such permissible use. Late one night, two Miami Dade police officers pursued a Cadillac SUV that they said had run a red light. Eventually, the SUV turned into a dead-end street and stopped. The officers exited their car and approached the SUV. What happened next was disputed; the denouement was not. They shot all three of the car's occupants; the driver and one passenger died.[35] The wounded passenger and the estate of the

---

[27] FED. R. EVID. 404(a)(2)(A).

[28] FED. R. EVID. 404(a)(2)(B). A defendant's ability to offer evidence of an alleged victim's character is limited by Rule 412, which bars evidence, in cases involving alleged sexual misconduct, of an alleged victim's other sexual behavior, or sexual predisposition. FED. R. EVID. 412. *See infra* text accompanying notes 239-47.

[29] In homicide prosecutions, the prosecutor may offer evidence of the alleged victim's peaceable character to rebut any evidence—even noncharacter evidence—that the victim was the first aggressor. FED. R. EVID. 404(a)(2)(C).

[30] FED. R. EVID. 405. A cross-examiner may, however, test a character witness's familiarity with the person or the person's reputation by asking "did you know" or "have you heard" questions about relevant specific instances. For example, a cross-examiner may ask a witness who has testified to the accused's excellent reputation for truthfulness whether the witness has heard that the accused embezzled thousands of dollars from his employer. Consequently, an accused with a checkered past typically pays a price for calling a reputation or opinion witness.

[31] A third exception, FED. R. EVID. 404(a)(3), sanctions use of evidence of a witness's character as allowed in Rules 607, 608, and 609, which govern impeachment. This Article does not address the use of character evidence for impeachment purposes. The use of character evidence to impeach a witness has been widely and cogently criticized. *See, e.g.*, MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 168 (2016); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991); Robert G. Spector, Commentary, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334 (1979).

[32] FED. R. EVID. 404(b)(1). As has been often noted, Rule 404(b)(1) logically is redundant. *E.g.*, DAVID P. LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 4.1 (2d ed. 2019) [hereinafter LEONARD, THE NEW WIGMORE]; GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 404.11 (7th ed. 2011) (referring to Rule 404(b)(1) as "extension" of Rule 404(a)(1)'s exclusionary principle and a "restatement" Rule 405's limitation on how character may be proved); Michael L. Russell, *Previous Acts of Employment Discrimination: Probative or Prejudicial*?, 25 AM. J. TRIAL ADVOC. 297, 300–01 (2001).

[33] FED. R. EVID. 404(b)(2).

[34] 856 F.3d 795 (11th Cir. 2017).

[35] *Id.* at 803-05.

other passenger brought a civil rights and assault and battery suit against the two officers.[36] The defendants contended that they fired only after the driver attempted to run them over.[37] The plaintiffs claimed that the car began moving only after the officers shot the driver.[38] The officers were allowed to introduce evidence of the driver's most recent felony conviction. Significantly, he was scheduled for a probation hearing the next day. Had he been caught associating with his passengers, both of whom were on probation, it might have jeopardized his probationary status. This provided a motive for him to flee rather than surrender; no inference from his character was required. The evidence was admissible.[39] But the jurors still were not authorized to draw from the driver's previous felony an inference about his character from which they might infer he acted in accordance with that character when the officers approached the SUV. That would have violated the character-evidence rule.[40]

Two cases briefly illustrate how Rule 404 affects civil cases where the proffered evidence is admissible only for a character inference. The first involves "pure" character evidence; the second, other-acts evidence.

Dr. Alan Sandifer was an avid bow hunter.[41] One evening, he was sitting at his computer with his 2007 Hoyt Vulcan XT500 compound bow.[42] His wife, sitting in another room, asked what he was doing; he replied that he was looking for a new part on the internet. Minutes later, after hearing a loud noise, she found Sandifer lying unconscious. The compound bow's metal cable guard rod[43] had pierced his left temple and penetrated deep into his brain. He died the next day.[44] His family filed suit under Louisiana's Product Liability Act[45] against Hoyt Archery, the bow's manufacturer, and its insurers, who had the case removed to federal court.

Given the absence of witnesses, the accident's cause was "confounding."[46] The defense claimed that Sandifer was trying to modify the bow and, while pulling the drawstring, voluntarily put his head in the bow to examine it. He then lost control of the drawstring, causing the cable guard rod to pierce his head. Because this was not a reasonably anticipated use of the bow,

---

[36] Before trial, the court dismissed other claims the plaintiffs leveled against the officers and other defendants. *Id*. at 802-03.

[37] *Id*. at 803-04; Answer Brief of Defendants-Appellees at 1, Knight v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017) (No. 15-10687-FF), 2016 WL 6893357, at *1.

[38] *Knight,* 856 F.3d at 803-05.

[39] *Id*. at 815-17.

[40] In reality, courts often cite Rule 404(b)(2) as the basis for admitting other-acts evidence that is probative only through a character-propensity inference, and so other-acts evidence is often admitted even though it is really character evidence. The scholarly literature well documents and critiques this phenomenon. *E.g.,* RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 367 (5th ed. 2014); Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1101, 1132 (2018); Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 778-79 (2018); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998) ("courts routinely admit bad acts evidence precisely for its relevance to defendant propensity").

[41] Sandifer v. Hoyt Archery, Inc., 907 F.3d 802, 804 (5th Cir. 2018).

[42] Compound bows use a system of cables and pulleys to generate greater arrow speed while requiring less effort by the archer. Brief of Appellees at 2-3, Sandifer v. Hoyt Archery, Inc., 907 F.3d 802 (5th Cir. 2018) (No. 3:12-cv-00322), 2017 WL 2225293, at *2-3.

[43] A cable guard rod is a component designed to keep the cables from contacting the arrow during launch. *Id.* at 3.

[44] *Sandifer*, 907 F.3d at 804.

[45] LA. STAT. ANN. RS 9:2800.51.

[46] *Sandifer*, 907 F.3d at 804.

defendants argued they could not be liable.[47] The plaintiffs sought to prove that a design defect caused Sandifer's death and offered both lay and expert testimony. Six lay witnesses sought to offer their opinion that Sandifer was careful and cautious when using a bow.[48] The expert opined that, from a purely biomechanical perspective, it was as likely that Sandifer's death was caused by voluntarily placing his head inside the bow as by a design defect. But the opinions of Sandifer's friends and family about his careful nature with a bow led the expert to conclude that a design defect was the more likely cause.[49] The trial court excluded both the expert and lay witness testimony and so granted summary judgment for the defense.[50] The court of appeals agreed that the expert's opinion was inadmissible, holding that his reliance on such "pure" character evidence rendered his conclusion unreliable.[51]

Although the court's reasoning on the admissibility of the expert opinion is a bit muddled,[52] I want to put that aside and focus instead on the proffered testimony of the six lay witnesses. The trial court easily excluded that under Rule 404(a).[53] But why should the rules of evidence categorically prevent juries from considering such information? Here we have a "confounding" accident, no eyewitnesses, and an expert who considers that it is equally likely, from a biomechanical perspective, that the cause of the accident is a design defect or what seems to be rather reckless behavior. If you were deciding the case, would you want to know that Sandifer was generally careful and cautious when using a bow?

In J & R Ice Cream Corp. v. California Smoothie Licensing Corp.,[54] the plaintiff franchisee sued franchisor California Smoothie because of various misrepresentations made by its agent. Among other claims, J & R charged that the California Smoothie agent represented, without a reasonable basis, that in its first year of operation J & R would accrue at least $250,000 and likely more than $300,000 in gross sales.[55] To buttress its case, J & R called two former California Smoothie franchisees to testify that the same California Smoothie agent made similar representations to them.[56] The court of appeals held the evidence inadmissible. "[T]he evidence was offered for 'exactly the purpose Rule 404(b) declared to be improper,' . . . namely to establish the defendants' propensity to commit the charged act."[57] Again, if you were a juror, would you

---

[47] *Id*. at 805.
[48] *Brief of Appellees*, at 11, 29-30.
[49] *Sandifer*, 907 F.3d at 808 ("Dr. Kelkar acknowledged several times that it was Dr. Sandifer's propensity to handle the bow as a 'meticulous, careful, safe archer' that allowed him to conclude that his nonvolitional theory was more likely than Hoyt's volitional theory.").
[50] *Sandifer*, 907 F.3d at 806; *Brief of Appellees*, at 11-12.
[51] *Id*. at 808-09. Once the expert's opinion was ruled inadmissible, the appellate court felt that plaintiffs' case causation failed and so it did not expressly address the exclusion of the "pure" character evidence. In fact, the court of appeals expressly declined to decide whether the lay witness's testimony might qualify as admissible habit evidence. 907 F.3d at 806 n.4.
[52] The court noted that experts are allowed to base their opinions on otherwise inadmissible facts or data so long as experts in the particular field reasonably rely on such facts or data. *Id*. at 808-09. If the lay witness testimony had been admissible, the "reasonably rely" standard (found in Rule 703) would no longer be applicable. Even so, it is plausible that a court might rule that a biomechanical engineer's expertise does not extend to assessing the probative value of such lay opinion testimony and that an opinion that is based on such information is unreliable under Rule 702. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
[53] *Brief of Appellees*, at 11-12. *See infra* text accompanying notes 338-41.
[54] 31 F.3d 1259 (3d Cir. 1994).
[55] *Id*. at 1265.
[56] *Id*. at 1268.
[57] *Id*. at 1269 (quoting Government of the Virgin Islands v. Pinney, 967 F.2d 912, 917 (3d Cir. 1992)).

want to know that the defendant's agent had made similar representations to other potential franchisees?[58]

Of course, any rule excluding a category of evidence will have outliers – cases where exclusion seems a poor outcome. But a rule that categorically excludes a category of probative evidence – such as evidence of a person's careful character when offered to prove the person acted carefully or that a person made similar representations to other people to prove he made them to the plaintiff – should require strong justification.

II. THE HISTORICAL ORIGINS OF THE CHARACTER-EVIDENCE RULE

The historical origins of the character-evidence rule offer little support for the categorical exclusion of character evidence in civil cases. Although the details are a source of some dispute,[59] the overall story is not. For our purposes, it is important to separate the "pure" character strand of the rule's origin from the other-acts evidence strand;[60] to see that the criminal-case horse pulled the civil-case carriage; and to understand that the forces that seemed to have propelled development of the character-evidence rule do not support a modern-day categorical exclusion of character evidence in civil cases.

A. The "Pure" Character-Evidence Strand

Character evidence – who a person was – played a major role in early common-law trials. As David Leonard observed, " '[p]roof' was less by establishing facts than by demonstrating the parties' relative merits as human beings."[61] As trials slowly evolved and witnesses supplanted jurors as the source of information, a body of evidence law gradually began to emerge.[62] Still, character evidence continued to be frequently admitted into the 18th century.[63] Although Wigmore dated the origins of the character-evidence rule to two late 17th-century cases,[64] more recent

---

[58] An acute reader might wonder why making similar representations to other franchisees should be considered "character" evidence. The character-evidence rule is plagued by the lack of an understanding of how character should be defined. *See infra* Part V(C).

[59] *See* Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1941 (2012) (describing, somewhat hyperbolically, history behind character-evidence rule as being "shrouded in mystery").

[60] A close look at the cases typically cited as establishing the character-evidence rule reveals, however, that the origin of the rule is more complicated than is sometimes depicted. *See infra* notes 64, 91.

[61] David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 IND. L.J. 1161, 1196 (1998) [hereinafter Leonard, *In Defense*].

[62] Wigmore believed the origins of modern evidence law were in place by the end of the 1600's. *See* John Henry Wigmore, *A General Survey of the History of the Rules of Evidence, in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 692-94 (1908). Langbein challenged Wigmore's long-accepted account, contending that "the law of evidence as we understand the term was largely nonexistent as late as the middle decades of the eighteenth century." John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COL. L. REV. 1168 (1996).

[63] *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 439-49 (1986); JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 190-91 (2003).

[64] R. v. Hampden, 9 How. St. Tr. 1053, 1103 (K.B. 1684); R. v. Harrison, 12 How. St. Tr. 833, 864 (O.B. 1692). *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646-47 (3d ed. 1940) [hereinafter WIGMORE 3d ed.]. *See also* R. N. Gooderson, *Is the Prisoner's Character Indivisible?,* 11 CAMBRIDGE L. J. 377, 377-78 (1953). *Hampden* involved rejection of character evidence – that a witness was an atheist – that had been offered to impeach the witness's credibility. 9 How. St. Tr. at 1103 (discussed in LANGBEIN, *supra* note 63, at 191). What Wigmore quotes is a slightly earlier part of *Hampden* in which the court refers to an earlier forgery case that stated that the prosecution would be permitted to prove only those of the

scholarship has found that courts allowed prosecutors to introduce evidence of an accused's bad character for some time afterwards.[65] Given the absence of a professional police force and the paucity of corroborating forensic evidence in pre-industrial England, it is not surprising that courts accepted such evidence.[66] And even after the character-evidence rule became firmly established and prosecutors were barred from introducing evidence of a defendant's bad character, courts continued to allow a criminal defendant to call character witnesses to attest to his good character.[67] We do not definitively know what prompted late-17th- and 18th-century courts to establish the character-evidence rule. But it appears that changing notions about the function of criminal trials and the role of character in society played a role.

Daniel Blinka, drawing heavily on the work of J.M. Beattie,[68] has argued that into the 18th century, criminal trials were less a search for truth than an exercise in deciding who deserved the death penalty.[69] Felonies then were capital offenses, and defendants' ability to claim benefit of clergy and thus avoid the hangman's noose, had been eroded.[70] Therefore, according to Blinka, "[p]unishing every offender for their transgressions was never the point."[71] Knowing something about the defendant was critical to judges and juries choosing whom to convict of the charged felony, whom to convict of a lesser, non-capital crime, and whom to acquit.[72] This may explain why courts continued to allow criminal defendants to offer evidence of their good character. Indeed, the crucial nature of this evidence "encouraged prisoners to bring character witnesses to speak on their behalf."[73] This explanation also sheds light on why courts allowed only criminal,[74] and not civil defendants to offer evidence of their good character.[75] But, as both Leonard and

---

defendant's previous forgeries for which he had been indicted. WIGMORE, § 194, at 647. *Harrison* rejected testimony of other-acts evidence – that the accused in a murder case had engaged in (apparently unindicted) felonious conduct three years before. 12 How.St. Tr. at 864, 874 (discussed in LANGBEIN, *supra* note 63 at 191).

[65] Langbein's study of Old Bailey cases revealed such evidence was still being admitted as late as the mid-18th century, LANGBEIN, *supra* note 63, at 195-96, and in some instances well up to 1770. *Id.* at 199-202.

[66] The Metropolitan Police Services, regarded as the first police department, was established in 1829. *See* J. L. Lyman, *The Metropolitan Police Act of 1829: An Analysis of Certain Events Influencing the Passage and Character of the Metropolitan Police Act in England*, 55 J. CRIM. L. & CRIMINOLOGY 141 (1964). Fingerprint evidence was first used to secure a criminal conviction in 1898. NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., THE FINGERPRINT SOURCEBOOK 1-15 to -17 (2011).

[67] *See 2* THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 365-66 (1824), https://llmc-com.eu1.proxy.openathens.net/docDisplay5.aspx?set=40496&volume=0002&part=001. Initially, evidence of a defendant's good character was admissible only in capital punishment cases but later was permitted in misdemeanor cases as well. Prosecutors were allowed to rebut such evidence both by cross-examining the defendant's character witnesses and presenting their own witnesses. *Id*. at 366.

[68] BEATTIE, *supra* note 63.

[69] Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law,* 37 SEATTLE U. L. REV. 87, 120-23 (2013) [hereinafter Blinka, *Character*].

[70] For a synopsis of the history of benefit of clergy, see BEATTIE, *supra* note 63, at 141-48.

[71] Blinka, *Character, supra* note 69, at 121.

[72] *Id.* at 123. *Cf.* Darling v. Town of Westmoreland, 52 N.H. 401, 406 (1872) ("There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation.").

[73] BEATTIE, *supra* note 63, at 440.

[74] *See* 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES § 47, at 61 (1st ed. 1877) (justifying allowance of evidence of criminal defendant's good character as "indulgence to one whose life or liberty are at stake" in comparison to civil cases where neither party "has the right to claim such an indulgence from the other").

[75] *See* S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 70 (London 1814), https://llmc-com.eu1.proxy.openathens.net/docDisplay5.aspx?set=40466&volume=0001&part=001; 2 STARKIE, *supra* note 67, at 366-67 (criticizing disparate treatment of civil defendants). Character evidence, however, was sometimes admitted in

Blinka argue, changes wrought by industrialization prompted changes in trial practices. A nascent middle class developed, challenging the rigid social stratification that had long existed;[76] urbanization meant less familiarity within a community, making it more difficult to judge litigants by their moral character;[77] and the concept of character itself began to take on new meanings.[78] In the mid-18th and early 19th centuries, trials increasingly became a search for truth, structured by rules of evidence and guided more by counsel for the parties. It was only in the 1730's, for example, that lawyers were first allowed to represent felony defendants.[79] Banishing most character evidence can be seen as a reaction to the old ways of conducting trials. Reflecting Enlightenment ideals, trials increasingly "were conceived of as a rational, even 'scientific,' search for truth" rather than as an attempt "to discern the inner nature and moral worth of the parties."[80] Without character evidence, judges and juries were forced to focus more on the facts of the case than on who the party was. Parties could not buffalo jurors by presenting a "throng" of witnesses who would do no more than testify about the party's general character.[81] Nineteenth-century treatise writers cheered the dethroning of character evidence.[82]

Notice, however, that the dates in the timeline sketched above do not fully align.[83] The cases Wigmore points to as establishing the character-evidence rule were decided in the late 17th century, [84] and Langbein reports that compliance took hold by the mid-18th century.[85] But the Industrial Revolution, which unleashed the forces cited by Blinka and Leonard as precipitating the rejection of character evidence, is typically dated as beginning in the second half of the 18th century.[86] Of course, history is never that neat; the Industrial Revolution did not begin on a date certain.[87] More important for our purposes, by the mid-18th century the character-evidence rule was formed only with regard to general evidence of a person's character. Did the defendant work regularly and support his family or was he an idler or troublemaker? Was he sober and honest?

