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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—for example

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1 Fed. R. Evid., Pub. L. No. 93-595, 88 Stat. 1929 (1975).

2 Federal Rule of Evidence 607 abolished the voucher rule, which prevented a party from impeaching its own witness. FED. R. EVID. 607. The voucher 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 IN TRIALS AT COMMON LAW §§ 898–99 (Chadbourn rev. ed. 1970).

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

4 FED. R. EVID. 601.

5 FED. R. EVID. 701.

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

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[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. 462–64 (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 a nonexclusive list of twenty-three 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, 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. *Compare* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 227–32 (1969), *with* § 404–405, 88 Stat. at 1932. *See also* 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 Apr. 2023) (discussing controversy over Rules 608 and 609).

criminal cases. But it applies frequently and in a wide array of civil cases.[12] 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 evidence in civil cases. Respected commentators like Charles McCormick,[16] Fleming James,[17] and Judson Falkner issued similar calls.[18] 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

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[12] *See* 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 7:1, Westlaw (database updated Jan. 2024) (listing three dozen types of cases). The rule frequently comes into play in civil rights and employment discrimination cases, *see infra* notes 258, 261–262, 313, and 340–341 and accompanying text, but it also affects suits brought under a wide range of statutes. *See, e.g.*, Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278 (11th Cir. 2022) (suit brought under Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (28 U.S.C. § 1350 Statutory Note)); Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990) (suit brought under Landrum-Griffin Act, 29 U.S.C. § 401 *et seq.*); Roe v. Howard, 917 F.3d 229 (4th Cir. 2019) (suit brought under Trafficking Victims Protection Act, 18 U.S.C. § 1589 *et seq.*); Kanida v. Gulf Coast Med. Personnel, LP, 363 F.3d 568 (2004) (suit brought under Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*).

[13] MODEL CODE OF EVID. (AM. L. INST. 1942); *see also infra* Section III.C.5.

[14] UNIF. R. EVID. (UNIF. L. COMM'N 1953). *See also infra* Section 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 also infra* Section III.B.5.

[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 to 1972 amendment.

[20] *See infra* Part II.

[21] *See infra* Part III.

[22] *See infra* Parts II–III.

[23] *See infra* Part IV.

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 be determined under Rule 403 on a case-by-case basis.[25] Part I offers a brief primer on the character-evidence rule. Part II explores how and why English courts instituted the character-evidence rule. Part III reviews and assesses 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. Finally, Part V examines the case law and how abolishing the character-evidence rule would be beneficial.

I. A BRIEF 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.[26] 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.[27] 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 do, the prosecution may introduce rebuttal evidence.[28] Second, in a criminal case, evidence of the alleged victim's character may be offered,[29] usually first by the

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[24] *See infra* Section 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* notes 249–265 and accompanying text.

[26] *See* United States v. Taylor, No. 09-43-ART, 2010 WL 3620235, at *3 (E.D. Ky. 2010) (describing a character-propensity inference as one in which the jury infers that because "he did it before, he probably did it again").

[27] 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.

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

[29] 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* notes 249–255 and accompanying text.

defendant[30] 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 their character.[31] 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,[32] 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.[33] 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."[34]

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[30] 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).

[31] 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.

[32] A third exception, FED. R. EVID. 404(a)(3), sanctions the 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).

[33] 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 an "extension" of Rule 404(a)(1)'s exclusionary principle and a "restatement" of 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).

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

Knight v. Miami Dade County illustrates one such permissible use.[35] Late one night, two Miami Dade police officers pursued a Cadillac SUV that they claimed had run a red light. Eventually, the SUV turned into a dead-end street and stopped.[36] The officers exited their car and approached the SUV.[37] What happened next was disputed;[38] the denouement was not. They shot all three of the car's occupants; the driver and one passenger died.[39] The wounded passenger and the estate of the other passenger brought a civil rights and assault and battery suit against the officers.[40] The defendants contended that they fired only after the driver attempted to run them over.[41] The plaintiffs claimed that the car began moving only after the officers shot the driver.[42] The officers were allowed to introduce evidence of the driver's most recent felony conviction.[43] Significantly, the driver was scheduled for a probation hearing the next day.[44] Had he been caught associating with his passengers, both of whom were on probation, it might have jeopardized his probationary status. This presented a motive for him to flee rather than surrender; no inference from his character was required. As a result, the evidence was admissible.[45] 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.[46] That would have violated the character-evidence rule.[47]

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[35] Knight v. Miami-Dade Cnty., 856 F.3d 795 (11th Cir. 2017).

[36] *Id.* at 803.

[37] *Id.* at 804.

[38] *Id.*

[39] *Id.* at 803–05.

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

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

[42] *Knight*, 856 F.3d at 803–05.

[43] *Id.* at 816.

[44] *Id.*

[45] *Id.* at 815–17.

[46] *Id.* at 817.

[47] *See id.* at 816–17 (citing FED. R. EVID. 404(b)). 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 documents and critiques this phenomenon well. *See, e.g.*, RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 367 (5th ed. 2013); Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1101, 1132–33 (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, 778–80 (2018); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning*

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.

An avid bow hunter, Dr. Alan Sandifer was sitting at his computer with his 2007 Hoyt Vulcan XT500 in hand.[48] His wife, sitting in another room, asked what he was doing; he replied that he was looking for a new part on the internet.[49] Minutes later, after hearing a loud noise, she found Sandifer lying unconscious.[50] The bow's metal cable guard rod had pierced his left temple and penetrated his brain.[51] He died the next day.[52] His family filed suit under Louisiana's Product Liability Act against Hoyt Archery, the bow's manufacturer, and its insurers, who had the case removed to federal court.[53]

Given the absence of witnesses, the accident's cause was "confounding."[54] 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.[55] He then lost control of the drawstring, causing the cable guard rod to pierce his head.[56] Because this was not a reasonably anticipated use of the bow, defendants argued they could not be liable.[57] The plaintiffs sought to prove that a design defect caused Sandifer's death and offered both lay and expert testimony.[58] Six lay witnesses offered their opinion that Sandifer was "careful and cautious" when he used a bow.[59] 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.[60] But the opinions of Sandifer's friends and family about his careful nature with a bow led the expert to

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from Other Crime Evidence, 17 REV. LITIG. 181, 184 (1998) ("courts routinely admit bad acts evidence precisely for its relevance to defendant propensity").

[48] Sandifer v. Hoyt Archery, Inc., 907 F.3d 802, 804 (5th Cir. 2018). Compound bows use a cable and pulley system to allow archers to generate greater arrow velocity with less effort. Brief of Appellees at 2, *Sandifer*, 907 F.3d 802 (5th Cir. 2018) (No. 17-30124).

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

[50] *Id.*

[51] *Id.* Cable guard rods are used in compound bows to keep the bow's cables from contacting an arrow during launch. Brief of Appellees, *supra* note 48, at 3.

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

[53] *Id.* at 804–05.