---

civil cases for a propensity inference, such as to show the unchaste character of the mother in an illegitimacy case, *id.* at 368, or of a wife or daughter in an action by her husband or father for seduction. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 54 (2 ed. 1844).

[76] Leonard, *In Defense*, *supra* note 61, at 1195-96. The Reform Act of 1832, 2 Will. IV c. 45, enfranchised middle-class men.

[77] Leonard, *In Defense*, *supra* note 61, at 1196.

[78] Blinka, *Character, supra* note 69, at 123-29.

[79] BEATTIE, *supra* note 63, at 356-62.

[80] Leonard, *In Defense*, *supra* note 61, at 1195.

[81] *See* Stow v. Converse, 3 Conn. 325, 345-46 (1820) (holding evidence of party's honesty inadmissible to prove he collected taxes impartially; "Instead of meeting a charge of misconduct, by testimony evincive of not having misconducted, general character would become the principal evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general, would shelter himself from the wrongs he had perpetrated.").

[82] *See, e.g.,* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 525 (Boston: Little, Brown, and Co. 1898); THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 74 (9th Amer. ed. 1869) (calling criminal defendant's right to offer evidence of good character "last remnant of compurgation"); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 60 (London: MacMillan and Co. 1876).

[83] Indeed, Leonard acknowledged that the final stages of the trial's evolution to a rational inquiry into the facts of the case coincided with the beginning of the period of industrialization. Leonard, *In Defense*, *supra* note 61, at 1196.

[84] *See supra* note 64.

[85] *See supra* note 65.

[86] *E.g.,* T. S. ASHTON, THE INDUSTRIAL REVOLUTION, 1760-1830 (1948); ARNOLD TOYNBEE, TOYNBEE'S INDUSTRIAL REVOLUTION (1969 ed.).

[87] Nor did the Age of Enlightenment. *See* THE ENLIGHTENMENT: A COMPREHENSIVE ANTHOLOGY 20-21 (Peter Gay ed. 1973).

Was he established in his community?[88] It was not until later that courts focused on other-acts evidence and character.

B. The Other-Acts Evidence Strand

R. v. Cole, the case widely recognized as establishing the character-evidence rule as to other-acts evidence[89] was not decided until 1810. Unfortunately, the case was unreported. What we know of it comes from a contemporary treatise. In 1814, Phillipps reported that *Cole*[90] held inadmissible, in a prosecution for "an infamous crime," an accused's admission that he had committed "such an offense at another time and with another person, and that he had a tendency to such practices."[91] Noteworthy for our discussion is that Phillipps discusses *Cole* under his first rule about the "nature of proofs": "Evidence must be confined to the points in issue."[92] *Cole* is but one of a number of cases Phillipps discusses regarding the admissibility of other-acts evidence.[93] But he does not include *Cole* in his ensuing discussion under the subhead, "When character may be given in evidence."[94] This hints at what later cases and treatises make more apparent. *Cole* was strongly rooted in the 19th century's crabbed view of relevancy.[95] The common-law doctrine of *res inter alios acta*[96] – which held that acts involving third parties was irrelevant – exemplified this narrow conception. For example, in Holcombe v. Hewson,[97] decided the same year as *Cole*, a publican claimed that a brewer sold him bad beer. The court rejected the brewer's proffer that he sold good beer to three other publicans as inadmissible *res inter alios acta*.[98] Courts were also

---

[88] BEATTIE, *supra* note 63, at 440.

[89] *See, e.g.,* LEONARD, THE NEW WIGMORE, *supra* note 32 § 2.3 ("it is generally believed that the rule that evidence of uncharged misconduct could not be offered to show a character for wronging became firmly established in 1810 with the decision in R. v. Cole"); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 960-61 (1933) ("*Rex v. Cole* in 1810 established the principle that evidence which merely showed that the defendant had a propensity to do the sort of acts with which he was charged, was not admissible.") (footnote omitted) [hereinafter Stone, *Rule of Exclusion: England*].

[90] PHILLIPPS, *supra* note 75, at 70 n. b., tells us that *Cole* was decided at "Mich. term 1810, by all the Judges."

[91] *Id.* at 69-70. Strangely, the facts of *Cole* scarcely distinguish it from the two cases Wigmore cited as establishing the character-evidence rule in the 1690's. In both, Wigmore noted that the court condemned the use of other-acts evidence: the defendant's other (unindicted) criminal conduct to prove his guilt on the charged crime. *See supra* note 64.

[92] *Id.* at 69.

[93] *Id.* at 70.

[94] *Id.*

[95] For example, STEPHEN, *supra* note 82, at 15, cites *Cole* in his chapter headed "Occurrences Similar to But Unconnected With the Facts in Issue Irrelevant Except in Certain Cases."

[96] 1 FRANK S. RICE, THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE 506 (1892) refers to the "celebrated maxim" in full: "res inter alios acta alteri nocere non debet." This translates to "things done to strangers ought not to injure those who are not parties to them." *Res inter alios acta,* BLACK'S LAW DICTIONARY 1470 (4th ed. 1968). *See generally* Charles H. Barrows, *The Maxim Res Inter Alios Acta: Its Place in the Law of Evidence,* 14 AM. L. REV. 350 (1880); Herman L. Trautman, *Logical or Legal Relevancy – A Conflict in Theory*, 5 VAND. L. REV. 385, 389 (1952); Note, *Admissibility of Evidence res inter alios acta*, 10 COL. L. REV. 759 (1910).

[97] 2 Camp. 891 (1810). The classic American case is Collins v. Inhabitants of Dorchester, 60 Mass. 396 (1850).

[98] Barrows, *supra* note 96, at 357. The connection between the civil character-evidence rule and the *res inter aliso acta* doctrine has been noted. 22A WRIGHT & GRAHAM, *supra* note 9 § 5239; Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 307 (1989); Edward J. Imwinkelried, *The Admissibility of Similar Facts Evidence in Civil Cases in the United Kingdom and the United States: The Need For Rethinking on Both Sides of the Atlantic*, 9 LIVERPOOL L. REV. 137, 141 (1989).

concerned that defendants would be surprised by and unable to defend themselves against other-acts evidence.[99]

Despite this, litigants often managed to introduce other-acts evidence. Even before later courts repudiated the *res inter alios acta* doctrine,[100] it was applied episodically,[101] albeit without explanation as to why such evidence was sometimes admissible.[102] And the same thing happened with the character-evidence rule. The courts dutifully repeated that other-acts evidence was inadmissible to prove a person's character, but frequently allowed such evidence.[103] Often, the evidence was probative without requiring an inference about the person's character.[104] But in many cases, courts admitted other-acts evidence even though a character inference was required. Although this occurred most frequently when an accused's other acts were offered to prove his intent,[105] it also happened when other-acts character evidence was offered to prove a defendant's actions.[106] And neither the courts nor the commentators ever acknowledged that nominally inadmissible character evidence was being admitted.[107] In essence, the common-law rule was that evidence of a person's other acts was inadmissible to prove character except when courts felt it was too probative to ignore.[108] The inconsistency with which the other-acts evidence strand of the character-evidence rule was applied reinforces the idea that it was motivated by relevancy notions very different from the concerns that animated the "pure" character strand.

C. The Criminal-Case Horse Pulled the Civil-Case Carriage

A reading of the case law and commentary also makes clear that criminal cases were overwhelmingly responsible for shaping both strands of the character-evidence rule. The move to

---

[99] THAYER, *supra* note 82, at 525; WIGMORE 3d ed., *supra* note 64 § 194; Stone, *Rule of Exclusion: England*, *supra* note 89, at 957–58.

[100] Darling v. Town of Westmoreland, 52 N.H. 401 (1872), was the forerunner in rejecting the doctrine. Maine courts waited more than one hundred years to abandon it. Simon v. Town of Kennebunkport, 417 A.2d 982, 984-86 (Me. S. Ct. 1980).

[101] Note, *supra* note 96, at 759 ("The rule that evidence of *res inter alios acta* is inadmissible has become subject to so many exceptions that, as a principle of general application, its value has been considerably diminished.").

[102] *See*, *e.g.*, GREENLEAF, *supra* note 75 § 53, at 64 (stating that cases in which such evidence had been admitted were somehow not "exceptions to the rule [but] fall strictly within it").

[103] *See generally* LEONARD, THE NEW WIGMORE, *supra* note 32 §§ 2.3-2.4, 3.3-3.4.

[104] For example, such evidence was often admitted to prove the accused's knowledge in forging and uttering cases. *See, e.g.,* LEONARD, THE NEW WIGMORE, *supra* note 32 § 2.4.1.b (discussing cases); 2 STARKIE, *supra* note 67, at 378. It also was used to prove knowledge in other types of cases. *E.g.,* R. v. Mogg, 172 Eng. Rep. 741 (1830) (admitting evidence that defendant poisoned other horses with sulfuric acid to rebut his claim that he did not know sulfuric acid would be deadly when he administered it to horse in question).

[105] *See* 1A JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 54.1 n.1 (Tillers rev. ed. 1983).

[106] For example, Leonard reports that it was "not uncommon" for courts to admit other-acts evidence in arson cases. LEONARD, THE NEW WIGMORE, *supra* note 32 § 2.4.1.e.(1). But evidence that a defendant committed other acts of arson to prove the fire in question was arson typically requires an inference that the defendant was an arsonist and therefore committed arson on the occasion in question. R. v. Geering, 18 L.J. (N.S.) 215, 8 Cox C.C. 450 (1849), provides another example. There, the defendant was charged with fatally poisoning her husband with arsenic. The prosecution was allowed to produce evidence that three of her sons, for whom she prepared meals, suffered arsenic poisoning (two fatally) in the ensuing seven months. Since her sons' arsenic poisonings occurred after her husband's death, they could not possibly be said to prove the defendant's knowledge of arsenic's toxicity at the time of the husband's death.

[107] *See* LEONARD, THE NEW WIGMORE, *supra* note 32 § 2.2, at 31-32; § 2.4.3.

[108] It was not until the early 20th century that Wigmore became the first to try to impose an analytical framework on the admissibility of other-acts evidence. LEONARD, THE NEW WIGMORE, *supra* note 32 §2.4.1-3, at 233-36 (referring to Wigmore's 1904 edition of his A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW).

exclude evidence of a person's general character was a reaction to the practice of using character to sort out which criminal defendants deserved to hang and which deserved to live. The early other-acts cases came overwhelmingly from the criminal side of the docket. David Leonard has exhaustively reviewed the history of other-acts evidence, both in Great Britain and the United States.[109] What is striking about his nearly 200-page discussion is the almost complete absence of civil cases. For example, his 40-page section reviewing British 19th-century case law mentions only two civil cases.[110] His 98-page review of American case law from the same period devotes six pages to civil fraud and false representation cases; the other 92 pages discuss criminal cases.[111] Julius Stone's path-breaking articles on other-acts evidence in England[112] and America[113] share a similar preoccupation with criminal cases.[114] Wigmore praised the character-evidence rule as "a revolution in the theory of criminal trials," viewing it as one of the features that elevated the Anglo-American system of evidence over the Continental system.[115] What happened in criminal cases largely dictated what happened in civil cases.

D. The Inapplicability of the Historical Origins to a Contemporary Civil Character-Evidence Rule

What this brief historical review demonstrates is that the origins of the character-evidence rule provide no support for its continuation in civil cases. First, the ban on general evidence of a person's character was a reaction to the outsized role character played in English society generally and in trials particularly. We can safely say that the role that character played in English society centuries ago hardly prevails today. Into the mid-19th century, a convicted felon was not even allowed to testify at trial.[116] Today, a convicted felon can be a major political party's presidential nominee. General character evidence was banned from English trials because it was too often the critical evidence in a trial more concerned with who the person was than what had happened. It was not because of a considered judgment that such evidence was unhelpful as but one piece of evidence in a rigorous, structured trial whose goal was the search for truth. Second, the forces that motivated the other-acts strand—a crabbed view of relevance and, to a lesser extent, concerns about surprise—have little bearing on modern civil litigation. Contemporary notions of relevance are far broader[117] than the 18th century's; the doctrine of *res inter alios acta* is wholly incompatible with current notions of relevancy.[118] Moreover, the danger of surprise is largely irrelevant in

---

[109] LEONARD, THE NEW WIGMORE, *supra* note 32 §§ 2.1-3.4.
[110] *Id.* § 2.4.
[111] *Id.* § 3.3.
[112] Stone, *Rule of Exclusion: England, supra* note 89.
[113] Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) [hereinafter Stone, *Rule of Exclusion: America*].
[114] Stone, *Rule of Exclusion: England, supra* note 89, at 958-73, 982-83 ("The common-law rule here examined is the same in civil and criminal cases. . . . . By far the greater number of important decisions, however, have been in criminal matters . . .); Stone, *Rule of Exclusion: America, supra* note 113, at 992-1022.
[115] WIGMORE 3d. ed., *supra* note 64 § 194, at 647.
[116] This disqualification was not fully abolished in England until passage of the Evidence Act 1843. *See* 21 CHARLES ALAN WRIGHT, KENNETH W. GRAHAM, JR., & DANIEL D. BLINKA, FEDERAL PRACTICE AND PROCEDURE § 5005 (2d ed.), Westlaw database (updated June 12, 2023). In this country, most, but not all states had abolished this disqualification by the end of the 19th Century. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372 n.4 (1897) (listing state statutes).
[117] *See* FED. R. EVID. 401; Dortch v. Fowler, 588 F.3d 396, 400 ("The standard for relevancy is 'extremely liberal' under the Federal Rules of Evidence.").
[118] Simon v. Town of Kennebunkport, 417 A.2d 982, 985 (Me. S. Ct. 1980) ("A blanket rule of irrelevance is manifestly incompatible with modern principles of evidence.").

contemporary civil litigation, where discovery plays a large role.[119] Finally, civil cases played almost no role in the shaping of what is now the character-evidence rule. Neither the cases nor the commentators dwelled much on differences between civil and criminal cases.[120] And that remains true for the contemporary justification typically offered for the character-evidence rule.

III. CONTEMPORARY JUSTIFICATION FOR THE CHARACTER-EVIDENCE RULE

Contemporary courts and commentators justify the character-evidence rule primarily by casting doubt on character-evidence's probative value and raising concerns about the unfair prejudice it poses. They conclude that because the danger of unfair prejudice consistently outweighs the probative value, a categorical rule excluding such evidence is justified. Some commentators throw in arguments about deleterious extrinsic effects that may flow from admitting character evidence. Even a brief review of these arguments, however, makes clear just how much they focus on the criminal side of the docket, are infused by concerns for criminal defendants, and ignore a myriad of relevant differences between civil and criminal cases. And because "pure" character evidence has been relegated to a minor role even in criminal cases, discussions of the character-evidence rule focus almost exclusively on other-acts evidence.[121]

A. Primary Justification: Probative Value Outweighed by Unfair Prejudice

There is widespread agreement, from the Supreme Court[122] to commentators,[123] that character evidence has some probative value – that is, that evidence of a person's character has a tendency to prove that the person acted in accordance with that character on the occasion in question. This accords with the way most people perceive the world. Suppose the answer key to an exam is missing from a high school teacher's desk. The only people who had access to the desk at the relevant time are three students. Two have exemplary records; the third had recently been caught shoplifting and embezzling funds from the student government. Who is rationally likely to be the first suspect? Or as Fred Schauer recently put it, "it is pointless to try telling your insurance company that your three previous accidents should not cause them to raise your rates or cancel your policy because the accidents you have had (or caused) in the past do not show that you are more likely than anyone else to have or cause accidents in the future."[124]

In judging whether we should have a categorical rule excluding character evidence, however, the question is more complicated than answering whether character evidence is relevant.

---

[119] Rule 403 does not even include "surprise" in its list of factors that a court must weigh in determining the admissibility of relevant evidence. FED. R. EVID. 403.

[120] Thomas Starkie both noted and criticized the disparate treatment afforded civil litigants. 2 STARKIE, *supra* note 67, at 366-67.

[121] Impeachment is the one area where "pure" character evidence may legitimately be offered for a propensity purpose in civil cases. See FED. R. EVID. 404(a)(3) and 608(a). As mentioned earlier, *see supra* note 31, this Article addresses only the substantive use of character evidence.

[122] *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) (noting "admitted probative value" of character evidence).

[123] *See, e.g.,* Hillel Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 128 (2022); Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 533 (1991); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 728-38 (1998) [hereinafter Park, *Character at the Crossroads*]. A few dissenters have contended that character evidence is irrelevant. *E.g.*, David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 254 (2011).