[54] *Id.* at 804.

[55] *Id.* at 805.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Brief of Appellees, *supra* note 48, at 11, 29–30.

[60] *Sandifer*, 907 F.3d at 805.

conclude that a design defect was the more likely cause.[61] The trial court excluded both the expert and lay witness testimony and granted summary judgment for the defense.[62] 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.[63]

Although the court's reasoning on the admissibility of the expert opinion was a bit muddled,[64] this Article focuses instead on the proffered testimony of the six lay witnesses, which the trial court easily excluded under Rule 404(a).[65] But why should the rules of evidence categorically prevent juries from considering such testimony? Here we had a "confounding" accident, no eyewitnesses, and an expert who considered that it was equally likely, from a biomechanical perspective, that the cause of the accident was a design defect or reckless behavior.[66] 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 Corporation v. California Smoothie Licensing Corporation*,[67] 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.[68] To buttress its case, J & R called two former California Smoothie franchisees to testify that the same California Smoothie agent

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[61] *Id.* at 805–06. "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." *Id.* at 808.

[62] *Id.* at 806–07; Brief of Appellees, *supra* note 48, at 11–12.

[63] *Sandifer*, 907 F.3d at 808–09. Once the expert's opinion was ruled inadmissible, the appellate court found that plaintiffs' case for causation failed and so it did not expressly address the exclusion of the "pure" character evidence. *Id.* In fact, the court of appeals expressly declined to decide whether the lay witness's testimony might qualify as admissible habit evidence. *Id.* at 806 n.4.

[64] 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. 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).

[65] *See* Brief of Appellees, *supra* note 48, at 11–12, 31. *See also infra* notes 347–348 and accompanying text.

[66] *Sandifer*, 907 F.3d at 804–05.

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

[68] *Id.* at 1263.

made similar representations to them.[69] The court of appeals held the evidence inadmissible: "the evidence was admitted for 'exactly the purpose Rule 404(b) declared to be improper,' . . . namely to establish the defendants' propensity to commit the charged act."[70] Again, if you were a juror, would you want to know that the defendant's agent had made similar representations to other potential franchisees?[71]

Of course, any rule excluding a category of evidence will have outliers—cases where exclusion seems like 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. Parts II and III demonstrate the absence of such 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,[72] the overall story is not. For this Article's purposes, it is important to separate the "pure" character strand of the rule's origin from the other-acts evidence strand;[73] 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.

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[69] *Id*. at 1268.

[70] *Id*. at 1269 (quoting Gov't of the V.I. v. Pinney, 967 F.2d 912, 917 (3d Cir. 1992)).

[71] 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* Section V.C.

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

[73] 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 77, 104 and accompanying text.

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."[74] As trials slowly evolved and witnesses supplanted jurors as the source of information, a body of evidence law gradually began to emerge.[75] Still, character evidence continued to be frequently admitted into the eighteenth century.[76] Although Wigmore dated the origins of the character-evidence rule to two late seventeenth century cases,[77] more recent scholarship has found that courts allowed prosecutors to introduce evidence of an accused's bad character for some time afterwards.[78] 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.[79] And even after the

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[74] 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*].

[75] Wigmore believed the origins of modern evidence law were in place by the end of the 1600s. *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 (Ass'n Am. L. Sch. ed., 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." *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172 (1996).

[76] *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).

[77] R. v. Hampden (1684), 9 How. St. Tr. 1053, 1103 (KB); R. v. Harrison (1692), 12 How. St. Tr. 833, 864 (OB); *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 the rejection of character evidence—that a witness was an atheist—that had been offered to impeach the witness's credibility. *Hampden*, 9 How. St. Tr. at 1103 (discussed in LANGBEIN, *supra* note 76, 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 defendant's previous forgeries for which he had been indicted. WIGMORE 3d ed., *supra*, § 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. *Harrison*, 12 How. St. Tr. at 864, 874 (discussed in LANGBEIN, *supra* note 76 at 191).

[78] Langbein's study of Old Bailey cases revealed such evidence was still being admitted as late as the mid-eighteenth century, and in some instances well up to 1770. LANGBEIN, *supra* note 76, at 195–96, 199–202.

[79] The Metropolitan Police, 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 & POLICE SCI. 141 (1964). Fingerprint evidence was first used to secure a criminal conviction in 1898. NAT'L INST. OF JUST., OFF. OF JUST.

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.[80] We do not definitively know what prompted late-seventeenth and eighteenth-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,[81] has argued that into the eighteenth century, criminal trials were less a search for truth than an exercise in deciding who deserved the death penalty.[82] Felonies then were capital offenses, and defendants' ability to claim benefit of clergy, and thus avoid the hangman's noose, had eroded.[83] Therefore, according to Blinka, "[p]unishing every offender for their transgressions was never the point."[84] 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.[85] 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."[86] This explanation also sheds light on why courts allowed only criminal,[87] and not civil defendants to offer

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PROGRAMS, U.S. DEP'T OF JUST., THE FINGERPRINT SOURCEBOOK 1-15–1-17 (2011), https://www.ojp.gov/pdffiles1/nij/225320.pdf [https://perma.cc/SXK7-VRW3].

[80] *See* 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 365–66 (1826). Initially, evidence of a defendant's good character was admissible only in capital punishment cases but later was permitted in misdemeanor cases as well. *Id*. at 365. Prosecutors were allowed to rebut such evidence both by cross-examining the defendant's character witnesses and by presenting their own witnesses. *Id*. at 366.

[81] BEATTIE, *supra* note 76.

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

[83] For a synopsis of the history of benefit of clergy, see BEATTIE, *supra* note 76, at 141–48.

[84] Blinka, *Character*, *supra* note 82, at 121.

[85] *Id*. at 122–23. *Cf*. Darling v. Town of Westmoreland, 52 N.H. 401, 407 (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.").

[86] BEATTIE, *supra* note 76, at 440.

[87] *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 a criminal defendant's good character as an "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").

evidence of their good character.[88] But, as both Leonard and 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;[89] urbanization meant less familiarity within a community, making it more difficult to judge litigants by their moral character;[90] and the concept of character itself began to take on new meanings.[91] In the mid-eighteenth and early-nineteenth 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 1730s, for example, that lawyers were first allowed to represent felony defendants.[92] 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."[93] 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 no longer buffalo jurors by presenting a "throng" of witnesses who would do no more than testify about the party's general character.[94] Nineteenth-century treatise writers cheered the dethroning of character evidence.[95]

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[88] *See* S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 70 (London 1814); 2 STARKIE, *supra* note 80, at 366–67 (criticizing disparate treatment of civil defendants). Character evidence, however, was sometimes admitted in civil cases for a propensity inference, such as to show the unchaste character of the mother in an illegitimacy case or of a wife or daughter in an action by her husband or father for seduction. *Id.* at 368; *see also* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 54, at 64 (2d ed. 1844).

[89] Leonard, *In Defense*, *supra* note 74, at 1195–96. The Reform Act of 1832 enfranchised middle-class men.

[90] Leonard, *In Defense*, *supra* note 74, at 1196.

[91] Blinka, *Character*, *supra* note 82, at 123–29.

[92] BEATTIE, *supra* note 76, at 356–62.

[93] Leonard, *In Defense*, *supra* note 74, at 1195.

[94] *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").

[95] *See, e.g.*, JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 525 (Boston: Little, Brown & Co. 1898); THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 72 n.h (8th Am. ed. 1869) (calling criminal defendant's right to offer evidence of good character the "last remnant of compurgation"); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 64 (London: MacMillan & Co. 1876).

Notice, however, that the dates in the timeline sketched above do not fully align.[96] The cases Wigmore points to as establishing the character-evidence rule were decided in the late-seventeenth century,[97] and Langbein reports that compliance took hold by the mid-eighteenth century.[98] 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 eighteenth century.[99] Of course, history is never that neat; the Industrial Revolution did not begin on a particular date.[100] More important for this Article's purposes, by the mid-eighteenth 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? Was he established in his community?[101] 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,[102] 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*[103] held inadmissible, in a prosecution for "an infamous crime," an accused's admission that he had committed "such an offence at another time and with

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[96] 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 74, at 1196.

[97] *See supra* note 77 and accompanying text.

[98] *See supra* note 78 and accompanying text.

[99] *See generally* T. S. ASHTON, THE INDUSTRIAL REVOLUTION, 1760-1830 (1948); ARNOLD TOYNBEE, TOYNBEE'S INDUSTRIAL REVOLUTION (1969).

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

[101] BEATTIE, *supra* note 76, at 440.

[102] *See, e.g.*, LEONARD, THE NEW WIGMORE, *supra* note 33, § 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) [hereinafter Stone, *Rule of Exclusion: England*] ("*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).

[103] PHILLIPPS, *supra* note 88, at 70 n.b (noting that *Cole* was decided at "Mich. term 1810, by all the Judges").

another person, and that he had a tendency to such practices."[104] It is noteworthy that Phillipps discussed *Cole* under his first rule about the "[n]ature of [p]roofs": "Evidence must be confined to the points in issue."[105] *Cole* is but one of a number of cases Phillipps discussed regarding the admissibility of other-acts evidence.[106] But he did not include *Cole* in his ensuing discussion of when character may be given in evidence. This hints at what later cases and treatises make more apparent. *Cole* was strongly rooted in the nineteenth century's crabbed view of relevancy.[107] The common-law doctrine of *res inter alios acta*[108]—which held that acts involving third parties were irrelevant—exemplified this narrow conception. For example, in *Holcombe v. Hewson*, decided the same year as *Cole*, a publican claimed that a brewer sold him bad beer.[109] The court rejected the brewer's proffer that he sold good beer to three other publicans as inadmissible *res inter alios acta*.[110] Courts were also concerned that defendants would be surprised by and unable to defend themselves against other-acts evidence.[111]

Despite this, litigants often managed to introduce other-acts evidence. Even before later courts repudiated the *res inter*

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[104] *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 1690s. 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* WIGMORE 3d ed., *supra* note 77.

[105] PHILLIPPS, *supra* note 88, at 69.

[106] *Id.* at 70.

[107] For example, STEPHEN, *supra* note 95, at 14, cites *Cole* in his chapter headed "Occurrences Similar to But Unconnected With the Facts in Issue, Irrelevant Except in Certain Cases."

[108] 1 FRANK S. RICE, THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE 506 (1892) refers to the "celebrated maxim" in full: *"[r]es inter alios acta alteri nocere non debet*." This translates to "[t]hings done between strangers ought not to injure those who are not parties to them." *Res inter alios acta alteri nocere non debet*, BLACK'S LAW DICTIONARY 1471 (4th ed. 1968). *See* 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 COLUM. L. REV. 759 (1910).

[109] Holcombe v. Hewson (1782), 170 Eng. Rep. 1194 (KB). The classic American case is Collins v. Inhabitants of Dorchester, 60 Mass. 396 (1850).

[110] *Holcombe*, 170 Eng. Rep. at 391–92. *See also* Barrows, *supra* note 108, 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).

[111] THAYER, *supra* note 95, at 525; WIGMORE 3d ed., *supra* note 77, § 194; Stone, *Rule of Exclusion: England*, *supra* note 102, at 957–58.

alios acta doctrine,[112] it was applied episodically,[113] albeit without explanation as to why such evidence was sometimes admissible.[114] 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.[115] Often, the evidence was probative without requiring an inference about the person's character.[116] 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,[117] it also happened when other-acts character evidence was offered to prove a defendant's actions.[118] And neither the courts nor the commentators ever acknowledged that nominally inadmissible character evidence was being admitted.[119] 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.[120] The inconsistency with which the other-acts evidence

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[112] 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. 1980).

[113] Note, *supra* note 108, 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.").

[114] *See*, *e.g.*, 1 GREENLEAF, *supra* note 88, § 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").

[115] *See generally* LEONARD, THE NEW WIGMORE, *supra* note 33, §§ 2.3–2.4, 3.3–3.4.

[116] For example, such evidence was often admitted to prove the accused's knowledge in forging and uttering cases. *See, e.g.*, *id.* § 2.4.1.b (discussing cases); 2 STARKIE, *supra* note 80, at 378. It also was used to prove knowledge in other types of cases. *E.g.*, R. v. Mogg (1830), 172 Eng. Rep. 741 (KB) (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 the horse in question).

[117] *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).

[118] 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 33, § 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 (1849), 18 L.J. (MC) 215, 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. *Id.* at 215–16.

[119] *See* LEONARD, THE NEW WIGMORE, *supra* note 33, § 2.2, at 31–32; *id.* § 2.4.3.

[120] It was not until the early twentieth century that Wigmore became the first to try to impose an analytical framework on the admissibility of other-acts evidence. *Id.* §§ 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").

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 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.[121] What is striking about his nearly 200-page discussion is the almost complete absence of civil cases. For example, his forty-page section reviewing British nineteenth-century case law mentions only two civil cases.[122] His ninety-eight-page review of American case law from the same period devotes six pages to civil fraud and false representation cases; the other ninety-two pages discuss criminal cases.[123] Julius Stone's path-breaking articles on other-acts evidence in England[124] and America[125] share a similar preoccupation with criminal cases. 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.[126] 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

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[121] *Id.* §§ 2.1–3.4.

[122] *Id.* § 2.4.

[123] *Id.* § 3.3.

[124] Stone, *Rule of Exclusion: England*, *supra* note 102.

[125] Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) [hereinafter Stone, *Rule of Exclusion: America*].