[124] FREDERICK SCHAUER, THE PROOF: USES OF EVIDENCE IN LAW, POLITICS, AND EVERYTHING ELSE 207 (2022).

We must decide whether the probative value of such evidence is so consistently outweighed by the danger of unfair prejudice that we are better off excluding this entire category of evidence. Some critics of character evidence would doubtlessly claim that Schauer's example is inapposite. There is a difference between using character evidence (in the form of three previous accidents) as a predictor that a driver is more likely than average to have another accident in the next policy year and using the same evidence as proof that the driver was the negligent party in a particular accident.[125] As to the latter issue, some critics of character evidence believe its probative value is minimal. People's actions, they argue, are driven more by the particulars of the situations in which they find themselves than by their character traits.[126] Even commentators who believe that character evidence has greater probative value concede that it carries the risk of unfair prejudice. It is here that concern for criminal defendants dominates the defense of the character-evidence rule.

Many, if not most[127] commentators mention only criminal defendants when discussing the prejudicial effect of character evidence. For example, in their treatise, Mueller and Kirkpatrick note that it is a "fundamental principle of American jurisprudence, and seemingly an axiom of simple fairness, that a person accused of crime should be tried for some specific act—for what he has done, and not for what he is."[128] Numerous courts sing the same refrain in criminal cases.[129] One major concern is that jurors will overvalue this type of evidence, and one reason often proffered for this is unique to criminal cases: the "round-up-the-usual-suspects" phenomenon.[130] Confronted with an unsolved crime, police are more likely to suspect and try to build a case against someone who they believe has committed similar types of crimes than a citizen with an unblemished record.[131] Likewise, the photo arrays that police present to crime victims and eyewitnesses for identification purposes are likely to comprise arrestees' mug shots and not pictures of law-abiding citizens.[132] Jurors, therefore, are unlikely to understand that an innocent defendant's prior record, rather than being probative of his guilt, is the very reason he was targeted for investigation and prosecution. Empirical studies—flawed as they are[133]—that have sought to

---

[125] *E.g.,* Mike Redmayne, *The Relevance of Bad Character*, 61 CAMBRIDGE L. J. 684, 692 (2002). *Cf.* Park, *Character at the Crossroads*, *supra* note 123, at 722 (noting that other-acts evidence is used civil commitment sentencing proceedings to predict future dangerous acts).

[126] *E.g.,* Robert G. Lawson, *Credibility and Character: A Different Look at an Indeterminable Problem*, 50 NOTRE DAME L. REV. 758, 780-83 (1975); 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, 1052 (1984); Sonenshein, *supra* note 123, at 255-60; Spector, *supra* note 31, at 351.

[127] A few discuss concerns about the prejudicial effect in civil cases, although usually briefly. *E.g.,* IMWINKELRIED, *supra* note 11 §§ 1:2, 1:3; 22A WRIGHT & GRAHAM, *supra* note 9 § 5232, at 21.

[128] 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:22, Westlaw (database updated August 2023). Commentators consistently express concern that juries are prone to give the evidence too much weigh or that they may decide that a defendant deserves to be convicted regardless of whether he is actually guilty (or at least subconsciously to be less concerned with making an erroneous verdict). *See* Steven Goode, *It's Time to Put Character Back Into the Character-Evidence Rule,* 104 MARQ. L. REV. 709, 764-67 (2021). For a thorough exposition of these concerns, see Park, *Character at the Crossroads*, *supra* note 123, at 720-46.

[129] *See, e.g.*, United States v. Gomez, 763 F.3d 845, 861 (7th Cir. 2014); United States v. Linares, 367 F.3d 941, 945 (D.C. Cir. 2004); United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993).

[130] *E.g*., Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 581 (1997); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263 (1995).

[131] LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, *supra* note 40, at 353; Park, *Character at the Crossroads*, *supra* note 123, at 772.

[132] LEMPERT, GROSS, LIEBMAN, BLUME, LANDSMAN & LEDERER, *supra* note 40, at 353.

[133] *See* Goode, *supra* note 128, at 768-770.

assess the impact of character evidence on jurors also reflect the predominant concern for criminal defendants. The studies overwhelming involve criminal cases,[134] both mock[135] and real.[136]

I do not mean to imply that all the justifications put forth for the character-evidence rule apply only to criminal cases. To the contrary, concerns about unfair prejudice certainly merit careful consideration. The danger that jurors may overestimate the probative value of character evidence in civil cases is quite real. There is no reason to suppose that civil jurors are less prone to cognitive errors[137] than are criminal jurors.[138] Research shows that in evaluating conduct people tend to overestimate the role of character and underestimate situational influences.[139] Evidence of a party's character may be overvalued by jurors who process evidence through a story-telling model rather than through Bayesian reasoning.[140] Some social psychologists contend that "motivated inculpation"—the inclination to punish people with bad character—further influences the way jurors judge evidence.

Perhaps most telling for our purposes is the work of social psychologist Mark Alicke.[141] He argued that "[p]eople are evaluating creatures, and perhaps the most important things they

---

[134] *See* Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 152 (Robert E. Litan ed., 1993) (noting that most studies of how jurors process evidence has focused on criminal cases).

[135] *See, e.g.*, Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 484–86 (2019); Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. APPLIED PSYCH. 347 (2004); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 737–38, 743–45 (2000); Edith Green & Mary Dodge, *The Influence of Prior-Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67 (1995); W.R. Cornish & A.P. Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208; Sarah Tanford, Steven Penrod & Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319 (1985); *cf.* Eugene Borgida & Roger Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 LAW & HUMAN BEHAV. 19 (1988).

[136] Kalven and Zeisel's seminal study of juries discusses only the results of their surveys of criminal cases. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). Likewise, follow-up studies focused on criminal cases. Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171 (2005); Joseph L. Gastwirth & Michael D. Sinclair, *A Re-examination of the 1966 Kalven-Zeisel Study of Judge-Jury Agreements and Disagreements and Their Causes*, 3 LAW, PROBABILITY & RISK 169, 174–75 (2004).

[137] *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 197 (2006); Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1087, 1092–93 (2003).

[138] Or judges. *See* Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1291 (2005) (judges affected by anchoring phenomenon); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (magistrate judges were susceptible to five common cognitive illusions); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCIENCES & L. 113 (1994).

[139] *See generally* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980). Some point to the representativeness heuristic as another explanation for jurors' tendency to overvalue the probative evidence of character evidence. *See, e.g.*, Russell B. Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1086–87 (2000).

[140] *See* MacCoun, *supra* note 134, at 152–53; Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 515–19 (2004).

[141] Alicke's seminal article was Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY AND SOC. PSYCH. 368 (1992) [hereinafter Alicke, *Culpable Causation*]. Earlier researchers studied the role of blame but in ways not as relevant to

evaluate are each other."[142] People are prone to blame actors whom they perceive as having an undesirable disposition or bad motives.[143] This extends to making judgments about causation and state of mind.[144] For example, in an early experiment exploring motives, Alicke asked subjects to determine the cause of an auto accident. Subjects were told that Driver A, who hit the other car, was speeding so he could get home to hide an item that he had left out and did not wish his parents to discover. Some subjects were told the item was an anniversary present for his parents; others, a vial of cocaine.[145] Subjects were much more likely to find Driver A caused the accident when he wanted to get home quickly to hide the cocaine.[146] A group of subjects were told not only that Driver A was speeding but that the other driver was running a stop sign when the accident occurred. Those who were told that Driver A wanted to hide the anniversary present were far more likely to blame the other driver for the accident; those who were told that Driver A wanted to hide the cocaine blamed Driver A far more often.[147] In an experiment addressing disposition, subjects were given information that portrayed a driver who was involved in a collision with a bicyclist as either "socially attractive" or "socially unattractive."[148] The subjects more consistently blamed the socially unattractive driver for causing the accident.[149] Additional studies by Alicke and his colleagues as well as other social psychologists have produced similar results.[150] What makes these

---

the character-evidence rule. *See* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOLOGICAL BULL. 556, 556 (2000) (citing literature).

[142] Mark D. Alicke, David R. Mandel, Denis J. Hilton, Tobias Gerstenberg, and David A. Lagnado, *Causal Conceptions in Social Explanation and Moral Evaluation: A Historical Tour*, 10 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 790, 807 (2015) [hereinafter Alicke, *Causal Conceptions*].

[143] The tendency to blame has also been invoked to explain how character evidence may be unfairly prejudicial through what is often referred to as nullification. *See, e.g.*, David P. Bryden & Roger C. Park, "*Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994); Davies, *supra* note 123, at 525; Leonard, *In Defense*, *supra* note 61, at 1184. As early as 1904 Wigmore noted the "deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught." 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57, at 127 (1904) [hereinafter WIGMORE 1904 ed.]. Wigmore also expressed concern that jurors might convict solely because they believe a defendant managed to escape previous wrongdoing without punishment. *Id.* § 194.

[144] "[S]pontaneous evaluative reactions evoke a blame validation mode of processing in which observers align the mental and behavioral criteria in a manner that supports their desire to blame the source of their reactions. So, for example, when a disliked character, or a person with opprobrious motives, behaves in a way that results in harmful outcomes, observers are more likely to judge that the actor caused or intended the harmful outcomes than if a liked character (or one with salutary motives) had engaged in the same behavior and effected the same outcomes." Ross Rogers, Mark D. Alicke, Sarah G. Taylor, David Rose, Teresa L. Davis and Dori Bloom, *Causal deviance and the ascription of intent and blame*, 32 PHILOSOPHICAL PSYCHOLOGY 404, 406 (2019) [hereinafter Rogers & Alicke].

[145] Alicke, *Culpable Causation*, *supra* note 141, at 369.

[146] *Id.* at 370.

[147] *Id.*

[148] Mark D. Alicke & Ethan Zell, *Social Attractiveness and Blame*, 39 J. APP. SOC. PSYCHOLOGY 2089, 2097-2101 (2009). The authors described the driver as either trying to steal his roommate's girlfriend (socially unattractive) or kind and empathetic to her (socially attractive). *Id.* at 2097-99.

[149] *Id.* at 2100-01.

[150] *See* Mark D. Alicke, *Evidential and Extra-Evidential Evaluations of Social Conduct,* 9 J. SOCIAL BEH. & PERSONALITY 591 (1994); Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame,* 75 LAW AND CONTEMP. PROB. 1 (2012); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012); Rogers & Alicke, *supra* note 144 Simon*, supra note* 140, at 537-38. *See generally* Alicke, *Causal Conceptions*, *supra* note 142, at 790; Janice Nadler & Pam A. Mueller, *Social Psychology and the Law*, *in* 1 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 124, 140 (Francesco Parisi ed., 2017); Eric Luis Uhlmann, et al., *A Person-Centered Approach to Moral Judgment*, 10 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 72 (2014).

works particularly striking is that the mock jurors' judgments about causation and state of mind issues are systematically influenced by their exposure to evidence about the actors' personal characteristics and motives—even though the experiments were designed so that this evidence was actually irrelevant to those issues.[151]

B. Secondary Justifications: Surprise, Confusion, Time, and Extrinsic Effects

Although the character-evidence rule is largely based on a view that the danger of unfair prejudice consistently outweighs the probative value of character evidence, a few secondary justifications are sometimes offered. Standing alone or in combination, however, none of these could justify a categorical rule of exclusion. Mostly with an eye to criminal cases, some commentators contend that the rule protects defendants from being surprised by, and having to prepare to respond to, evidence of prior misdeeds.[152] Even on the criminal side, however, Rule 404(b)'s requirement that prosecutors provide notice of their intent to offer other-acts evidence against a defendant greatly diminishes the force of this argument.[153] Some commentators assert that excluding character evidence spares jurors from being exposed to collateral issues that would tend to confuse them and waste time.[154]

The "round-up-the-usual-suspects" phenomenon has led some commentators to proffer a corollary justification for the character-evidence rule, one that is extrinsic to what happens in the courtroom. They posit that the exclusion of character evidence may impel police to investigate crimes more diligently. Without the rule, police would tend to round up the usual suspects and build a case through a narrative about the defendant's criminal character rather than through case-specific evidence.[155] Commentators have even gone so far as to suggest that, absent the rule, people with criminal records "may begin to feel it is futile to attempt reforming themselves."[156]

C. Evaluating These Justifications in Civil Cases

Civil cases differ from criminal cases in critical ways that undermine the case for categorically excluding character evidence in the former. Some differences are obvious and plainly render some of the justifications for the character-evidence rule inapplicable to civil cases. One readily apparent difference—the weightier stakes implicated in criminal cases—requires more careful scrutiny. And several other features of civil cases confound our ability to generalize about the balance between probative value and prejudicial effect.

1. Plainly inapplicable justifications. Police and prosecutors do not instigate civil litigation. Concerns that the "round-up-the-usual-suspects" phenomenon leads jurors to overvalue other-acts evidence therefore does not apply in civil cases. Nor need we worry that allowing character evidence in civil cases will prompt less diligent police investigations into crimes. And robust civil

---

[151] The authors of these studies, however, are not always successful in creating scenarios in which the characteristics and motives are irrelevant to causation and state of mind. *See infra* note 197.

[152] *E.g.*, MUELLER & KIRKPATRICK, *supra* note 128 § 4:22; Bryden & Park, *supra* note 143, at 565.

[153] FED. R. EVID. 404(b)(3).

[154] *E.g.*, 22A WRIGHT & GRAHAM, *supra* note 9 § 5232; Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981); Leonard, *In Defense, supra* note 61, at 1185-86.

[155] Park, *Character at the Crossroads*, *supra* note 123, at 749; Paul F. Rothstein, *Comment: The Doctrine of Chances, Brides of the Bath and a Reply to Sean Sullivan*, 14 L., PROBABILITY & RISK 51, 53 n.10 (2015).

[156] Paul F. Rothstein & Ronald J. Coleman, Prior Racist Acts and the Character Evidence Ban in Hate Crime Prosecutions, 102 N.Car. L. Rev. 753, 764-65 (2024) (forthcoming).

discovery obviates the danger the parties will be surprised that their adversary plans to introduce character evidence.[157]

2. The weightier stakes in criminal cases. To many, the most critical difference between civil and criminal cases is what is at stake.[158] Civil litigants typically battle over money; criminal defendants fight for their liberty. At first glance, however, this should not affect the character-evidence rule. The burden of persuasion is designed to account for the different stakes. In criminal cases, the beyond-a-reasonable-doubt standard places a meaty, pro-defendant thumb on the scales of justice. This reflects our view that an erroneous criminal conviction is far more costly than an erroneous acquittal.[159] In contrast, the preponderance-of-the-evidence standard typically employed in civil cases[160] indicates our indifference to which party bears the burden of an erroneous civil verdict. If the burdens of persuasion are properly calibrated and the probative value/unfair prejudice balance is similar in civil and criminal cases, the stakes should not matter. Whether it is liberty or merely monetary damages at stake, we should still want to exclude a category of evidence that consistently tends to lead to erroneous outcomes. Indeed, contemporary justifications for the character-evidence rule do not expressly rest solely on concerns about the relative costs of different types of erroneous verdicts. Otherwise, they would not be able to justify the rule's application to civil as well as criminal cases. Instead, they trumpet the rule's role in promoting overall accuracy of verdicts.

But courts' and commentators' overwhelming focus on criminal defendants suggests not only that they think the prejudicial effect associated with character evidence particularly jeopardizes criminal defendants[161] but that the reasonable-doubt standard insufficiently protects defendants' interests when it comes to character evidence.[162] Some features of the character-evidence rule manifest this latter concern. Rule 404(a) allows criminal defendants—but not civil defendants—to offer evidence of their good character[163] and their alleged victim's character.[164] The Advisory Committee justified this differential treatment on the ground that "the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government,'"[165] and added that "[t]hose concerns do not apply to parties in civil cases."[166] Indeed, these criminal-only exceptions to the character-evidence rule cannot be explained except by reference to the weightier stakes in criminal cases. The probative value/unfair prejudice balance associated with evidence of a defendant's honest character is no

---

[157] Civil parties may need to respond to such evidence but that does not distinguish character evidence from other probative evidence offered by their adversaries.

[158] *See* Speiser v. Randall, 357 U. S. 513, 526 (1958) (stating that defendant's stake in criminal cases – liberty – is of "transcending value").

[159] In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J. concurring); 1 WILLIAM BLACKSTONE, COMMENTARIES 535 (1796) ("it is better that ten guilty persons escape, than one innocent suffer"), https://llmc-com.eu1.proxy.openathens.net/docDisplay5.aspx?set=74049&volume=0001&part=001.

[160] In civil commitment hearings, however, the potential loss of liberty faced by respondents impelled the Supreme Court to adopt a "clear and convincing evidence" standard. Addington v. Texas, 441 U.S. 418 (1979).

[161] *See supra* text accompanying notes 127-136 and *infra* text accompanying notes 177-191.

[162] *E.g.,* FED. R. EVID. 404 advisory committee's note (2006) (referring to "so-called 'mercy rule'"); MCCORMICK, *supra* note 2 § 159 ("a special dispensation to criminal defendants whose life or liberty were at hazard").

[163] FED. R. EVID. 404(a)(2)(A).

[164] FED. R. EVID. 404(a)(2)(B).

[165] FED. R. EVID. 404 advisory committee's note (2006) (quoting C. Mueller & L. Kirkpatrick, Evidence: Practice Under the Rules, pp. 264-5 (2d ed. 1999)). Wharton offered a similar justification in 1877. WHARTON, *supra* note 74 § 47, at 61.

[166] FED. R. EVID. 404 advisory committee's note (2006) (quoting C. Mueller & L. Kirkpatrick, Evidence: Practice Under the Rules, pp. 264-5 (2d ed. 1999)).

different when it is offered in a criminal fraud prosecution than in a civil fraud case. The same holds when a defendant offers evidence of his deceased victim's character to prove self-defense in a criminal murder prosecution versus a civil wrongful death suit.[167]

3. Other differences. Several features of civil cases make it difficult to conclude that the danger of unfair prejudice consistently outweighs the probative value of character evidence. First, the subject matter of civil cases is far more varied. Consequently, parties offer a much wider mix of other-acts evidence for a character inference in civil cases. In criminal cases, other-acts evidence consists primarily of a defendant's other criminal acts. It is the use of just such evidence that fuels the concerns about unfair prejudice to the accused.[168] In civil cases, other-acts evidence may involve previous criminal conduct,[169] but typically does not. The character-evidence rule is invoked, for example, in attempts to exclude evidence of other negligent acts,[170] business arrangements,[171] failures to provide a warning,[172] employment decisions,[173] campaign contributions,[174] litigiousness,[175] and legal price fixing.[176] The range of other-acts evidence makes it far more difficult to make categorical judgments about its probative value in civil cases.

Second, civil cases are much less likely to be morally charged. At its core, our criminal law is suffused with concern for moral culpability and punishment.[177] Consequently, in addition to having to prove what a defendant did, a prosecutor typically has to prove the defendant's subjective state of mind. While moral considerations appear in many civil cases,[178] overall they are less prevalent. Negligence suffices for many torts, and not even that is always required.[179] A breach of contract may be seen as involving immoral conduct[180] or not.[181] Accordingly, the relevant other-acts evidence presented in these cases is itself less likely to be morally tinged. And since it is the

---

[167] Rule 404(a) also permits the use of character evidence to impeach a witness's credibility under Rules 608 and Rule 609. FED. R. EVID 404(a)(3). Rule 609 provides special protection to criminal defendants—but not civil defendants (or plaintiffs)—against such evidence. FED. R. EVID. 609(a)(1) (authorizing the use of misdemeanor convictions not involving dishonesty or false statement to impeach a criminal defendant only if it meets a stricter balancing test than that used for all other witnesses). *See* FED. R. EVID. 609 advisory committee's note (1990).

[168] *See* MUELLER & KIRKPATRICK, *supra* note 128 § 4:21 (noting that in criminal cases, practical effect of character-evidence rule is to limit use of prior crimes).

[169] *E.g.,* SEC v. Teo, 746 F.3d 90, 95-96 (3d Cir. 2014).

[170] *E.g.,* Bair v. Callahan, 664 F.3d 1225 (8th Cir. 2012), discussed *infra* at text accompanying notes 335-37.

[171] *E.g.,* J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994), discussed *supra* at text accompanying notes 54-58 and *infra* at text accompanying notes 309-13.

[172] *E.g.,* Colley v. CSX Transp., Inc., 2009 WL 1515524, at *1 (S.D. Miss. 5/27/2009); American Nat. Watermattress Corp. v. Manville, 642 P.2d 1330, 1335-36 (Alas. 1982).

[173] *E.g.,* Fresquez v. BNSF Ry. Co., 52 F.4th 1280, 1311-14 (10th Cir. 2022).

[174] *E.g.,* Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 831 F.3d 815, 833-34 (7th Cir. 2016).

[175] *E.g.,* Outley v. New York, 837 F.2d 587, 592-93 (2d Cir. 1988).

[176] *E.g.,* Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1316-17 (11th Cir. 2003).

[177] *See, e.g.,* United States v. Cordoba-Hincapie, 825 F.Supp. 485, 489-90 (E.D.N.Y. 1993) ("Western . . . nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment. 'For hundreds of years the books have repeated with unbroken cadence that Actus *non facit reum nisi mens sit rea*.' Francis Bowes Sayre, Mens Rea, 45 Harv.L.Rev. 974, 974 (1932); see also Black's Law Dictionary 55 (4th ed. 1968) (defining the actus non rule: 'An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal.'). This is the criminal law's mantra.").

[178] For example, civil analogs of criminal cases, such as civil actions for battery or wrongful death, may well be involve moral judgments. Employment discrimination cases typically require proof of an intent to discriminate.

[179] *See, e.g.,* DAVID G. OWEN, PRODUCTS LIABILITY LAW 243-46 (3d ed. 2015) (noting that RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY continues true strict liability for manufacturing defects cases while grounding design and warning defects liability on principles of negligence).

[180] HENRY MATHER, CONTRACT LAW AND MORALITY (1999).

[181] *See* Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885 (2019).

moral judgments that jurors draw from other-acts evidence that most strongly leads to unfair prejudice,[182] the categorical danger of unfair prejudice from character evidence is lower in civil than criminal cases.

Third, in criminal cases, the character-evidence rule functions predominantly to prevent the prosecution from offering evidence of the defendant's character. In civil cases, the rule may be invoked to prevent a party from offering evidence of a defendant's[183] character, but it is often invoked to prevent a defendant from offering evidence of a plaintiff's[184] character.[185] Civil parties often seek to offer evidence of a third party's character, whether the third party is affiliated in some way with a party[186] or not.[187] Sometimes, other-acts evidence involving both parties may be offered.[188] While the conventional way in which character evidence is offered in criminal cases makes it relatively easy to categorically judge its prejudicial effect, civil cases offer no such predictability. Indeed, the relatively rare instances in which a criminal defendant seeks to offer evidence of a third party's character—what is sometimes referred as reverse-Rule 404(b) evidence[189]—makes the point. Counter-textually, one federal court of appeals has held the character-evidence rule does not even apply to such proof.[190] Less drastically, other courts have announced that they are more amenable to receiving such evidence.[191]

In sum, it is clear that some of the justifications for the character-evidence rule are inapplicable to civil cases; that concerns about the danger of unfair prejudice are significantly greater in criminal than civil cases; and that it is harder to make a categorical judgment about the balance between probative value and prejudicial effect in civil cases. But that does not mean that Rule 404 should be abandoned in civil cases. The danger of unfair prejudice may still be consistently high enough to justify categorically excluding character evidence.

---

[182] Anderson, *supra* note 59, at 1920; David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 450 (2001) [hereinafter Leonard, *Character and Motive*].

[183] *E.g.,* Alaniz v. Zamora-Quezada, 591 F.3d 761, 774-75 (5th Cir. 2009); Westfield Ins. Co. v. Harris, 134 F.3d 608, 610-11 (4th Cir. 1998); Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 379-80 (6th Cir. 1997).

[184] *E.g.,* White Communications, LLC v. Synergies3 Tec Services, LLC, 4 F.4th 606, 611-12 (8th Cir. 2021); Batiste-Davis v. Lincare, Inc., 526 F.3d 377, 380 (8th Cir. 2008); Gastineau v. Fleet Mortg. Corp., 137 F.3d 490, 494-96 (7th Cir. 1998).

[185] Whether the person whose character is at issue is a plaintiff or defendant may be fortuitous. For example, cases about unpaid insurance claims where arson is suspected may be brought by the insurer in an action for a declaratory judgment, *e.g.,* Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986), or by the insured in an action for breach of the policy, *e.g.,* Dial v. Traveler's Indem. Co, 780 F.2d 520 (5th Cir. 1986).

[186] Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278, 1277-82 (11th Cir. 2022); Keller Farms, Inc. v. McGarity Flying Serv., LLC, 944 F.3d 975, 983-84 (8th Cir. 2019); Langbord v. United States Dep't of the Treasury, 832 F.3d 170, 193-94 (3d Cir. 2016) (en banc).

[187] *E.g.,* Kula v. United States, 2021 WL 1600140, at *4-*5 (M.D. Pa. 4/23/2021); Moorhead v. Mitsubishi Aircraft International, Inc., 828 F.2d 278, 287 (5th Cir. 1987); Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311-12 (11th Cir. 1987).

[188] Rothberg v. Rosenbloom, 771 F.2d 818, 823 (3d Cir. 1985) (upholding admission of evidence that both plaintiff and defendant engaged in other transactions in which they misused insider information). In a criminal case, evidence of both the defendant's and the victim's character may sometimes be admitted under Rule 404(a)(2)(B).

[189] *See* IMWINKELRIED, *supra* note 11 §§ 2:20-2:22.

[190] Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278, 1325 (11th Cir. 2022) (noting that " 'Rule 404(b) does not—at least of its own force—apply when, as here, the challenged . . . evidence implicates a witness or another non-party to the litigation.'") (quoting Ermini v. Scott, 937 F.3d 1329, 1342 (11th Cir. 2019)).

[191] *E.g.,* United States v. Alayeto, 628 F.3d 917, 921 (7th Cir. 2010); United States v. Montelongo, 420 F.3d 1169, 1174-75 (10th Cir. 2005); United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004); United States v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991).

4. Social psychology and unfair prejudice. The social psychology literature discussed earlier suggests that the introduction of character evidence may well lead jurors astray.[192] But this should merely serve to caution courts when making Rule 403 determinations; it provides little support for categorically excluding character evidence in civil cases. First, much of this literature demonstrates how the actors' motives—good or bad—influence judgments about the actors' liability. Yet this is the exact kind of evidence that courts routinely admit.[193] The reason a driver involved in an accident was speeding or the purpose for which a person stored highly-flammable materials that caused a conflagration[194] is part of the narrative that lawyers are ordinarily allowed to present to juries.[195] Counsel may invoke Rule 403 in an effort to exclude evidence that their client was rushing home so he could hide his cocaine or stored highly-flammable materials so he could manufacture methamphetamine. But, despite the danger of unfair prejudice, this type of evidence is not categorically excluded.[196]

Second, the very feature that makes this research so striking—its attempt to show that mock jurors are affected by evidence of motivation or character that is logically irrelevant to liability—diminishes its value in assessing the character-evidence rule.[197] Take Alicke's experiment in which he found that mock jurors were more likely blame a socially unattractive driver for an accident with a bicyclist than a socially attractive driver.[198] The former was portrayed as unattractive because he tried to steal his roommate's girlfriend; the latter, because he was kind and empathetic to her.[199] While that fit Alicke's purposes, it is the type of evidence that would be ruled inadmissible even if the character-evidence rule did not exist—it is simply irrelevant.[200]

---

[192] *See generally* Teneille R. Brown, *The Content of Our Character,* 126 PENN ST. L. REV. 1, 13 (2021).

[193] Motive is the first permissible use of other-acts evidence listed in FED. R. EVID. 404(b)(2). *See generally* Leonard, *Character and Motive*, *supra* note 182.

[194] One set of experiments compared subjects' reactions to a conflagration caused by the ignition of highly-flammable fertilizers. Some subjects were told that the fertilizers were stored to grow exotic orchids; others, that they were stored to manufacture methamphetamine. Nadler & McDonnell's *supra* note 150, at 273-84.

[195] *See* Old Chief v. United States, 519 U.S. 172, 187 (1997) ("The 'fair and legitimate weight' of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.").

[196] Indeed, such evidence is frequently admitted over Rule 403 objections. *See, e.g.,* United States v. Miller, 61 F.4th 426 (4th Cir. 2023) (holding, in prosecution for sending obscene letter to recipient defendant knew was under the age of sixteen, that trial court erred in excluding under Rule 403 evidence that recipient was defendant's sibling despite defendant's offer to stipulate that he knew recipient was under sixteen); Roshan v. Fard, 705 F.2d 102, 103-05 (4th Cir. 1983) (admitting evidence that participant in barroom fight had prior conviction to prove he had motive to start fight because he believed other participant was informant and had ratted on him).

[197] Some of Alicke's experiments were unsuccessful in creating scenarios in which the actor's disposition was irrelevant to the conduct. In one experiment, for example, mock jurors were presented with a scenario in which a wife, "blinded with rage" toward her husband, killed him when saw him and fired a gun "without even aiming." Mock jurors who were told that the wife had history of being physically and verbally abusive to husband were more likely to find her blameworthy than mock jurors who were told that husband was physically and verbally abusive to the wife. Rogers & Alicke *supra* note 144, at 413-16. Clearly, the mock jurors who were told that the wife had previously physically abused the husband might view this as evidence of her violent character and logically see that as bearing on her conduct. *See* Goode, *supra* note 128, at 60-61.

[198] Alicke & Zell, *supra* note 148, at 2097-2101.

[199] *Id.* at 2098-99.

[200] More generally, mock-juror experiments such as these suffer from other well-documented shortcomings, such as lack of demographic representativeness, the truncated set of facts with which the mock jurors are presented, and lack of deliberative decisionmaking. Goode, *supra* note 128, at 59-60.

In the end, the social psychology literature indicates that both the type of motive evidence that courts routinely admit and the type of character evidence that courts would not admit even in the absence of the character-evidence rule may unfairly prejudice jurors' decisionmaking. That is hardly a basis for categorically excluding an entire class of evidence that has probative value. In crafting rules of evidence, our choice is never between perfect evidence and imperfect evidence. It is between more imperfect evidence and less imperfect evidence. And cognitive errors may lead jurors to distort any and all evidence to which they are exposed.[201] The danger that jurors overvalue eyewitness identifications has been widely acknowledged, but eyewitness testimony is routinely admitted.[202] Studies consistently debunk the value of demeanor in ascertaining truthtelling.[203] Yet preserving jurors' opportunity to observe a witness's demeanor remains a mainstay of the hearsay rule,[204] and courts may even encourage jurors to consider a witness's demeanor.[205] And, despite the character-evidence rule, jurors search for clues to help them divine a litigant's character,[206] and trial lawyers frequently seek to exploit this.[207] They coach their witnesses on how to dress, behave, and speak[208] and urge family members to appear in court.[209] Some characteristics, like race, ethnicity, religion, and gender cannot so easily be manipulated, and may well influence jurors' judgments.[210] It is no wonder that Samuel Gross remarked, only somewhat hyperbolically, that

---

[201] *See* MacCoun, *supra* note 134, at 154-59. *See generally* Vincent Berthet & Vincent de Gardelle, *The heuristics-and-biases inventory: An open-source tool to explore individual differences in rationality*, 14 FRONTIERS IN PSYCHOL., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10106569/.

[202] DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 53 (2012) ("The single most important observation from the research on eyewitness identification is that it is substantially less accurate than generally believed."). *See generally* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996); Elizabeth F. Loftus, *Eyewitness Testimony*, 33 APPLIED COGNITIVE PSYCH. 498 (2019). Exoneration studies demonstrate that mistaken eyewitness identifications cause a substantial percentage of mistaken convictions. *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.

[203] *See, e.g.*, SIMON, *supra* note 202, at 125 (meta-analysis of studies shows that people perform only slightly better than coin-flip in determining accuracy from demeanor and are overconfident in their ability to do so); Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1346–48 (2015); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078–88 (1991) (reviewing studies).

[204] In both civil and criminal cases, the former testimony hearsay exception, for example, authorizes the admission of a witness's prior sworn testimony only if the witness is unavailable to testify at trial. FED. R. EVID. 804(b)(1). In criminal cases, demeanor is central to the Confrontation Clause, U.S. CONST. amend. VI. *See* Mattox v. United States, 156 U.S. 237, 242-243 (1895) (stating that Confrontation Clause is designed to compel witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief").

[205] Bennett Capers, *Evidence Without Rules,* 94 NOTRE DAME L. REV. 867, 881 (2019) (noting pattern jury instructions regarding demeanor).

[206] *See, e.g.*, SAUL M. KASSIN AND LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 100-02 (1988); Ronald Mazzella and Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCH. 1315 (1994); John E. Stewart II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCH. 348 (1980).

[207] Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L. J. 843, 846 (1998) ("Trial attorneys . . . learn to do everything possible to develop character images that suit their purposes.").

[208] Capers, *supra* note 205, at 874-78; Brown, *supra* note 192, at 4, 14.

[209] Capers, *supra* note 205, at 893; Gross, *supra* note 207, at 846-47.

[210] Brown, *supra* note 192, at 14; Capers, *supra* note 205, at 885-93; Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 330-31 (2015); Park, *Character at the Crossroads*, *supra* note 123, at 741; Nadler & Mueller, *supra* note 150, at 139–40.

"[o]ur character evidence rules are like a law that claims to regulate hunting by prohibiting the use of rifles for killing wild animals . . . but which never mentions shotguns, pistols, bows and arrows, dogs, hawks, poison, traps, or snares." In the end, the character-evidence rule keeps out of civil cases only proof based on what the person has done—the type of character evidence that would be more probative and less subject to the biases jurors bring to the courtroom than the character evidence that they now rely on.[211]

5. Calls for change. Disquiet about the civil character-evidence rule has been percolating for many years, resulting in piecemeal calls for reform. The American Law Institute's Model Code of Evidence, adopted in 1942, significantly narrowed the categorical ban on character evidence in civil cases,[212] although it still severely limited how character could be proved.[213] A decade later, the original Uniform Rules of Evidence mainly followed the Model Code's lead.[214] Wigmore's own proposed code rejected a categorical ban on civil character evidence, [215] but specifically excluded evidence of a person's negligent character.[216] In contrast, a number of prominent scholars, including Fleming James[217] and Charles McCormick,[218] called for authorizing the admission evidence of a person's accident proneness.[219] More modest calls for reform urged that the exceptions allowing criminal defendants to offer evidence of their good character and their victim's bad character should be extended to civil litigants.[220] Both before[221] and after[222] enactment of the federal rules, some states agreed that this type of "pure" character evidence should be admissible.[223] The willingness of some states to allow such "pure" character evidence reflects the

---

[211] *See* Hynes v. Coughlin, 79 F.3d 285, 289 (2d Cir. 1996) (holding that trial court erred in admitting evidence of plaintiff's previous acts of violence offered to prove he initiated fight with prison guards; counsel representing officers had argued that such evidence was necessary to counter plaintiff's slight physical appearance and manner in which he dressed for trial).