[126] WIGMORE 3d ed., *supra* note 77, § 194, at 647.

society centuries ago hardly prevails today. Into the mid-nineteenth century, a convicted felon was not even allowed to testify at trial.[127] Today, a convicted felon can be elected President. General character evidence was banned from English trials because it was too often the critical piece of evidence in a trial more concerned with who the person was than what had happened. The ban in no way reflected a considered judgment that character evidence would be 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. Today's notions of relevance are far broader[128] than were the eighteenth century's; the doctrine of *res inter alios acta* is wholly incompatible with current notions of relevancy.[129] Moreover, the danger of surprise is largely irrelevant in contemporary civil litigation, where discovery plays a large role.[130] 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.[131] And that remains true for the contemporary justifications typically offered for the character-evidence rule.

III. CONTEMPORARY JUSTIFICATIONS 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

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[127] This disqualification was not fully abolished in England until passage of the Evidence Act 1843. *See* 21 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5005 (2d ed.), Westlaw (database updated June 12, 2023). In this country, most, but not all states abolished this disqualification by the end of the nineteenth century. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372 n.4 (1897) (listing state statutes).

[128] *See* FED. R. EVID. 401; Dortch v. Fowler, 588 F.3d 396, 400 (6th Cir. 2009) ("The standard for relevancy is 'extremely liberal' under the Federal Rules of Evidence.").

[129] Simon v. Town of Kennebunkport, 417 A.2d 982, 985 (Me. 1980) ("A blanket rule of irrelevance is manifestly incompatible with modern principles of evidence.").

[130] 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.

[131] Thomas Starkie both noted and criticized the disparate treatment afforded civil litigants. 2 STARKIE, *supra* note 80, at 366–67.

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.[132]

A. Primary Justification: Probative Value Outweighed by Unfair Prejudice

There is widespread agreement from the Supreme Court[133] to commentators[134] 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 the late 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.[135]

However, in judging whether we should have a categorical rule excluding character evidence, the question is

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[132] 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),608(a). As mentioned earlier, this Article addresses only the substantive use of character evidence. *See supra* note 32 and accompanying text.

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

[134] *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).

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

more complicated than answering whether character evidence is relevant. 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 undoubtedly 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.[136]

As to the latter issue, some critics of the use of character evidence maintain that 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.[137] 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,[138] 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."[139] Numerous courts

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[136] *E.g.*, Mike Redmayne, *The Relevance of Bad Character*, 61 CAMBRIDGE L.J. 684, 692 (2002). *Cf.* Park, *Character at the Crossroads*, *supra* note 134, at 722 (noting that other-acts evidence is used in civil commitment sentencing proceedings to predict future dangerous acts).

[137] *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 134, at 255–60; Spector, *supra* note 32, at 351.

[138] A few commentators discuss concerns about the prejudicial effect in civil cases, although usually briefly. *E.g.*, 1 IMWINKELRIED, *supra* note 12, §§ 1:2–1:3; 22A WRIGHT & GRAHAM, *supra* note 9, § 5232, at 21.

[139] 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:22, Westlaw (database updated Aug. 2023). Commentators consistently express concern that juries are prone to give the evidence too much weight 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 134, at 720–46.

sing the same refrain in criminal cases.[140] 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.[141] 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.[142] 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.[143] Jurors, therefore, are unlikely to understand that an innocent defendant's prior record, rather than being probative of his guilt, may be the very reason he was targeted for investigation and prosecution. Empirical studies—flawed as they are[144]—that have sought to assess the impact of character evidence on jurors also reflect the predominant concern for criminal defendants. The studies overwhelming involve criminal cases,[145] both mock[146] and real.[147]

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[140] *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).

[141] *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).

[142] LEMPERT ET AL., *supra* note 47, at 353; Park, *Character at the Crossroads*, *supra* note 134, at 772.

[143] LEMPERT ET AL., *supra* note 47, at 353.

[144] *See* Goode, *supra* note 139, at 768–70.

[145] *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).

[146] *See, e.g.*, 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; Edith Green & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67 (1995); W.R. Cornish & A.P. Sealy, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208; Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 L. & HUM. BEHAV. 319 (1985); *cf.* Eugene Borgida & Roger Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 L. & HUMAN BEHAV. 19 (1988). *But see* Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 464–82 (2019) (mock juror study of both criminal and civil cases).

[147] 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 of Kalven and Zeisel's work focused on criminal cases. Theodore Eisenberg et al., *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 L., PROBABILITY & RISK 169, 174–75 (2004).

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 than are criminal jurors.[148] Research shows that in evaluating conduct, people tend to overestimate the role of character and underestimate situational influences.[149] Evidence of a party's character may be overvalued by jurors who process evidence through a story-telling model rather than through Bayesian reasoning.[150] 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 this Article's purposes is the work of social psychologist Mark Alicke.[151] He argued that "[p]eople are evaluating creatures, and perhaps the most important things they evaluate are each other."[152] People are prone to blame actors whom they perceive as having an

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[148] *See, e.g.*, Sevier, *supra* note 146, at 470–82 (finding mock jurors in civil and criminal cases viewed character evidence in much the same way and that differences in the changes in their respective liability findings were explained by the different standards of proof in civil and criminal cases); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 185–88 (2006); Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1087, 1092–93 (2003). Judges are also susceptible to cognitive errors. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1291 (2005) (explaining that judges are affected by anchoring phenomenon); Chris Guthrie et al., *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. SCIS. & L. 113 (1994).

[149] *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).

[150] *See* MacCoun, *supra* note 145, 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).

[151] Alicke's seminal article was Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368 (1992) [hereinafter Alicke, *Culpable Causation*]. Earlier researchers studied the role of blame but in ways not as relevant to the character-evidence rule. *See* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556, 556 (2000) (citing literature).

[152] Mark D. Alicke et al., *Causal Conceptions in Social Explanation and Moral Evaluation: A Historical Tour*, 10 PERSPS. ON PSYCH. SCI. 790, 807 (2015) [hereinafter Alicke et al., *Causal Conceptions*].

undesirable disposition or bad motives.[153] This extends to making judgments about causation and state of mind.[154]

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.[155] Some subjects were told the item was an anniversary present for his parents; others, that it was a vial of cocaine.[156] Subjects were much more likely to find Driver A caused the accident when he wanted to get home quickly to hide the cocaine.[157] A group of subjects were told not only that Driver A was speeding but also that the other driver was running a stop sign when the accident occurred.[158] 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.[159]

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."[160] The subjects more consistently blamed the

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[153] 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 134, at 525; Leonard, *In Defense*, *supra* note 74, 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.

[154] "[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 et al., *Causal Deviance and the Ascription of Intent and Blame*, 32 PHIL. PSYCH. 404, 406 (2019) [hereinafter Rogers & Alicke].

[155] Alicke, *Culpable Causation*, *supra* note 151, at 369

[156] *Id.*

[157] *Id.* at 370.

[158] *Id.* at 369.