[212] MODEL CODE OF EVIDENCE Rule 306 (1) (AM. LAW INST. 1942) (allowing "evidence of a trait of a person's character . . . to prove his conduct on a specific occasion"). But Rule 306(3) banned evidence of a "trait of a person's character with respect to care or skill."

[213] The Model Code sanctioned opinion and reputation evidence or proof that the person had been convicted of pertinent crimes, but prohibited the use of specific instances of conduct that did not result in conviction. *Id.* Rule 306(2).

[214] UNIF. R. EVID. Rules 46-48 (UNIF. LAW COMM'N 1953).

[215] WIGMORE'S CODE, *supra* note 15, Rules 36-50 (1942). The prolixity of Wigmore's code defies concise summarization.

[216] *Id.* Rule 37 art. 2.

[217] James & Dickinson, *supra* note 17, at 792-94.

[218] MCCORMICK, *supra* note 2 § 156.

[219] *See also* Frank E. Maloney & William J. Rish, *The Accident-Prone Driver: The Automotive Age's Biggest Unsolved Problem,* 14 U. FLA. L. REV. 364, 376-78 (1962); Trautman, *supra* note 96, at 399-401.

[220] *E.g.,* MCCORMICK, *supra* note 2 § 159; Falknor, *supra* note 18, at 581-83; H. Richard Uviller, E*vidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 854-55 (1982). Starkie urged this reform two centuries ago. 2 STARKIE, *supra* note 67, at 367.

[221] *See* Falknor, *supra* note 18, at 581-82 (noting that "a respectable minority of jurisdictions has held evidence of good reputation relevant and admissible in behalf of a civil party charged with criminal, immoral, or fraudulent conduct").

[222] *E.g.*, ALA. R. EVID. 404(a)(2)(B) (character of victim); OR. REV. STAT. § 40.170(2)(d) (character of victim); PA. R. EVID. 404(a)(4) (character of victim); TEX. R. EVID. 404(a)(2)(C), (a)(3)(C) (character of party, victim).

[223] Despite rather clear language to the contrary in Rule 404 as it then existed, some federal courts held that this type of evidence should be admitted in certain situations. *E.g.,* Perrin v. Anderson, 784 F.2d 1040, 1044-45 (10th Cir. 1986) (interpreting rule to allow defendants to offer evidence of deceased victim's violent character through reputation or opinion evidence); Crumpton v. Confederation Life Insurance Co., 672 F.2d 1248, 1253 (5th Cir.1982) (allowing evidence of insured's good character to prove he did not rape victim). Rule 404(a) was amended in 2006 to make clear that these exceptions applied only in criminal cases. FED. R. EVID. 404 advisory committee's note (2006).

illogic of accepting the probative value of such evidence in criminal cases while denying it in analogous civil situations. It also reflects the relatively anodyne nature of "pure" character evidence. Although relevant, the limited form in which this evidence may be offered – conclusory reputation and opinion testimony – means that jurors are both unlikely to view it as highly probative or be unfairly prejudiced by it.[224]

IV. A COMPARISON WITH OTHER RELEVANCE RULES

When enacted fifty years ago, the tenor of the new federal rules was largely consistent with the "trend in evidence law toward free proof."[225] Overall, the rules liberalized the admission of evidence.[226] A quick tour of Article IV—the relevancy article—both confirms this and demonstrates how the treatment of character evidence in civil cases remains an outlier. Rule 401 defines relevancy broadly.[227] Rule 403 authorizes judges to exclude relevant evidence because its probative value is outweighed by the danger presented by a host of countervailing factors (primarily unfair prejudice).[228] But this danger must *substantially* outweigh the probative value; close calls must be decided in favor of admissibility.[229] Skipping over the character-evidence and related habit-evidence rules,[230] we come to Rules 407, 408 and 409, which respectively deal with subsequent remedial measures, settlement offers and settlements, and offers to pay medical expenses. These rules all have dual justifications: each seeks to promote an extrinsic policy[231] and reflects concern that the unfair prejudice[232] associated with such evidence outweighs its probative value.[233] Rule 410, which covers pleas and plea discussions in criminal cases, is justified solely by an extrinsic policy objective: the desire to promote the plea-bargaining process.[234] On the other hand, Rule 411 is based solely on concerns about low probative value and high prejudicial

---

[224] *See* Hunt & Budesheim, *supra note* 135, at 352, 355 (2004) (reporting that exposing mock jurors to such character evidence had very little effect). *But see infra* note 352.

[225] Bryden & Park, *supra* note 143, at 561. Late in the 19th century, Thayer urged a liberal admissibility standard. *See* THAYER, *supra* note 82 at 530 (stating that a legal principle that should govern evidence law is "everything which is thus probative should come in, unless a clear ground of policy or law excludes it").

[226] See *supra* text accompanying notes 2-6.

[227] *See* FED. R. EVID. 401 advisory committee's note (1972) (rejecting "more stringent requirement as unworkable and unrealistic").

[228] FED. R. EVID. 403 (listing "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence").

[229] *Id.*

[230] FED. R. EVID. 404-406.

[231] Rules 407 through 409 seek to promote certain behavior outside the court. Rule 407 seeks to encourage parties to take safety measures (or at least not discourage them from doing so). Rule 408 seeks to facilitate settlement negotiations and settlements. And Rule 409 seeks not to discourage parties from providing assistance to people they might have injured. *See* FED. R. EVID. 407, 408, 409 advisory committee's note (1972).

[232] I use "unfair prejudice" here as a shorthand for all the countervailing factors listed in Rule 403.

[233] *Id.* Rule 407, for example, bars proof that, after the plaintiff wandered onto and fell at a work site, the defendant erected a fence around the site if this is used to show the defendant's belief that the site was dangerous and needed to be enclosed. But if the defendant contends that someone else controlled the site, Rule 407 allows the same evidence to be used to prove the defendant's control. FED. R. EVID. 407 (providing subsequent remedial measures are admissible to prove control). The greater probative value of the latter trumps the extrinsic policy designs underpinning the rule. Rules 408 and 409 share the same structure: the evidence in question is inadmissible if offered for one purpose but admissible if offered for other purposes. FED. R. EVID. 408, 409.

[234] *See* FED. R. EVID. 410 advisory committee's note (1972).

impact.[235] The first four of these five rules, therefore, are based in whole or part on their desire to promote a social policy extrinsic to the factfinding process. Without the extrinsic policy justification, none of these rules would likely exist as a categorical rule of exclusion. As we have seen, however, the prohibition on character evidence in civil cases is not based on any such extrinsic policy concerns.[236] The last of these five rules is based on the "tenuous" association between having or lacking liability insurance and acting negligently on a particular occasion.[237] Yet there is virtually unanimous agreement that character evidence is plainly probative.[238] Next to these five rules, the civil character-evidence rule stands as an outlier and inconsistent with the trend "toward free proof."

Rule 412 further demonstrates the unsoundness of the categorical ban on civil character evidence. It began as a rape-shield rule in criminal cases, enacted by Congress in 1978 to prevent rape defendants from offering evidence of their victim's character to establish the victim consented to the defendant's alleged assault.[239] Sixteen years later, Rule 412 was amended to cover civil proceedings as well.[240] In civil cases alleging sexual misconduct (such as sexual harassment cases and suits for damages stemming from a sexual assault), it deems evidence of a victim's sexual predisposition or other sexual behavior[241] generally inadmissible.[242] Little legislative history accompanied the original enactment of Rule 412,[243] but comments made during floor debates stressed extrinsic policy goals: protecting rape victims' privacy interests, sparing them from humiliating inquiries into their sexual history, and encouraging them to report sexual assaults and testify at trial.[244] Similarly, the Advisory Committee's Note accompanying the 1994 expansion of the rule emphasized the rule's policy goals.[245] But from the beginning, proponents of rape shield laws also argued strenuously that sexual-behavior evidence carried little probative value and risked substantial unfair prejudice.[246] Contemporary views of sexual conduct differ dramatically from those of yesteryear. Willingness to engage in sexual conduct with one person tells us little about a person's willingness to do so with a different partner.[247]

Rule 412(b) creates exceptions to the ban on sexual-behavior evidence but takes markedly different approaches to criminal and civil cases. On the criminal side, it creates three categorical

---

[235] Whether a driver involved in an accident, for example, had liability insurance has little, if any, bearing on whether she drove negligently. But jurors are more likely to find for her opponent if they learn an insurance company will foot the bill. *See* FED. R. EVID. 410 advisory committee's note (1972).
[236] See *supra* Part III(C)(1).
[237] FED. R. EVID. 411 advisory committee's note (1972).
[238] See *supra* text accompanying notes 122-126.
[239] Pub.L. 95-540, § 2(a), Oct. 28, 1978, 92 Stat. 2046.
[240] Pub.L. 103-322, Title IV, § 40141(b), Sept. 13, 1994, 108 Stat. 1919.
[241] For brevity's sake, I will refer to both as "sexual-behavior evidence."
[242] FED. R. EVID. 412(a).
[243] 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5381 (1980).
[244] *See* MUELLER & KIRKPATRICK, *supra* note 128 § 4:77.
[245] FED. R. EVID. 412 advisory committee's note (1994).
[246] *See, e.g.,* SUSAN BROWNMILLER, AGAINST OUR WILL 385-86 (1975); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COL. L. REV. 1, 17-20, 31-32, 55-56 (1977).
[247] *See, e.g.,* MUELLER & KIRKPATRICK, *supra* note 128 § 4:77; Berger, *supra* note 246, at 55-56 (discussing changing sexual mores); Sandoval v. Acevedo, 996 F.2d 145, 149 (7th Cir. 1993) ("The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she consented to engage in this activity with the defendant on the occasion on which she claims that she was raped.").

exceptions;[248] on the civil side, however, it shuns categorical exceptions. It simply creates a balancing test—albeit a strict one[249]—for courts to apply in determining whether sexual-behavior evidence should be admitted despite the general ban.[250] These different approaches cannot be explained by the extrinsic policy justifications for the rule. Society is just as interested in protecting victims seeking civil remedies for sexual misconduct as victims in criminal prosecutions for sexual misconduct.[251] But the difference can be explained by looking at the probative value/unfair prejudice concerns. The civil contexts in which sexual-behavior evidence may be offered[252] are more varied, as are the issues to which such evidence may be directed.[253] Moreover, in civil cases, the proffered sexual-behavior evidence may be that of the plaintiff, defendant, or a third party.[254] Consequently, it is much harder to make categorical judgments in civil cases about when the

---

[248] FED. R. EVID. 412(b)(1)(A) authorizes the admission of specific instances of the victim's sexual behavior that is "offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." FED. R. EVID. 412(b)(1)(B) allows evidence of specific instances of the victim's sexual behavior with the accused, when offered by the accused to show consent or by the prosecution. Evidence admitted under either of these exceptions is probative without an inference about the victim's character. FED. R. EVID. 412(b)(1)(C) simply provides exception for situations in which excluding such evidence would violate the accused's constitutional rights. But this exception is unnecessary; constitutional imperatives would prevail even if the rule contained no such exception.

[249] FED. R. EVID. 412(b)(2). The rule sets forth a reverse-Rule 403 balancing test. Sexual-behavior evidence is admissible only if its probative value substantially outweighs the danger of harm and unfair prejudice. *Id.*

[250] This exception does not authorize the use of sexual-behavior evidence as character evidence. Initially, the exception provided that sexual behavior evidence was admissible if it met the balancing test and "is otherwise admissible under these rules." Pub.L. 103-322, Title IV, § 40141(b), Sept. 13, 1994, 108 Stat. 1919. The quoted language precluded evidence that ran afoul of Rule 404. This language was dropped when the federal rules were restyled in 2011. But since the restyling effort was nonsubstantive, this was not intended to alter the rule's meaning. FED. R. EVID. 412 advisory committee's note (2011).

Despite this, some courts have upheld the use of this exception when the probative value of the evidence seems to derive from a character-evidence inference. *See, e.g.,* Stampf v. Long Island R.R., 761 F.3d 192, 203 (2d Cir. 2014) (upholding admission of evidence that co-worker defendant, whom plaintiff alleged falsely accused her of grabbing her breast, "was a regular participant in a culture of sexually tinted" locker room conduct); Beard v. Southern Flying J, Inc., 266 F.3d 792, 801-02 (8th Cir. 2001) (upholding admission in hostile work environment case of evidence of plaintiff's sexual behavior in the workplace); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855-56 (1st Cir. 1998) (upholding admission of some of plaintiff's sexual behavior on flimsy noncharacter basis while affirming exclusion of other such evidence).

[251] *See* FED. R. EVID. 412 advisory committee's note (1994) (expressing same policy justifications for civil and criminal cases).

[252] The civil exception applies almost entirely to other-acts evidence. Evidence of a victim's reputation remains inadmissible unless the victim places it in controversy. FED. R. EVID. 412(b)(2).

[253] *See, e.g.,* Sun v. Xu, 99 F.4th 1007, 1017-18 (7th Cir. 2024) (allowing defendant, a professor who allegedly sexually assaulted plaintiff student, to briefly question plaintiff's damage expert regarding effect of subsequent sexual relationship plaintiff had with another professor); Wilson v. City of Des Moines, 442 F.3d 637, 643-44 (holding evidence that plaintiff made sexually charged comments in workplace admissible to prove why coworkers did not socialize with her and that plaintiff did not find alleged harassment unwelcome); Alaniz v. Zamora-Quezada, 591 F.3d 761, 774-76 (5th Cir. 2009) (evidence of defendant's other acts to prove hostile work environment); Ammons-Lewis v. Metropolitan Water Reclamation Dist. of Greater Chicago, 488 F.3d 739, 745 (7th Cir. 2007) (evidence that plaintiff dated alleged harasser offered to attack credibility); Heyne v. Caruso, 69 F.3d 1475, 1479-82 (9th Cir. 1995) (evidence of defendant's propositioning other employees in quid pro quo case to prove he propositioned plaintiff). *See also* 2 SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 26:3 n.34 Westlaw (database updated Oct. 2023) (citing cases).

[254] *See* cases cited *supra* in notes 250 and 253; OMILIAN & KAMP, *supra* note 254 § 26:3. In criminal cases, Rule 412 may sometimes bar a defendant from offering evidence of the sexual behavior of someone other than the complainant. FED. R. EVID. 412 advisory committee's note (1994) (noting rule protects "pattern" witnesses in criminal cases).

probative value of sexual-behavior evidence is sufficiently great to warrant its admission.[255] Rule 412(b) thus instantiates the point made earlier.[256] The ways in which other-acts evidence is used in criminal cases allows categorical judgments to be made about the balance between probative value and unfair prejudice; the more varied nature of civil cases does not.[257]

This review of the other relevance rules in Article IV demonstrates that Rule 404's treatment of character evidence in civil cases is an outlier. Civil character evidence shares little in common with the types of evidence that Rules 407 through 411 categorically exclude. Rule 412 creates categorical exceptions for criminal cases but relies on a balancing test for civil cases. In addition, a quick review of how the law of evidence addresses the most analogous type of evidence – similar-happenings evidence – further buttresses the case for abolishing the civil character-evidence rule. The rules of evidence contain no rule specifically addressing the admissibility of similar-happenings evidence, such as similar transactions, accidents, and product defects. Courts universally address such evidence under Rules 401 through 403.[258] To insure that such evidence is probative, courts apply a "substantial similarity" test[259] that is context specific.[260] Then courts consider whether the risk of unfair prejudice and injecting collateral issues into the trial substantially outweighs the probative value of the similar-happenings evidence.[261]

The differences between civil character evidence and similar-happenings evidence do not explain why the former is categorically excluded while the latter is not. David Leonard sought to justify the different treatment of similar-happenings and character evidence. But he rooted his explanation in the fact that the character-evidence rule applies "overwhelmingly in criminal cases

---

[255] Rules 413 and 414 effectively create additional exceptions to the character-evidence rule in criminal cases, and Rule 415 creates corresponding exceptions in civil cases. In prosecutions for sexual assault, FED. R. EVID. 413 authorizes the admission of other sexual assaults committed by the accused. Likewise, in prosecutions for child molestation, FED. R. EVID 414 authorizes the admission of evidence of the accused's other acts of sexual assault or child molestation. FED. R. EVID 415 authorizes the admission of such evidence in civil cases based on sexual assault or child molestation. These rules reflect the controversial view that evidence of these types of other acts has higher probative value than other kinds of other-acts evidence. Congress enacted them over vociferous disapproval from the Judicial Conference. *See* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415,* 38 SANTA CLARA L. REV. 961, 969-72 (1998). Since the Rule 413-415 package treats civil and criminal cases equally, these rules do not offer insight into the issues discussed in this Article.

[256] *See supra* Part III(C)(3).

[257] To be clear: I am not arguing that Rule 412 should be repealed. My point here is simply that Rule 412(b) reinforces the notion that it is harder to make categorical judgments about the probative value/unfair prejudice balance in civil cases. Particular categories of evidence can and should continue to be addressed specifically in rules like Rules 412 through 415.

[258] *See* LEONARD, THE NEW WIGMORE, *supra* note 32 §§ 14.1-14.5; 1 MCCORMICK ON EVIDENCE §§ 196-200 (8th ed.), Westlaw (database updated July 2022) [hereinafter MCCORMICK (8th ed.)]; Anthony Frazier, Note, *The Admissibility of Similar Incidents in Product Liability Actions*, 53 MO. L. REV. 547 (1988); Francis H. Hare, Jr. & Mitchell K. Shelly, *The Admissibility of Other Similar Incident Evidence: A Three-Step Approach*, 15 AM. J. TRIAL ADVOC. 541 (1992); Clarence Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948); Robert A. Sachs, *"Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?*, 49 OKLA. L. REV. 257 (1996).

[259] *E.g.,* Henderson v. Ford Motor Co., 72 F.4th 1237, 1243 (11th Cir. 2023); Surles ex rel. Johnson v. Greyhound Lines, Inc., 478 F.3d 288, 297 (6th Cir. 2007); Weir v. Crown Equipment Corp., 217 F.3d 453, 457-58 (7th Cir. 2000).

[260] Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1287 (11th Cir. 2015) ("The 'substantial similarity' doctrine does not require identical circumstances, and allows for some play in the joints depending on the scenario presented and the desired use of the evidence."); Moulton v. Rival Co., 116 F.3d 22, 27 (1st Cir. 1997) (" 'Substantial similarity' is a function of the theory of the case.").

[261] *See, e.g.,* Sachs, *supra* note 258, at 266-67 (discussing potential prejudice associated with other-accidents evidence).

to prove defendant's guilt," while similar-happenings evidence is used primarily in civil cases.[262] Consequently, his analysis actually tends to support treating civil character evidence like similar-happenings evidence instead of criminal character evidence. On the probative value side of the ledger, he asserts that similar-happenings evidence is categorically more probative than the other-acts evidence that the character-evidence rule excludes in criminal cases.[263] He bases his case for the high categorical probative value of the former on one hypothetical: a case in which the plaintiff claims she fell because the store escalator she was riding lurched suddenly. She wants to offer evidence that other store patrons previously fell when the same escalator lurched suddenly.[264] Leonard easily demonstrates the clear probative value of such evidence. But a mechanical defect is probably the strongest type of similar-happenings evidence. Machines tend to be far more predictable than humans. Lots, if not most similar-happenings evidence, however, involves humans. Drawing an inference in a slip-and-fall case about the existence of a dangerous condition from other slips-and-falls can be a much dicier proposition. It may be easy when a plaintiff presents evidence that 100 other people fell at the same sidewalk location as the plaintiff.[265] It's much harder a plaintiff offers evidence that two other hotel guests over a two-year period slipped and fell on the same steps leading from the hotel's pool deck to its hot tub.[266] Indeed, it is the wide variety of similar-happenings evidence[267] that precludes the possibility of a categorical rule governing its admissibility. This calls into question Leonard's conclusion that similar-happenings evidence is categorically more probative than character evidence even in criminal cases.

On the prejudice side of the ledger, however, Leonard's analysis is more pertinent. While similar-happenings evidence carries some risk of unfair prejudice,[268] he contends that it categorically poses a smaller risk than other-acts evidence poses in criminal cases.[269] The types of cases in which similar-happenings evidence is typically offered are less "emotionally volatile" than criminal cases and the kinds of similar-happenings conduct are less likely to be "incendiary."[270] This aligns with the analysis earlier in this Article[271] that character evidence generally poses a smaller danger of unfair prejudice in civil than criminal cases.[272] It may make sense, therefore, to treat criminal character evidence differently than similar-happenings evidence. But the reasons for doing so do not apply to civil character evidence.

V. THE CASE LAW

None of this matters unless there is good reason to believe that abolishing the civil character-evidence rule would produce better results at trial. Admittedly, often it would not. In

---

[262] LEONARD, THE NEW WIGMORE, *supra* note 32 § 14.1, at 865.
[263] *Id.* § 14.4 ("the inferential chain supporting the legitimate uses of similar occurrences evidence is relatively short, intuitively clear, and reasonably compelling in most situations").
[264] *Id.* § 14.2.
[265] Simon v. Town of Kennebunkport, 417 A.2d 982, 986 (Me. S. Ct. 1980).
[266] Thomas v. Boyd Biloxi LLC, 360 So.3d 204, 211-12 (Miss. 2023) (reversing trial court's exclusion of such evidence).
[267] *See, e.g.,* cases cited in IMWINKELRIED, *supra* note 11 § 7:15 and sources cited in note 258 *supra.*
[268] LEONARD, THE NEW WIGMORE, *supra* note 32 §§ 14.3, 14.4; Morris, *supra* note 40, at 184; Sachs, *supra* note 258, at 266-67.
[269] LEONARD, THE NEW WIGMORE, *supra* note 32 § 14.4.
[270] *Id.* § 14.4, at 886.
[271] *See supra* Parts III(C)(2) and (3)
[272] In determining the admissibility of similar-happenings evidence under Rule 403, courts also consider the danger of injecting time-consuming inquiries into the facts surrounding the other happenings as well as the risk that this will confuse jurors. But there is no reason to believe that such dangers are categorically greater for civil character evidence.

numerous cases, courts already admit other-acts evidence because its probative value for a legitimate noncharacter purpose outweighs the risk of unfair prejudice. In others, the court excludes such evidence because the probative value of the evidence (even as character evidence) is so attenuated. And in many cases, courts admit the evidence by denying that its probative value arises solely from a character-propensity inference. But there is a substantial group of cases where better results would flow. This primarily consists of cases where courts, because of Rule 404, exclude character evidence that jurors should be allowed to consider. Usually, they do so because the probative value of the evidence flows only from a propensity inference. But they sometimes exclude other-acts evidence under Rule 403 even when it is probative for a nonpropensity purpose. This is sometimes the result of a perverse feature the character-evidence rule builds into the Rule 403 balancing test. Moreover, the lack of a meaningful definition of character results in courts inconsistently determining whether a particular type of conduct counts as character evidence. Abandoning the character-evidence rule would eliminate both of these problems. Lastly, we need not be concerned that eliminating the rule would result in courts admitting character evidence that should be kept from jurors.

A. Cases That Would Not Change

In many cases, courts reject Rule 404 objections because the proffered evidence is highly probative without requiring a character-propensity inference. Knight v. Miami-Dade County,[273] discussed in Part I,[274] illustrates how other-acts evidence may legitimately establish a person's motive without requiring jurors to draw an inference about the person's character.[275] In scores of cases, courts have admitted other-acts evidence for a host of other noncharacter purposes, including to prove notice,[276] control,[277] physical or mental capacity,[278] knowledge,[279] the existence of a hostile work environment,[280] or the appropriate amount of damages[281] or punishment,[282] or when the other acts are intrinsic to the events in question.[283] In all these cases, courts have had little difficulty in upholding the admission of the evidence. Even where they acknowledged the

[273] 856 F.3d 795 (11th Cir. 2017).
[274] *See supra* text accompanying notes 34-40.
[275] *See also* Fields v. City of Chicago, 981 F.3d 534, 549-50 (7th Cir. 2020); Buckley v. Mukasey, 538 F.3d 306, 318-19 (4th Cir. 2008); Lamar v. Steele, 693 F.2d 559, 561 (5th Cir. 1983).
[276] *E.g.,* Howard Opera Assocs. v. Urban Outfitters, Inc., 322 F.3d 125, 128 (2d Cir. 2003); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 571-74 (1st Cir. 1989).
[277] *E.g.,* Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471, 1482-84 (8th Cir. 1987).
[278] *E.g.,* Lange v. City of Oconto, 28 F.4th 825, 832-36, 842-43 (7th Cir. 2022); Boyd v. City & County of San Francisco, 576 F.3d 938, 944 (9th Cir. 2009).
[279] *E.g.,* Lange v. City of Oconto, 28 F.4th 825, 842 (7th Cir. 2022); Langbord v. United States Dep't of the Treasury, 832 F.3d 170, 193-94 (3d Cir. 2016); In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 822-23 (2d Cir. 1994).
[280] *E.g.,* Alaniz v. Zamora-Quezada, 591 F.3d 761, 774-75 (5th Cir. 2009); Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285 (11th Cir. 2008).
[281] *E.g.,* Chatham v. Davis, 839 F.3d 679, 687 (7th Cir. 2016); Cobige v. City of Chicago, 651 F.3d 780, 784-85 (7th Cir. 2011). *Cf.* Smith v. Balt. City Police Dep't, 840 F.3d 193 (4th Cir. 2016) (noting that plaintiff's three prior arrests were probative as bearing on her pain and suffering claim but excluding evidence under Rule 403).
[282] *E.g.,* Colon v. Howard, 215 F.3d 227, 234-35 (2d Cir. 2000); Blankenship & Assocs. v. NLRB, 999 F.2d 248, 250-51 (7th Cir. 1993).
[283] *E.g.,* Waste Mgmt. of La., L.L.C. v. River Birch, Inc., 920 F.3d 958, 967 (5th Cir. 2019); Davies v. Benbenek, 836 F.3d 887, 890-91 (7th Cir. 2016); Agushi v. Duerr, 196 F.3d 754, 761 (7th Cir. 1999).

danger that jurors might illegitimately draw a character inference, they have found such Rule 403 concerns insufficiently weighty.[284]

On the other end of the spectrum lies a smaller group of appellate cases that reject offers of character evidence because its probative value is so slight.[285] For example, in Aetna Casualty & Surety Co. v. Gosdin,[286] Aetna suspected arson was the cause of a fire that substantially damaged its policyholder's shopping center and refused to pay under the policy. The trial court allowed Aetna to prove that, just before the fire, Gosdin, the policyholder, had been released on bond in connection with a burglary charge. The trial court also permitted Aetna to prove that Gosdin had previously faced charges of pimping, pandering, and drug possession and distribution.[287] The appellate court upheld admission of Gosdin's burglary charge. It tended to prove he needed funds (to defend against the charge) and so had a motive for torching the shopping center.[288] But the court held that evidence of the other criminal charges was inadmissible. They did not provide a motive and were "too inflammatory" to present to the jury.[289]

A far larger group of cases should be problematic to anyone who believes that courts really should apply the character-evidence rule in civil cases. As in criminal cases,[290] courts frequently admit highly probative other-acts evidence only by ignoring that its probative value flows from an impermissible inference about the person's character. Typically, they do this by invoking one or more of Rule 404(b)'s listed permissible purposes. In Wilson v. City of Chicago,[291] for example, the plaintiff claimed that, after being arrested for murdering two Chicago police officers, he was tortured and made to confess by, among others, police lieutenant Burge.[292] The Seventh Circuit rebuked the trial court for excluding evidence of Burge's other acts. One arrestee would have testified that Burge beat him for hours shortly before the plaintiff was arrested, and a second that Burge used an electroshock device on him nine days before.[293] This is classic character evidence—because Burge beat other prisoners, he beat the plaintiff—but the court denied this. Rather than being offered to prove Burge's propensity to beat prisoners, the court, invoking Rule 404(b), insisted the evidence was offered to show "intent, opportunity, preparation, and plan."[294] This is exactly the type of mindless invocation of Rule 404(b)[295] that has been widely criticized in criminal

---

[284] *E.g.,* Lange v. City of Oconto, 28 F.4th 825, 844-45 (7th Cir. 2022); Langbord v. United States Dep't of the Treasury, 832 F.3d 170, 194 (3d Cir. 2016); Chatham v. Davis, 839 F.3d 679, 687 (7th Cir. 2016); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 573-74 (1st Cir. 1989).

[285] It is likely that trial courts' rejection of many such offers never make it to the appellate stage because of the evidence's obvious lack of relevance.

[286] 803 F.2d 1153 (11th Cir. 1986).

[287] *Id.* at 1156.

[288] *Id.* at 1158.

[289] *Id.* at 1158-59. The court rejected Aetna's claim that the evidence was sufficiently probative as to Gosdin's bad-faith claim because Aetna considered these other criminal charges in its decisionmaking process. *Id. See also* In re DePuy Orthopaedics, Inc., 888 F.3d 753, 784-85 (5th Cir. 2018) (reversing admission, in products liability suit against Johnson & Johnson subsidiary, that other Johnson & Johnson subsidiaries had violated Foreign Corrupt Practices Act).

[290] *See* Goode, *supra* note 128, at 723-60.

[291] 6 F.3d 1233 (7th Cir. 1993).

[292] *Id.* at 1236. Plaintiff filed this suit only after the Illinois Supreme Court reversed his conviction because his confession had been coerced. *Id.* On retrial, he was again convicted. *Id.*

[293] *Id.* at 1238.

[294] *Id.*

[295] The court does not even attempt to explain how the other beatings proved Burge intended to beat Wilson without an inference about his violent character. Moreover, his intent was hardly an issue: he denied beating Wilson, not that he repeatedly hit him but didn't intend to torture him. Neither was there a claim that Burge somehow lacked the

cases.[296] And it is a regular occurrence in a wide range of civil actions including claims under civil rights statutes,[297] insurance policies,[298] the Federal Railroad Safety Act,[299] and the Securities Exchange Act of 1934,[300] as well as suits alleging breach of contract[301] or real estate fraud,[302] or seeking sanctions against an attorney.[303] Courts' widespread use of "motive" and "intent" as a permissible Rule 404(b) purpose to justify admitting other-acts evidence in employment discrimination cases[304] has long been criticized as a form of disguised character evidence.[305] Courts have also used the bogus "doctrine of chances"[306] and dubiously claimed that a litigants' other acts amounted to a habit[307] as alternative ways of ignoring the character-evidence rule.

To be clear: Abolishing the civil character-evidence rule would not change the results in these cases. To the contrary, it would make it easier for the courts to reach the same conclusion. They could simply acknowledge that the evidence was probative as character evidence instead of having to dissemble about what they are doing. Even though the results would not change, enhancing the analytical integrity of court reasoning should count as a benefit.[308]

---

opportunity or the time to prepare to do so, nor an explanation of how the other beatings were instrumental in bringing a larger plan involving the torture of Wilson to fruition.

[296] *See, e.g.,* 1 MUELLER & KIRKPATRICK, *supra* note 128 § 4:28 ("[I]t is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars."); Capra & Richter, *supra note* 40, at 779 (2018) (criticizing "knee-jerk" approach courts take to Rule 404(b) rulings); Sonenshein, *supra* note 123, at 218.

[297] *E.g.,* Duckworth v. Ford, 83 F.3d 999, 1001-02 (8th Cir. 1996); Young v. Rabideau, 821 F.2d 373, 379-80 (7th Cir. 1987); Carson v. Polley, 689 F.2d 562, 572-75 (5th Cir. 1982).

[298] *E.g.,* Westfield Ins. Co. v. Harris, 134 F.3d 608, 614-15 (4th Cir. 1998); Turley v. State Farm Mut. Auto. Ins. Co., 944 F.2d 669, 674-75 (10th Cir. 1991); Dial v. Traveler's Indem. Co, 780 F.2d 520, 523 (5th Cir. 1986).

[299] Fresquez v. BNSF Ry. Co., 52 F.4th 1280, 1313-14 (10th Cir. 2022).

[300] SEC v. Teo, 746 F.3d 90, 96 (3d Cir. 2014); SEC v. DiBella, 587 F.3d 553, 570-71 (2d Cir. 2009).

[301] *E.g.,* White Communications, LLC v. Synergies3 Tec Services, LLC, 4 F.4th 606, 611-12 (8th Cir. 2021); Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 379-80 (6th Cir. 1997); Rothberg v. Rosenbloom, 771 F.2d 818, 823 (3d Cir. 1985).

[302] *E.g.,* Tschira v. Willingham, 135 F.3d 1077, 1086-87 (6th Cir. 1998); Austin v. Loftsgaarden, 675 F.2d 168, 180 (8th Cir. 1982), *rev'd on other grounds sub nom*. Randall v. Loftsgaarden, 478 U.S. 647 (1986).

[303] Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of the Fox Masonry & Expert Restorations, 140 F.3d 661, 667 (7th Cir. 1998).

[304] Fudall v. Napolitano, 283 F.R.D. 400, 403 (E.D. Ill. 2012) ("The cases are basically uniform in holding as a general principle that discriminatory intent or the pretextual nature of an employment related decision may be proven by "other acts" of discrimination or retaliation.").

[305] *See* Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1072 (2005) ("Faced with a discrimination plaintiff offering proof, courts respond to the mandates of Rule 404 in one of two ways: They either ignore the Rule or misapply it.").

[306] Westfield Ins. Co. v. Harris, 134 F.3d 608, 615 (4th Cir. 1998).

[307] *E.g.,* Perrin v. Anderson, 784 F.2d 1040, 1045-46 (10th Cir. 1986); Frase v. Henry, 444 F.2d 1228, 1231-32 (10th Cir. 1971).