[159] *Id.*

[160] Mark D. Alicke & Ethan Zell, *Social Attractiveness and Blame*, 39 J. APP. SOC. PSYCH. 2089, 2097–101 (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.

socially unattractive driver for causing the accident.[161] Additional studies by Alicke and his colleagues as well as other social psychologists have produced similar results.[162] What makes these 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.[163] These studies seem, therefore, to support the notion that the risk of unfair prejudice posed by character evidence may well outweigh its probative value.

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

A few secondary justifications are also sometimes proffered in defense of the character-evidence rule. 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.[164] 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.[165] Some commentators assert that excluding character evidence spares jurors from being exposed to collateral issues that would tend to confuse them and waste time.[166]

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[161] *Id.* at 2100–01.

[162] *See* Mark D. Alicke, *Evidential and Extra-Evidential Evaluations of Social Conduct*, 9 J. SOC. BEHAV. & PERSONALITY 591 (1994); Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 L. & CONTEMP. PROBS. 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 154; Simon, *supra* note 150, at 537–38. *See generally* Alicke et al., *Causal Conceptions*, *supra* note 152, 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 PERSPS. ON PSYCH. SCI. 72 (2014).

[163] 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 207 and accompanying text.

[164] *E.g.*, 1 MUELLER & KIRKPATRICK, *supra* note 139, § 4:22; Bryden & Park, *supra* note 153, at 565.

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

[166] *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 74, at 1185–86.

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.[167] 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."[168]

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 initiate 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 one worry that allowing character evidence in civil cases will prompt less diligent police investigations into crimes. And robust civil discovery obviates the danger that parties will be surprised when their adversary seeks to introduce character evidence.[169]

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[167] Park, *Character at the Crossroads*, *supra* note 134, 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).

[168] Paul F. Rothstein & Ronald J. Coleman, *Prior Racist Acts and the Character Evidence Ban in Hate Crime Prosecutions*, 102 N.C. L. REV. 753, 764–65 (2024).

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

2. The Weightier Stakes in Criminal Cases

To many, the most critical difference between civil and criminal cases is what is at stake.[170] 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 the view that an erroneous criminal conviction is far more costly than an erroneous acquittal.[171] In contrast, the preponderance of the evidence standard typically employed in civil cases indicates our indifference to which party bears the burden of an erroneous civil verdict.[172] If the burdens of persuasion are properly calibrated and the balance of probative value and unfair prejudice is similar in civil and criminal cases, the stakes should not matter. Whether it is liberty or 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[173] but also that the reasonable doubt standard insufficiently protects defendants' interests when it comes to character evidence.[174] Some features of the character-evidence rule manifest this latter concern. Rule 404(a) allows criminal defendants—but not civil defendants—to offer

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[170] *See* Speiser v. Randall, 357 U.S. 513, 525 (1958) (stating that defendant's stake in criminal cases—liberty—is of "transcending value").

[171] *See In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring); 2 WILLIAM BLACKSTONE, COMMENTARIES 357 (J.B. Lippincott Co. 1893) ("it is better that ten guilty persons escape than one innocent suffer").

[172] 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).

[173] *See supra* notes 138–147 and accompanying text; *see also infra* notes 189–200 and accompanying text.

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

evidence of their good character[175] and their alleged victim's character.[176] 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,'"[177] and added that "[t]hose concerns do not apply to parties in civil cases."[178] 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 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.[179]

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 such evidence that fuels the concerns about unfair prejudice to the accused.[180] In civil cases, other-acts evidence may involve previous criminal conduct[181] but typically does not. The character-evidence rule is invoked, for example, in attempts to exclude evidence of other negligent acts,[182] business

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175 FED. R. EVID. 404(a)(2)(A).

176 FED. R. EVID. 404(a)(2)(B).

177 FED. R. EVID. 404 advisory committee's notes to 2006 amendment (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES 264–65 (2d ed. 1999)). Wharton offered a similar justification in 1877. 1 WHARTON, *supra* note 87, § 47, at 61.

178 FED. R. EVID. 404 advisory committee's notes to 2006 amendment.

179 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 also* FED. R. EVID. 609 advisory committee's notes to 1990 amendment (explaining the rationale behind 1990 amendment to 609(a)).

180 *See* 1 MUELLER & KIRKPATRICK, *supra* note 139, § 4:21 (noting that in criminal cases, practical effect of character-evidence rule is to limit use of prior crimes).

181 *E.g.*, Secs. & Exch. Comm'n v. Teo, 746 F.3d 90, 95–96 (3d Cir. 2014).

182 *E.g.*, Bair v. Callahan, 664 F.3d 1225 (8th Cir. 2012).

arrangements,[183] failures to provide a warning,[184] employment decisions,[185] campaign contributions,[186] litigiousness,[187] and legal price fixing.[188] 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.[189] 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,[190] overall they are less prevalent. Negligence suffices for many torts, and even that is not always required.[191] A breach of contract may be seen as involving immoral conduct, or not.[192] Accordingly, the relevant other-acts evidence presented in these cases is itself less likely to be morally tinged. And since it is the moral judgments that jurors draw from other-acts evidence that most strongly leads to unfair prejudice,[193] the categorical danger of

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[183] *E.g.*, J & R Ice Cream Corp. v. Cal. Smoothie Licensing Corp., 31 F.3d 1259, 1268 (3d Cir. 1994) (for further discussion see text accompanying *supra* notes 67–71 and *infra* notes 317–320).

[184] *E.g.*, Colley v. CSX Transp., Inc., No. 1:07-CV-1175HSO-JMR, 2009 WL 1515524, at *1 (S.D. Miss. May 27, 2009); Am. Nat. Watermattress Corp. v. Manville, 642 P.2d 1330, 1335–36 (Alaska 1982).

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

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

[187] *E.g.*, Outley v. City of N.Y., 837 F.2d 587, 591–94 (2d Cir. 1988).

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

[189] *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.*'") (quoting 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 intention be criminal").

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

[191] *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).

[192] *Compare, e.g.*, HENRY MATHER, CONTRACT LAW AND MORALITY (1999), *with* Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885 (2019).

[193] Anderson, *supra* note 72, 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*].

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 character,[194] but it is often invoked to prevent a defendant from offering evidence of a plaintiff's character.[195] 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 or not.[196] Sometimes, other-acts evidence involving both parties may be offered.[197] 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 to as reverse-Rule 404(b) evidence[198]—makes the point. Counter textually, one federal court of appeals has held the character-evidence rule does not even apply to such proof.[199] Less drastically, other courts have announced that they are more amenable to receiving such evidence.[200]

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[194] *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).

[195] *E.g.*, White Commc'ns, LLC v. Synergies3 Tec Servs., LLC, 4 F.4th 606, 611–12 (8th Cir. 2021); Batiste-Davis v. Lincare, Inc., 526 F.3d 377, 380 (8th Cir. 2008). Indeed, 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 Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153, 1154 (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, 523 (5th Cir. 1986).