[308] Another group of cases that would benefit analytically by jettisoning the character-evidence rule are those in which parties seek to introduce other-acts evidence against an entity. Substantial disagreement remains as to whether Rule 404 applies to entities. *See* 22B CHARLES ALAN WRIGHT, KENNETH W. GRAHAM, JR., & DANIEL D. BLINKA, FEDERAL PRACTICE AND PROCEDURE § 5234 (2d ed.), Westlaw database (updated April 2023) ("the proper method of handling issues of corporate character remains an open question"); Susanna M. Kim, Character Evidence of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations, 2000 U. ILL. L. REV 763 (arguing character-evidence rule should not apply to corporations); Robert E. Wagner, 65 FLA. L. REV. 1293 (2013) (accord, at least with respect to criminal cases). Too often, courts address Rule 404 issues in this context without even acknowledging that the rule might not apply to entities or that "corporate character" may be something quite different from human character. *E.g.,* In re DePuy Orthopaedics, Inc., 888 F.3d 753, 784-85 (5th Cir. 2018); Becker v. ARCO Chem. Co., 207 F.3d 176, 190-94 (3d Cir. 2000); In re Air Disaster at Lockerbie Scot. On Dec. 21, 1988, 37 F.3d 804, 822-23 (2d

B. Cases Where Probative Evidence Might Be Admitted

The primary payoff to abolishing the civil character-evidence rule would come in cases where the courts actually follow the rule and exclude probative character evidence. Abandoning the rule would not compel courts to admit such evidence. But it would give them the discretion to determine admissibility under Rules 401 through 403. And by allowing courts to consider the probative value of character evidence, it would correct a perverse feature embedded in the manner in which courts must currently make Rule 403 rulings.

Recall the *J & R Ice Cream Corp.*[309] case discussed earlier.[310] The plaintiff-franchisee alleged the defendant-franchisors' agent induced the franchisee's founders to acquire a franchise by making misleading representations about expected sales and profits. The Third Circuit held that the trial court erroneously allowed the plaintiff to call two former franchisees to testify that the same agent made similar representations to them.[311] The court held that the character-evidence rule foreclosed admissibility because the evidence was admitted "to establish the defendants' propensity to commit the charged act."[312] In the absence of the character-evidence rule, however, a trial court would be able to consider whether the probative value of this evidence—even for a propensity inference—warranted its admission.[313]

Suits involving claims of police misconduct often raise questions about the admissibility of other-acts evidence. Sometimes courts, as in Wilson v. City of Chicago,[314] circumvent the character-evidence rule by asserting (erroneously) that the evidence is probative without requiring a character-propensity inference. But sometimes they don't try to circumvent the rule, and the evidence gets excluded. In Tanberg v. Sholtis,[315] for example, the defendant police officer approached the plaintiffs, two women who were in an Albuquerque park after it had closed. The parties hotly disputed the details of their encounter.[316] It ended with both women being handcuffed and charged with several offenses,[317] all of which were ultimately dropped. The plaintiffs filed suit, alleging both federal false arrest and excessive force claims.[318] At trial, they offered proof of three other instances in which the defendant falsely arrested people or used excessive force. All were relatively close in time,[319] and two resulted in court rulings that the officer had violated the Fourth Amendment.[320] The Tenth Circuit affirmed the trial court's exclusion of the evidence, ruling

---

Cir. 1994); Monger v. Cessna Aircraft Co., 812 F.2d 402, 406-07 (8th Cir. 1987); In Re: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation, 518 F.Supp.3d 1028, 1034-38 (S.D. Ohio 2021).

[309] J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994).

[310] *See supra* text accompanying notes 54-58.

[311] *Id.* at 1268-69.

[312] *Id.* at 1269.

[313] *See also* Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358, 1363-64 (11th Cir. 2002) (excluding, because evidence was probative only through character inference, that defendants had previously fraudulently altered bills of lading).

[314] 6 F.3d 1233 (7th Cir. 1993), discussed *supra* in text accompanying notes 291-94.

[315] 401 F.3d 1151 (10th Cir. 2005).

[316] The account of the events that appears in the plaintiffs' brief, *see* Appellant's Opening Brief, Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) (No. 03–2231), 2004 WL 3543479, at 13-16, differs markedly from the one in the court opinion. *See* 401 F.3d at 1155.

[317] They were charged with resisting arrest, disobeying a police officer, and being in a park after closing. 401 F.3d at 1156.

[318] One of the plaintiffs suffered an arm fracture, the cause of which was contested at trial. *Id.* They also brought state assault and battery claims.

[319] The first occurred about twenty-one months before the incident in question; the last, a month after. *Appellant's Opening Brief*, at 11, 55-57.

[320] *Id.* at 55-57.

that it was inadmissible character evidence.[321] Other plaintiffs alleging police misconduct have met the same fate.[322]

In some misconduct cases against law-enforcement officers, however, it has been the defendant who has been stymied. The plaintiff in Hynes v. Coughlin[323] claimed that a number of prison guards beat him in retaliation for his complaining about prison conditions. The parties agreed that Zemken, one of the guards, had escorted Hynes, who was in ankle shackles, a waist chain, and handcuffs, from his cell to the shower. After Zemken removed Hynes's restraints, a fight broke out. The central issue at trial was who started the fight. Hynes testified that Zemken started it and other guards joined in. Zemken testified that Hynes kicked him in the testicles just as Zemken finished unshackling him and that the other guards came forward only when Hynes continued to attack him.[324] The trial court allowed the defense to offer evidence of five incidents in which Hynes had been disciplined for threatening, harassing, and assaulting corrections officers.[325] The defense apparently thought this evidence was particularly needed to counteract Hynes's physical appearance at trial. In closing, defense counsel noted Hynes's small stature and contended that, dressed at trial as Hynes was "in a nice gray suit and tie, . . . if you hadn't heard all the testimony throughout this trial, you might think of him as an altar boy, or just as any average person you might pass on the street."[326] The court of appeals reversed, holding that the five other incidents constituted impermissible character evidence.[327]

Courts hearing employment discrimination claims often allow plaintiffs to introduce other-acts evidence against defendants. But, as is true with police-misconduct cases, they often do so only by ignoring that the purpose for which they admit the evidence—typically to prove motive or intent—actually requires a character-propensity inference.[328] Courts, however, don't always admit such evidence. In Wilson v. Muckala,[329] for example, the plaintiff, a hospital psychiatric nurse, claimed that the defendant, the hospital's vice-chief, sexually harassed her for six months, causing her to resign. She tried to offer evidence that the defendant sexually harassed other women, but ran into the character-evidence barrier. The court excluded the evidence, stating that the plaintiff

---

[321] 401 F.3d at 1167-68. The court rejected the plaintiffs' contention that the evidence was admissible under Rule 404(b) to prove intent because intent was not an issue. *Id.*

[322] *E.g.,* Teel v. Lozada, 99 F.4th 1273, 1286-87 (11th Cir. 2024) (upholding exclusion of seven prior instances in which defendant police officer had violated policies of sheriff's office); Trotter v. Lawson, 997 F.3d 819 (8th Cir. 2021) (excluding evidence in excessive use of force case brought by inmate of other incident in which defendant stuck another inmate); Flagg v. City of Detroit, 715 F.3d 165, 175-77 (6th Cir. 2013) (affirming, in suit alleging mayor and city obstructed investigation into plaintiffs' mother's death that would have raised questions about mayor's behavior, evidence that defendants retaliated against police officers who had investigated mayor concerning another matter); Hudson v. Dist. of Columbia, 558 F.3d 526, 532 (D.C. Cir. 2009) (excluding testimony about defendant police officer's "purported history of anger, using 'improper use of force' and filing 'false reports'" in suit making federal excessive force and various state claims); Clark v. Martinez, 295 F.3d 809, 812-14 (8th Cir. 2002) (excluding evidence of other assault by defendant officer in suit making federal excessive force and state assault and battery claims); Duran v. City of Maywood, 221 F.3d 1127, 1132-33 (9th Cir. 2000) (excluding, in civil rights suit brought by parents of son shot by defendant police officer, evidence that defendant was involved in another shooting three days later).

[323] 79 F.3d 285 (2d Cir. 1996).

[324] *Id.* at 287.

[325] *Id.* at 288. The trial court excluded evidence of ten other such incidents. *Id.*

[326] *Id.* at 289.

[327] *Id.* at 291-92. *See also* Gates v. Rivera, 993 F.2d 697, 700 (9th Cir. 1993) (holding that trial court erred in allowing defendant police officer to testify that in his 16½ years as an officer he had never before discharged his weapon).

[328] *See* Marshall, *supra* note 305; Goode, *supra* note 128, at 744-50 (discussing how using other-act evidence offered to establish motive may require propensity inference).

[329] 303 F.3d 1207 (10th Cir. 2002).

was seeking to use the other harassment incidents "to prove the fact of the harassment itself—exactly the purpose prohibited by . . . Rule 404(b)."[330]

The character-evidence rule also results in the exclusion in negligence cases of evidence we well might think would be helpful to jurors. In Moorhead v. Mitsubishi Aircraft Int'l,[331] the plaintiffs, survivors of passengers killed in an airplane crash, named the federal government as a defendant. They claimed that when the pilot called the Federal Aviation Administration's service station for a weather briefing, the FAA briefer negligently failed to tell the pilot of dangerous weather conditions on his flight path.[332] The government contended that it was the pilot's negligence that caused the crash. The trial court allowed the government to offer evidence that the pilot received low marks at a flight school refresher course for his ability to handle emergency situations and that his instructor thought that he was weak in aircraft knowledge and instrument flying.[333] The court of appeals reversed, holding that this was impermissible character evidence.[334] In Bair v. Callahan,[335] a medical malpractice case, the plaintiffs sought to prove that the defendant surgeon misplaced pedicle screws while performing a lumbar fusion surgery. Citing Rule 404, the court refused to allow the plaintiffs to offer evidence that, in the same year that he operated on the plaintiff, the defendant had misplaced pedicle screws in four[336] other lumbar fusion surgery patients.[337]

These are all cases in which other-acts evidence was categorically rejected. In other cases (admittedly less frequent), it is "pure" character evidence that Rule 404 requires courts to reject. In Sandifer v. Hoyt Archery, Inc.,[338] discussed in Part I, the jurors had to decide how an avid bow

---

[330] *Id.* at 1217. The court noted that because the other incidents took place outside the hospital, they could not be used to establish a hostile work environment. And because the plaintiff conceded that the defendant hospital was unaware of these incidents, they could not be used to prove its discriminatory intent. *Id. Cf.* Kebede v. Hilton, 580 F.3d 714, 716-18 (8th Cir. 2009) (affirming, in alienation of affections case against plaintiff's husband's co-worker, who had affair with husband, exclusion of defendant's affairs with two other co-workers); Berry v. Oswalt, 143 F.3d 1127, 1131-33 (8th Cir. 1998) (excluding, in case alleging prison official sexually harassed plaintiff, evidence that defendant had sexually harassed other female inmates and distinguishing employment discrimination cases where such evidence is admitted to prove motive).

[331] 828 F.2d 278 (5th Cir.1987).

[332] *Id.* at 280-81.

[333] *Id.* at 287.

[334] *Id.* ("The contested evidence has no probative value other than to prove action in conformity with Baker's past conduct."). Similarly, in Kula v. United States, 2021 WL 1600140 (M.D. Pa. 4/23/2021), the government—defending against a claim that an air-traffic controller gave a pilot erroneous instructions—sought to offer evidence of the pilot's deficiencies. In a pretrial motion in limine ruling, the trial court excluded, as impermissible character evidence, that the pilot flunked the instrument knowledge test four times before passing and that he had "barely" satisfied his certification requirements. *Id.* at *4-5. It also noted that evidence that the pilot had repeatedly made errors when logging previous flights and had a history of "poor fuel planning" could not be offered to prove the pilot's carelessness when operating aircraft, but deferred final decision on these pieces of evidence because the parties had not yet made clear their definitive theories of the case. *Id.* at *4. *See also* Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, Div. of Textron, Inc., 805 F.2d 907 (10th Cir. 1986) (excluding, in products liability action against helicopter's manufacturer, evidence offered by defendant that pilot had several times picked up loads too heavy for helicopter, was reckless, and had been deemed not fit to fly as command pilot).

[335] 664 F.3d 1225 (8th Cir. 2012).

[336] Brief of Appellant, Bair v. Callahan, 664 F.3d 1225 (8th Cir. 2012) (No. 11–1593), 2011 WL 2179353, at 35.

[337] 664 F.3d at 1229. *See also* Henderson v. George Washington Univ., 449 F.3d 127, 135 (D.C. Cir. 2006) (excluding, as impermissible character evidence, proof that defendant surgeon created same size anastomosis in other gastric-bypass surgeries); Weil v. Seltzer, 873 F.2d 1453, 1460-61 (D.C.Cir.1989) (excluding, as impermissible character evidence, testimony of other patients that defendant doctor prescribed steroids to five other allergy patients while representing the drugs to be antihistamines or decongestants).

[338] 907 F.3d 802, 804 (5th Cir. 2018), discussed *supra* at text accompanying notes 41-53.

hunter, sitting in his computer room, came to have his skull pierced by the metal cable guard rod of his compound bow. There were no witnesses, and the court declared that the accident's cause was "confounding."[339] The plaintiffs contended a design defect was at fault; the defendant claimed that Sandifer, while trying to modify the bow, pulled the drawstring and put his head in the bow to examine it.[340] Rule 404 prevented the trial court even from considering whether to allow the plaintiffs to call some of Sandifer's fellow bow hunters to testify that he was safe around weapons.[341] Had the defendants wanted to call his fellow bow hunters to testify that Sandifer was reckless around weapons, Rule 404 would precluded that as well.

Crumpton v. Confederation Life Ins. Co.[342] also involved the admissibility of evidence about a dead man's character. Crumpton, the beneficiary of her father's accidental death policy, brought suit when the defendant, claiming her father's death was not accidental, refused to pay her the policy proceeds.[343] The defendant's theory was that the father had raped a neighbor and threatened to kill her children if she reported the incident. Five days later, the neighbor went to the police. That night, she went out to her garage and saw Crumpton's father. When he approached her, she shot him without any warning. According to the insurance company, the insured should have anticipated that his actions would cause him bodily injury. Therefore, his death was not accidental.[344] Crumpton denied her father raped the neighbor, and so much of the trial focused on the rape accusation. Crumpton called several witnesses to testify to her father's good character, both as to peaceableness and his conduct toward women.[345] Remarkably, the Fifth Circuit held this evidence was admissible. Had the father been tried for rape, the exception to the character-evidence rule that allows criminal defendants to offer evidence of their good character[346] would have applied. Because the facts of this case were "of a criminal nature,"[347] that exception should apply.[348] To reach this result, however, the court had to disregard both the plain text of the rule[349] and the Advisory Committee's note.[350] And Rule 404 was subsequently amended to make crystal clear that this exception applies only in criminal cases.[351] If *Crumpton* were tried today, the evidence would be categorically inadmissible. The trial court would not have discretion to balance its probative value against the danger of unfair prejudice.

---

[339] *Id.* at 804.
[340] *Id.* at 805.
[341] *Brief of Appellees*, *supra* note 42, at 29-30 (enumerating excluded lay testimony: Sandifer was "safety conscious," "safe" around weapons, a "safe hunter" and "type of person" who would recognize obvious dangers).
[342] 672 F.2d 1248 (5th Cir. 1982).
[343] *Id.* at 1250.
[344] *Id.* at 1250-51.
[345] *Id.* at 1251-52.
[346] FED. R. EVID. 404(a)(1) (1982).
[347] 672 F.2d at 1253.
[348] The court also justified admission on the ground that the character-evidence rule did not apply because the insured's character was an essential element that had to be proved. *Id.* at 1252-53. But that is clearly wrong. Neither party had to prove the insured's character to prevail. The evidence was offered solely for the inference that his good character tended to prove he did not rape the neighbor.
[349] At the time, Rule 404(a)(1) said that "an accused" could offer evidence of his good character and "the prosecution" could offer rebuttal evidence.
[350] See FED. R. EVID. 404 advisory committee's note (1972) (expressly rejecting proposal to extend Rule 404(a) exceptions to civil cases).
[351] The rule was amended in 2006. The relevant exception is now located in Rule 404(a)(2), which begins "[t]he following exceptions apply in a criminal case." The Advisory Committee's note to the 2006 amendment states, "The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait."

Reasonable people will probably disagree in each of these cases about whether the excluded evidence would have helped jurors accurately determine what happened. That's the point. The justifications for applying the character-evidence rule in civil cases simply are not strong enough to warrant categorical exclusion. Other-acts evidence is sometimes quite probative; other times, it is not. Admitting such evidence will sometimes risk substantial unfair prejudice; other times, it will not. "Pure" character evidence, limited as it is to a witness's conclusory expression of the person's character (either as opinion or reputation testimony), rarely is likely to carry great weight.[352] But it may help the jury decide a close case and, due to its anodyne nature, is unlikely to risk much in the way of unfair prejudice.[353]

In a smaller set of cases, abolishing the civil character-evidence rule might lead courts to admit evidence they now exclude only because of a perverse feature of the Rule 403 balancing test. Sometimes courts find that other-acts evidence is probative for a non-character inference but exclude the evidence under Rule 403 because they find the danger of unfair prejudice substantially outweighs the probative value. But the character-evidence rule perversely tilts both sides of the balancing scale. In assessing the probative value of the evidence, the court may consider only its probative value for its nonpropensity purpose. Because of Rule 404, the court may not consider the probative value that flows from a character-propensity inference, even though there is universal agreement that such probative value exists.[354] Compounding matters, Rule 404 impels courts to count as a form of unfair prejudice the danger that jurors will logically draw a character-propensity inference. In other words, the character-evidence rule both artificially discounts the probative value of character evidence and inflates its prejudicial effect.

Mathis v. Phillips Chevrolet, Inc.[355] illustrates this. Mathis brought a race and age discrimination claim against the defendant auto dealership, claiming that defendant never even interviewed him after he applied for a job as a car salesman. The defendant claimed that Mathis never even filed an application. It offered evidence that, around this time, Mathis had filed

---

[352] In rare cases, prominent character witnesses for the defense seemed to have aided the cause. For example, former President Theodore Roosevelt and numerous other prominent men testified as character witnesses in the perjury trial of three bank officers. *Roosevelt Witness For Riggs Officials: Testifies to High Character of Defendants*, WASH. POST, May 24, 1916, at 1 (noting that Roosevelt received an "ovation in court") http://ezproxy.lib.utexas.edu/login?url=https://www.proquest.com/hnpwashingtonpost/historical-newspapers/roosevelt-witness-riggs-officials/docview/145458727/sem-2?accountid=7118. The jury deliberated nine minutes before acquitting the defendants. *Jury Acquits Riggs Men On First Vote; Out Nine Minutes*, WASH. POST, May 28, 1916, at A1, http://ezproxy.lib.utexas.edu/login?url=https://www.proquest.com/hnpwashingtonpost/historical-newspapers/jury-acquits-riggs-men-on-first-vote-out-nine/docview/145428329/sem-2?accountid=7118. In former Secretary of the Treasury John B. Connally's bribery trial, defense counsel called a host of well-known character witnesses, including noted evangelist Billy Graham. Emily Couric, *The Genius of Ed Williams*, 74 ABA JOURNAL 72, 75 (1988) (noting that when Graham testified, one juror said "Amen"). Connally was acquitted. *Id.* Sometimes, however, the magic of prominent character witnesses does not work. Defense character witnesses in Alger Hiss's first perjury trial included two Supreme Court justices, two other federal judges, and a future Democratic Party nominee for president. ALLEN WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE 376 (1978). The jury hung, voting eight to four in favor of conviction. *Id.* at 467-68. Hiss was convicted at his second trial despite again presenting a roster of prominent character witnesses. *Id.* at 470-81, 497.

[353] *See* Hunt & Budesheim, *supra* note 135, at 352, 355. Admittedly, if the civil character-evidence rule is abandoned the cost of presenting a character witness will decrease. Currently, before calling a "pure" character witness, counsel must consider whether an adversary might use "have you heard" questions on cross-examination to reveal relevant specific instances of conduct that the character-evidence rule would otherwise keep from the jury. FED. R. EVID. 405(b). Without a civil character-evidence rule, the jury might well learn about these other acts anyway.

[354] *See supra* text accompanying notes 122-26.

[355] 269 F.3d 771 (7th Cir. 2001).

discrimination suits against six other Chicago-area dealerships. One of the dealerships had offered Mathis an interview, but he left and never returned. Three others claimed that Mathis had filled out an application but took it home with him and never submitted it. Other dealerships said Mathis lied on his applications.[356] The district court excluded this evidence. It seemed merely to be "an effort to show bad character on the part of the plaintiff."[357] The Seventh Circuit held that although the trial court correctly ruled that this evidence was inadmissible to prove Mathis's character,[358] it was probative for a non-character purpose—to prove that Mathis "was engaged in a plan or scheme to harass Chicago-area dealerships."[359] Nevertheless, the court affirmed the evidence's exclusion. The trial court had relied on Rule 403 as well as Rule 404 and had not abused its discretion. One of the factors the Seventh Circuit cited in approving the Rule 403 ruling was that the jury might have drawn a character-propensity inference from the evidence.[360] Thus, in making its Rule 403 determination, the trial court had properly excluded from the probative value side of the balance the evidence's logical probative value—that if Mathis filed six other frivolous claims, it was more likely that this claim lacked merit—and instead counted as unfair prejudice the danger that the jury would draw such a logical inference. If the civil character-evidence rule were abandoned, the trial court could still consider under Rule 403 whether to admit such evidence.[361] But it would consider the actual probative value of the evidence as probative value and not as unfair prejudice.[362]

C. The Failure to Define Character

The courts' failure to define what constitutes character for purposes of the character-evidence rule[363] has been well documented.[364] It should not be surprising, therefore, that it is

---

[356] *Id.* at 774. When Mathis testified, the trial court did allow the defendant to use these lies to impeach Mathis under Rule 608. *Id.*

[357] *Id.*

[358] *Id.* at 775.

[359] *Id.* at 776.

[360] *Id.* at 776-77.

[361] The court might still decide to exclude the evidence because of other ways in which the evidence might present a danger of unfair prejudice, such as the danger that the jurors simply may overestimate the probative value of a party's having filed prior claims. *See, e.g.,* Outley v. New York, 837 F.2d 587, 592-93 (2d Cir. 1988). The court might also be concerned that the introduction of such evidence might confuse the issues or consume an unreasonable amount of time. Indeed, the Seventh Circuit cited the trial court's reasonable concern that admitting the evidence would lead to a time-consuming exploration of the merits of each of the other six suits. *Id.* at 776.

[362] Similarly, in Berkovich v. Hicks, 922 F.2d 1018,1022-23 (2d Cir. 1991), the court rejected plaintiff's evidence of seven prior complaints against the defendant police officer, who plaintiff alleged had falsely arrested and assaulted him. Although the evidence was probative for a nonpropensity purpose (to prove motive), the court excluded the evidence under Rule 403 because the jury might impermissibly consider the evidence as probative of the defendant's propensity to falsely arrest and assault citizens. *See also* Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, Div. of Textron, Inc., 805 F.2d 907, 917 (10th Cir. 1986) (excluding, under Rule 403, evidence that defendant's pilot had four times in past year hauled logs exceeding helicopter's weight limit, offered to prove he caused accident in question by hauling log exceeding weight limit; unfair prejudice cited by the court is that jurors might infer from pilot's past actions that he acted same way during flight in question). *But see* Ermini v. Scott, 937 F.3d 1329, 1342-43 (11th Cir. 2019), in which the court adhered to, despite its disagreement with, Eleventh Circuit precedent that Rule 404(b) does not apply to evidence of a non-party's character. But the court then analyzed the admissibility of the evidence under Rule 403 and found that the risk that jury might have considered the evidence for a character-propensity purpose posed a risk of unfair prejudice.

[363] Goode, *supra* note 128, at 715 ("No one knows what 'character' means.").

[364] SAKS & SPELLMAN, *supra* note 31, at 143 (2016); 22B WRIGHT & GRAHAM, *supra* note 308, § 5233, at 23; Anderson, *supra* note 59, at 1922–24 (2012); Blinka, *Character*, *supra* note 69, at 139–40; Goode, *supra* note 128, at 775-81.

sometimes hard to divine why courts even treat certain types of evidence as character evidence. Why should the size of a surgical connection that a doctor made in other gastric-bypass surgeries be considered evidence of character?[365] Or representations about projected sales and profits that a sales agent made to other potential franchisees?[366] Or that a pilot had flunked the instrument-knowledge test four times before passing and had "barely" satisfied his certification requirements?[367] None of these is likely to strike a casual observer as evidence respectively of the doctor's, sales agent's, or pilot's character. The failure to define character has led courts to classify similar types of evidence in different ways. In one case, evidence of a defendant's surgical technique is treated as character evidence;[368] in another, evidence of a defendant's building design technique is treated as similar-happenings evidence.[369] Statements and actions made in the course of business dealings are sometimes classified as character evidence[370] and sometimes not.[371] The same holds true for discriminatory attitudes and actions.[372] The unwillingness to define what counts as character will undoubtedly continue to plague criminal cases. The character-evidence rule is a fixture in criminal trials.[373] But we can eliminate the problem in civil cases by abolishing

---

[365] *See* Henderson v. George Washington Univ., 449 F.3d 127, 135 (D.C. Cir. 2006) (excluding, as impermissible character evidence, proof that defendant surgeon created same size anastomosis in other gastric-bypass surgeries).

[366] *See* J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1268-69 (3d Cir. 1994), discussed *supra* at text accompanying notes 54-58, 310-13.

[367] *See* Kula v. United States, 2021 WL 1600140, *4-*5 (M.D. Pa. 4/23/2021).

[368] *Henderson*, 449 F.3d at 135.

[369] Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 518-19 (5th Cir. 1981) (holding trial court erroneously excluded evidence of defendant's design and use of redwood of inferior quality in other buildings that experienced similar structural failures as building defendant designed for plaintiff). *Cf.* Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 423-27 (5th Cir. 2006) (criticizing trial court's treatment of evidence of other fires associated with allegedly defective product under Rule 404 instead of as similar-occurrence evidence). *See generally* 1 MCCORMICK (8th ed.), *supra* note 258 § 200.1.

[370] J & R Ice Cream Corp., 31 F.3d at 1268-69; Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 831 F.3d 815, 833-34 (7th Cir. 2016) (discussing admissibility of past campaign contributions under Rule 404); Jankins v. TDC Management Corp., 21 F.3d 436, 439-41 (D.C. Cir. 1994) (holding evidence of other sub-contractors' contract disputes with defendant inadmissible under Rule 404).

[371] *E.g.,* Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2d 817 (10th Cir. 1986) (holding that trial court erred in excluding evidence of plaintiff's trading habits and dealings with other commodities broker to prove his level of sophistication and conduct when dealing with defendant broker); Hartford Steam Boiler Inspection & Ins. Co. v. Schwartzman Packing Co., 423 F.2d 1170, 1173–74 (10th Cir. 1970) (admitting evidence of parties' prior insurance contracts to establish meaning of later policy). *See generally* 1 MCCORMICK (8th ed.), *supra* note 258 § 198.

[372] *Compare, e.g.,* Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379 (2008) (discussing admissibility, in age-discrimination suit, of other acts of discrimination only with reference to Rules 401 through 403; no mention of Rule 404); United States v. Abel, 469 U.S. 45 (1984) (treating membership in Aryan Brotherhood as probative of bias and not as character evidence); Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 1285-86 (10th Cir. 2003) (deciding admissibility, in age-discrimination suit, of evidence of how plaintiff's supervisor treated other older employees under Rules 401 through 403); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1102-03 (8th Cir. 1988) (deciding admissibility, in race-discrimination suit, of evidence of other acts of racial discrimination under Rules 401 through 403); *with* Alaniz v. Zamora-Quezada, 591 F.3d 761, 774-75 (5th Cir. 2009) (deciding admissibility, in sex-discrimination suit, of evidence that defendant harassed other female employees under Rule 404); Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1285-86 (11th Cir. 2008) (deciding admissibility, in race-discrimination suit, of evidence of other racist acts under Rule 404); Ansell v. Green Acres Contr. Co., 347 F.3d 515 (3d Cir. 2003) (deciding admissibility, in age-discrimination suit, of evidence of how plaintiff's supervisor treated other older employees under Rule 404); Outley v. New York, 837 F.2d 587, 592-93 (2d Cir. 1988) (treating plaintiff's grudge against white police officers as evidence of character, not bias).

[373] *See* FED. R. EVID. 404 advisory committee's note (1972) ("the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions").

the civil character-evidence rule. Courts could simply treat the evidence as evidence and determine its admissibility under Rules 401 through 403.

D. The Fear That Bad Evidence Will Be Admitted

For all its faults, the character-evidence rule produces the right outcome in a good number of cases. Character evidence is not always terribly probative, and it can pose risks of unfair prejudice.[374] The possibility exists, therefore, that abandoning the character-evidence rule might lead to an overall increase in bad admissibility decisions. The number of cases where courts might wind up admitting bad character evidence might exceed the number in which they admit good character evidence. But that would not make character evidence different from any other type of evidence that is not governed by a special rule categorically excluding it. In an evidentiary regime that employs a liberal view of relevance tempered by a balancing rule that favors admissibility—Rule 403 requires unfair prejudice to *substantially* outweigh probative value—that is a feature, not a bug. And there is nothing special about civil character evidence other than it has been yoked to criminal character evidence for centuries.

More important, this fear is unlikely to be realized. Courts have long been trained to be sensitive to the need to carefully consider the potential dangers of character evidence. Indeed, nearly every circuit court of appeals has a two-, three-, or four-part test for evaluating the admissibility of other-acts evidence that incorporates a Rule 403 balancing test.[375] And courts are not shy about invoking Rule 403 to exclude such evidence even when they find it has probative value for a nonpropensity purpose.[376] For example, in Barber v. City of Chicago,[377] a false-arrest and use-of-excessive-force case, the court of appeals explained why evidence of the plaintiff's subsequent felony conviction was inadmissible. Even though it had some slight bearing on plaintiff's damages claim, the court emphasized that when defendants are permitted to present evidence of a civil-rights plaintiff's criminal history,[378] a substantial risk arises that "the jury will render a defense verdict based not on the evidence but on emotions or other improper motives, such as a belief that bad people should not be permitted to recover from honorable police officers."[379] Numerous cases echo this particular sentiment[380] as well an awareness of other ways in which unfair prejudice can genuinely arise.[381] Courts are alert to parties seeking to introduce evidence primarily to tar their opponent. A court, for example, easily swatted aside the plaintiffs' argument that they should have been able to introduce evidence that the defendant police officer

---

[374] *See supra* text accompanying notes 137-51, 192-211.

[375] *See* STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM HANDBOOK ON FEDERAL EVIDENCE 297-99 (2023) (compiling tests)

[376] *E.g.,* Pressman v. Franklin Nat'l Bank, 384 F.3d 182, 187-88 (6th Cir. 2004); Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153, 1158-59 (11th Cir. 1986).

[377] 725 F.3d 702 (7th Cir. 2013).

[378] *Id.* at 712-14.

[379] *Id.* at 714.

[380] *E.g.*, Howard v. City of Durham, 68 F.4th 934, 957 (4th Cir. 2023) (noting that "we must be cognizant of the context at play in civil rights actions, which 'often pit unsympathetic plaintiffs ... against the guardians of the community's safety,' Barber, 725 F.3d at 714 (quoting Llaguno v. Mingey, 763 F.2d 1560, 1570 (7th Cir. 1985) (en banc))" and expressing concern that defendants may argue " 'that [the plaintiff] is a despicable human being who should not be permitted to recover from the angelic police officers being wrongfully sued.' Id. at 717"); Seidelman v. Gomez, 62 F.Supp.3d 702, 705 (N.D. Ill. 2014) (quoting *Barber* and noting "significant danger of unfair prejudice" that jury might view plaintiff "as somehow less than deserving of protection against alleged violations of his rights").

[381] Courts, for example, repeatedly warn about the danger of jury bias against chronic litigants. *E.g.,* Nelson v. City of Chicago, 810 F.3d 1061, 1071 (7th Cir. 2016); Batiste-Davis v. Lincare, Inc., 526 F.3d 377, 380 (8th Cir. 2008); Outley v. New York, 837 F.2d 587, 592 (2d Cir. 1988).

who shot and killed their family member had twice fired his gun at dogs that he perceived to be threatening him while on patrol.[382] Even when the evidence is not as inflammatory, courts have consistently resisted attempts to offer other-acts evidence where it is clear that the evidence bears slight or no probative value.[383] And there exists little reason to believe that they will not be able to continue to do so, citing other of Rule 403's countervailing factors, even if a character inference no longer counts as unfair prejudice.

VI. CONCLUSION

The civil character-evidence rule is an anachronism that deprives courts even from considering in civil cases whether to admit evidence that is offered for a character-propensity inference. The judgment upon which it is based–that the probative value of such evidence is consistently outweighed by the danger of unfair prejudice—is ill-considered. Both the historical origins of and contemporary justifications for the rule are rooted in concerns about criminal cases. Neither provides an adequate supporting rationale for continuation of the civil rule. That is borne out when the civil character-evidence rule is compared to the other relevancy rules in Article IV that exclude other categories of evidence. And while abolishing the civil character-evidence rule would not change the results in many cases—courts often circumvent the rule—there still exist a substantial number of cases where the results would change. Probative evidence should not be categorically excluded without a compelling justification. When it comes to character evidence in civil cases, that justification is absent.

---

[382] Callahan v. Wilson, 863 F.3d 144, 153-54 (2d Cir. 2017). *See also* In re DePuy Orthopaedics, Inc. 888 F.3d 753, 784-85 (5th Cir. 2018) (holding that trial court abused discretion in admitting evidence that non-party subsidiaries of products liability defendant had paid bribes to Hussein regime in Iraq); Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153, 1158-59 (11th Cir. 1986) (affirming trial court's decision to allow defendant insurer to prove that insured had just been charged with burglary to prove motive for committing arson, but holding that defendant could not offer evidence that insured had in past faced charges of pimping, pandering, and possession and distribution of drugs).

[383] *E.g.,* Kebede v. Hilton, 580 F.3d 714, 716-18 (8th Cir. 2009); Surprenant v. Rivas, 424 F.3d 5, 22-23 (1st Cir. 2005); Tennison v. Circus Circus Enterp., Inc., 244 F.3d 684, 689 (9th Cir. 2000); Jankins v. TDC Management Corp., 21 F.3d 436, 439-41 (D.C. Cir. 1994); Veranda Beach Club Ltd. Partnership v. Western Sur. Co., 936 F.2d 1364, 1372-73 (1st Cir. 1991); Wierstak v. Heffernan, 789 F.2d 968, 972-73 (1st Cir. 1986).