[196] *E.g.*, Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278, 1325 (11th Cir. 2022) (affiliated); Keller Farms, Inc. v. McGarity Flying Serv., LLC, 944 F.3d 975, 983–84 (8th Cir. 2019) (affiliated); Kula v. United States, No. 4:17-CV-02122, 2021 WL 1600140, at *4–5 (M.D. Pa. Apr. 23, 2021) (unaffiliated); Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 287 (5th Cir. 1987) (unaffiliated).

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

[198] *See* 1 IMWINKELRIED, *supra* note 12, §§ 2:20–2:22.

[199] *Carrizosa*, 47 F.4th at 1325 (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)).

[200] *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,

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.

4. Social Psychology and Unfair Prejudice

The social psychology literature discussed earlier[201] suggests that the introduction of character evidence may well lead jurors astray.[202] 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.[203] The reason a driver involved in an accident was speeding[204] is part of the narrative that lawyers are ordinarily allowed to present to juries.[205] Counsel may invoke Rule 403 in an effort to exclude evidence that their client was rushing home so he could hide his cocaine. But, despite the danger of unfair prejudice, this type of evidence is not categorically excluded.[206]

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357 F.3d 599, 605 (6th Cir. 2004); United States v. Stevens, 935 F.2d 1380, 1404–05 (3d Cir. 1991).

[201] *See supra* notes 151–163 and accompanying text.

[202] *See generally* Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1, 13 (2021) (stating that jurors are invited to use information about a defendant's character traits when reaching decisions).

[203] 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 193 (detailing circumstances in which courts admit evidence of a defendant's motive).

[204] *See supra* notes 155–159 and accompanying text. Another set of experiments compared subjects' reactions to a conflagration caused by the ignition of highly-flammable fertilizers. Some subjects were told that the person who stored the fertilizers did so to grow exotic orchids; others, that the person stored them to manufacture methamphetamine. Nadler & McDonnell, *supra* note 162, at 273–84. Courts would routinely admit evidence about the person's reason for storing the fertilizers.

[205] *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.") (quoting Dunning v. Maine Cent. R. Co., 39 A. 352, 356 (Me. 1897).

[206] Indeed, such evidence is frequently admitted over Rule 403 objections. *See, e.g.*, United States v. Miller, 61 F.4th 426, 429–30 (4th Cir. 2023) (holding, in prosecution for sending an obscene letter to a recipient defendant knew was under the age of sixteen,

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.[207] Take Alicke's experiment in which mock jurors were more likely to blame a socially unattractive driver for an accident with a bicyclist than a socially attractive driver.[208] 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.[209] 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.[210]

In the end, the social psychology literature indicates that both the type of motive evidence courts routinely admit and the type of character evidence courts would not admit even in the absence of the character-evidence rule may unfairly prejudice jurors. That is hardly a basis for categorically excluding an entire class of evidence that has probative value. In crafting rules of evidence, the 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 evidence to which they are exposed.[211] The danger that jurors overvalue eyewitness identifications has been widely acknowledged, but eyewitness testimony is routinely

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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).

[207] Other 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, a woman who shot her husband claimed the shooting was an accident. Mock jurors who were told that the woman had a history of being physically and verbally abusive toward her husband were more likely to find the woman blameworthy than mock jurors who were told that the husband was physically and verbally abusive toward her. Rogers & Alicke *supra* note 154, at 413–16. Clearly, the mock jurors who were told that the woman had previously physically abused her husband might view this as evidence of her violent character and logically see that as bearing on her conduct. *See* Goode, *supra* note 139, at 760–63.

[208] Alicke & Zell, *supra* note 160, at 2097–101.

[209] *Id.* at 2098–99.

[210] 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 139, at 768–70.

[211] *See* MacCoun, *supra* note 145, 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. 1 (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10106569/ [https://perma.cc/9JPJ-WQPD].

admitted.[212] Studies consistently debunk the value of demeanor in ascertaining truthtelling.[213] Yet preserving jurors' opportunity to observe a witness's demeanor remains a mainstay of the hearsay rule,[214] and courts may even encourage jurors to consider a witness's demeanor.[215] And, despite the character-evidence rule, jurors search for clues to help them divine a litigant's character,[216] and trial lawyers frequently seek to exploit this.[217] They coach their witnesses on how to dress, behave, and speak[218] and urge family members to appear in court.[219] Some characteristics, like race, ethnicity, religion, and gender cannot so easily be manipulated, and may well influence jurors' judgments.[220] It is no wonder that Samuel Gross

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[212] 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 [https://perma.cc/Z9JC-UPX5].

[213] *See, e.g.*, SIMON, *supra* note 212, 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, 1346–47 (2015); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078–88 (1991) (reviewing studies).

[214] 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, 242–43 (1895) (stating that Confrontation Clause is designed to compel a 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").

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

[216] *See, e.g.*, SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 100, 102–03 (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); *see generally* 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).

[217] 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.").

[218] Capers, *supra* note 215, at 874–78; Brown, *supra* note 202, at 4, 14.

[219] Capers, *supra* note 215, at 893; Gross, *supra* note 217, at 846–47.

[220] Brown, *supra* note 202, at 13–14; Capers, *supra* note 215, 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 134, at 741; Nadler & Mueller, *supra* note 162, at 139–40.

remarked, only somewhat hyperbolically, that "[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."[221] 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.[222]

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,[223] although it still severely limited how character could be proved.[224] A decade later, the original Uniform Rules of Evidence mainly followed the Model Code's lead.[225] Wigmore's own proposed code rejected a categorical ban on civil character evidence[226] but specifically excluded evidence of a person's negligent character.[227] In contrast, a number of prominent scholars, including Fleming James[228] and Charles McCormick,[229] called for authorizing the admission of evidence of a person's accident proneness.[230] More modest calls for reform urged that the exceptions allowing criminal defendants to offer evidence of their good character and

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[221] Gross, *supra* note 217, at 846.

[222] *See* Hynes v. Coughlin, 79 F.3d 285, 290–92 (2d Cir. 1996) (holding that the trial court erred in admitting evidence of plaintiff's previous acts of violence offered to prove he initiated a 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).

[223] MODEL CODE OF EVID. R. 306(1) (AM. L. 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."

[224] 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. MODEL CODE OF EVID. R. 306(2).

[225] UNIF. R. EVID. 46, 48 (UNIF. L. COMM'N 1953).

[226] WIGMORE'S CODE, *supra* note 15, Rules 36–50. The prolixity of Wigmore's code defies concise summarization.

[227] *Id.* Rule 37, art. 2.

[228] James, Jr. & Dickinson, *supra* note 17, at 792–94.

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

[230] *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 108, at 399–401.

their victim's bad character should be extended to civil litigants.[231] Both before[232] and after[233] enactment of the federal rules, some states agreed that this type of "pure" character evidence should be admissible.[234] The willingness of some states to allow such "pure" character evidence reflects the 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 unlikely either to view it as highly probative or be unfairly prejudiced by it.[235]

IV. COMPARISON WITH OTHER RELEVANCE RULES

A. Rules 401-415

When enacted fifty years ago, the new federal rules evinced the "trend in evidence law toward free proof."[236] Overall, they liberalized the admission of evidence.[237] 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.[238]

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[231] *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 80, at 367.

[232] *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").

[233] *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).

[234] 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 Ins. 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 to 2006 amendment.

[235] *See* Hunt & Budesheim, *supra* note 146, at 352, 355 (reporting that exposing mock jurors to such character evidence had very little effect).

[236] Bryden & Park, *supra* note 153, at 561. Late in the nineteenth century, Thayer urged a liberal admissibility standard. *See* THAYER, *supra* note 95, 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").

[237] *See supra* notes 2–6 and accompanying text.

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

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).[239] But this danger must substantially outweigh the probative value; close calls must be decided in favor of admissibility.[240] Skipping over the character-evidence and related habit-evidence rules,[241] we arrive at 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[242] and addresses concern that the unfair prejudice[243] associated with such evidence outweighs its probative value.[244] 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.[245] Without the extrinsic policy justifications on which these rules are based, none 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.[246] Unlike Rules 407 through 410, Rule 411 is based solely on concerns about low probative value and high prejudicial impact. The link between a party's having or lacking liability insurance and acting negligently on a particular occasion is considered "tenuous," at best.[247] Yet there is virtually unanimous agreement

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

[240] *Id.*

[241] FED. R. EVID. 404–06.

[242] 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 to 1972 amendment.

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

[244] *See* FED. R. EVID. 407, 408, 409 advisory committee's note to 1972 amendment. 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.

[245] *See* FED. R. EVID. 410 advisory committee's note to 1972 amendment.

[246] *See supra* Section III.C.1.

[247] FED. R. EVID. 411 advisory committee's note to 1972 amendment. Whether a driver involved in an accident, for example, had liability insurance has little, if any,

that character evidence is plainly probative.[248] 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 originally applied only in criminal cases, preventing a rape defendant from offering evidence of the victim's character to establish that the victim consented to the defendant's alleged assault,[249] but was later amended to cover civil proceedings as well.[250] In civil cases alleging sexual misconduct (such as sexual harassment cases and suits seeking damages for sexual assault), it deems evidence of a victim's sexual predisposition or other sexual behavior[251] generally inadmissible.[252] To justify the rule, its supporters pointed primarily to extrinsic policy goals: protecting rape victims' privacy interests, sparing them from humiliating inquiries into their sexual history, and encouraging them to report sexual misconduct and testify at trial.[253] 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.[254] Willingness to engage in sexual conduct with one person tells us little about a person's willingness to do so with a different partner.[255]

Rule 412(b) creates exceptions to the ban on sexual-behavior evidence but takes markedly different approaches in criminal and civil cases. On the criminal side, it creates three categorical exceptions;[256] on the civil side, however, it shuns

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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. *Id.*

[248] *See supra* notes 133–137 and accompanying text.

[249] Privacy Protection for Rape Victims Act, Pub. L. 95-540, § 2(a), 92 Stat. 2046 (1978).

[250] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1919 (1994).

[251] For brevity's sake, I will refer to both as "sexual-behavior evidence."

[252] FED. R. EVID. 412(a).

[253] *See* 1 MUELLER & KIRKPATRICK, *supra* note 139, § 4:77; 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382 (1980); FED. R. EVID. 412 advisory committee's note to 1994 amendment.

[254] *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).

[255] *See, e.g.*, 1 MUELLER & KIRKPATRICK, *supra* note 139, § 4:77; Berger, *supra* note 254, at 55–56 (discussing changing sexual mores); FED. R. EVID. 412 advisory committee's note to 1994 amendment (expressing concern about sexual stereotyping).

[256] 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

categorical exceptions. It simply creates a balancing test—albeit a strict one[257]—for courts to apply in determining whether sexual-behavior evidence should be admitted despite the general ban.[258] 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.[259] But the difference can be explained by looking at the probative value and unfair prejudice concerns. The civil contexts in which sexual-behavior evidence may be offered are more varied,[260] as are the issues to which such evidence may be directed.[261] Moreover, in civil cases, the proffered sexual-

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 an 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.

[257] 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.* (emphasis added).

[258] 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." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1919 (1994). 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 non-substantive, this was not intended to alter the rule's meaning. FED. R. EVID. 412 advisory committee's note to 2011 amendment. 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. Co., 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).

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

[260] 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).

[261] *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 that evidence that plaintiff made sexually charged comments in workplace was 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. Metro. Water Reclamation Dist. of Greater Chi., 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

behavior evidence may be that of the plaintiff, defendant, or a third party.[262] Consequently, it is much harder to make categorical judgments in civil cases about when the probative value of sexual-behavior evidence is sufficiently great to warrant its admission.[263] Rule 412(b) thus instantiates the point made earlier.[264] 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.[265]

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.

B. Similar-Happenings Evidence

The rules of evidence contain no rule specifically addressing the admissibility of similar-happenings evidence,

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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).

[262] *See* cases cited *supra* note 258; 2 OMILIAN & KAMP, *supra* note 261, § 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 to 1994 amendment (noting rule protects "pattern witnesses" in criminal cases).

[263] 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. FED. R. EVID. 413, 414. In prosecutions for sexual assault, Rule 413 authorizes the admission of other sexual assaults committed by the accused. FED. R. EVID. 413. Likewise, in prosecutions for child molestation, Rule 414 authorizes the admission of evidence of the accused's other acts of sexual assault or child molestation. FED. R. EVID. 414. Rule 415 authorizes the admission of such evidence in civil cases based on sexual assault or child molestation. FED. R. EVID. 415. 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.

[264] *See* Section III.C.3.

[265] To be clear, I am not arguing that Rule 412 should be repealed. Rule 412(b) simply 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.

such as similar transactions, accidents, and product defects. Courts universally address such evidence under Rules 401 through 403.[266] To ensure that such evidence is probative, courts apply a "substantial similarity" test[267] that is context specific.[268] 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.[269]

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 stands virtually alone in seeking systematically to justify the different treatment of similar-happenings and character evidence. But he roots his explanation in the fact that the character-evidence rule applies "overwhelmingly . . . in criminal cases to prove defendant's guilt," while similar-happenings evidence is used primarily in civil cases.[270] 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.[271] He bases his case for the high categorical probative value of the former on one hypothetical involving a mechanical defect in a store escalator.[272] But a mechanical defect is probably the strongest type of similar-

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[266] *See* LEONARD, THE NEW WIGMORE, *supra* note 33, §§ 14.1–14.5; 1 MCCORMICK ON EVIDENCE §§ 196-200 (8th ed.), Westlaw (database updated July 2022) [hereinafter 1 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).

[267] *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 Equip. Corp., 217 F.3d 453, 457–58 (7th Cir. 2000).

[268] 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.").

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

[270] LEONARD, THE NEW WIGMORE, *supra* note 33, § 14.1, at 865.

[271] *Id.* § 14.4, at 885 ("the inferential chain supporting the legitimate uses of similar occurrences evidence is relatively short, intuitively clear, and reasonably compelling in most situations") (citing *id.* § 14.2).

[272] *Id.* § 14.2.

happenings evidence.[273] 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.[274] It is much harder when 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.[275] Indeed, it is the wide variety of similar-happenings evidence[276] 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,[277] he contends that it categorically poses a smaller risk than other-acts evidence poses in criminal cases.[278] 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."[279] This aligns with the analysis earlier in this Article[280] that character evidence generally poses a smaller danger of unfair prejudice in civil than in criminal cases.[281] 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.

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[273] This is especially true when the similar happening involved, as in Leonard's hypothetical, the same device that allegedly was faulty. Much proffered similar-happenings evidence, however, involves defects in other devices, such as cars of the same or similar make or model.

[274] Simon v. Town of Kennebunkport, 417 A.2d 982, 986 (Me. 1980).

[275] Thomas v. Boyd Biloxi LLC, 360 So.3d 204, 211–12 (Miss. 2023) (reversing trial court's exclusion of such evidence).

[276] *See, e.g.*, 1 IMWINKELRIED, *supra* note 12, § 7:15 (citing cases); sources cited *supra* note 266.

[277] LEONARD, THE NEW WIGMORE, *supra* note 33, §§ 14.3–14.4; Morris, *supra* note 47, at 184; Sachs, *supra* note 266, at 266–67.

[278] LEONARD, THE NEW WIGMORE, *supra* note 33, § 14.4.

[279] *Id.* § 14.4, at 886.

[280] *See supra* Sections III.C.2–3.

[281] 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.

V. ABOLISHING THE CIVIL CHARACTER-EVIDENCE RULE WOULD BE BENEFICIAL

None of this analysis matters unless there is good reason to believe that abolishing the civil character-evidence rule would produce better outcomes at trial. Admittedly, often it would not. In numerous cases, courts already admit other-acts evidence because its probative value for a legitimate noncharacter purpose outweighs the risk of unfair prejudice. In other cases, the court excludes such evidence because the probative value of the evidence (even as character evidence) is too attenuated. And in many cases, courts admit the evidence by denying that its probative value arises solely from a character-propensity inference. But there remains a substantial group of cases where abolition of the rule would produce better outcomes. This would occur primarily in 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 sometimes, even when the other-acts evidence has a valid nonpropensity purpose, courts invoke Rule 403 to exclude it because of the unfair prejudice that would flow from the propensity inference jurors may draw. These latter cases highlight 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*,[282] discussed in Part I, illustrates how other-acts evidence may legitimately establish a person's motive without requiring jurors to draw an inference about the person's character.[283] In scores of cases, courts have admitted other-acts

[282] Knight v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017).

[283] *See* Fields v. City of Chi., 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).

evidence for a host of other noncharacter purposes, including to prove notice,[284] control,[285] physical or mental capacity,[286] knowledge,[287] the existence of a hostile work environment,[288] or the appropriate amount of damages[289] or punishment,[290] or when the other acts are intrinsic to the events in question.[291] In all of these cases, courts have had little difficulty upholding the admission of the evidence. Even where courts acknowledged the danger that jurors might illegitimately draw a character inference, they have found such Rule 403 concerns insufficiently weighty.[292]

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.[293] For example, in *Aetna Casualty & Surety Company v. Gosdin*, Aetna suspected arson was the cause of a fire that substantially damaged its policyholder's shopping center and refused to pay under the policy.[294] 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.[295] The trial court also permitted Aetna to prove that Gosdin had previously faced charges of pimping, pandering, and drug possession and distribution.[296] The appellate court upheld admission of Gosdin's burglary charge.[297] It tended to prove he needed funds (to defend against the charge)

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[284] *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).

[285] *E.g.*, Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1482–84 (8th Cir. 1987).

[286] *E.g.*, Lange v. City of Oconto, 28 F.4th 825, 832–36, 842–43 (7th Cir. 2022); Boyd v. City & Cnty. of San Francisco, 576 F.3d 938, 944 (9th Cir. 2009).

[287] *E.g.*, *Lange*, 28 F.4th at 842; Langbord v. U.S. Dep't of the Treas., 832 F.3d 170, 193–94 (3d Cir. 2016); *In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804, 822–23 (2d Cir. 1994).

[288] *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).

[289] *E.g.*, Chatham v. Davis, 839 F.3d 679, 687 (7th Cir. 2016); Cobige v. City of Chi., 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).

[290] *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).

[291] *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).

[292] *E.g.*, *Lange*, 28 F.4th at 844–45; *Langbord*, 832 F.3d at 194; *Chatham*, 839 F.3d at 687; Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 573–75 (1st Cir. 1989).

[293] 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.

[294] Aetna Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153, 1155 (11th Cir. 1986).

[295] *Id.* at 1156.

[296] *Id.*

[297] *Id.* at 1158–59.

and so had a motive for torching the shopping center.[298] But the court held that evidence of the other criminal charges was inadmissible.[299] They did not provide a motive and were "too inflammatory" to present to the jury.[300]

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,[301] 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*,[302] 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.[303] 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.[304] This is classic character evidence—because Burge beat other prisoners, he beat the plaintiff—but the court denied this. Invoking Rule 404(b), the court insisted the evidence was being offered only to show "intent, opportunity, preparation, and plan," and not to prove Burge's propensity to beat prisoners.[305] This is exactly the type of mindless invocation of Rule 404(b) that has been widely criticized in criminal cases.[306] And it is a

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[298] *Id.*

[299] *Id.* at 1158–60.

[300] *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).

[301] *See* Goode, *supra* note 139, at 723–60.

[302] Wilson v. City of Chi., 6 F.3d 1233 (7th Cir. 1993).

[303] *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.*

[304] *Id.* at 1238.

[305] *Id.* The court did not even attempt to explain how the other beatings proved Burge intended to beat Wilson without an inference about his violent character. Moreover, Burge's intent was hardly an issue: the defense did not claim that Burge lacked the opportunity or the time to prepare to beat Wilson, and the plaintiff offered no explanation of how the other beatings were instrumental in bringing a larger plan involving the torture of Wilson to fruition.

[306] *See, e.g.*, 1 MUELLER & KIRKPATRICK, *supra* note 139, § 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 47, at 779

regular occurrence in a wide range of civil actions, including claims under civil rights statutes[307] and insurance policies[308] as well as suits alleging breach of contract[309] or real estate fraud,[310] to name just a few.[311] Courts' widespread use of "motive" or "intent" as a permissible Rule 404(b) purpose to justify admitting other-acts evidence in employment discrimination cases[312] has long been criticized as a form of disguised character evidence.[313] Courts have also used the bogus "doctrine of chances"[314] and dubiously claimed that a litigants' other acts amounted to a habit as alternative ways of ignoring the character-evidence rule.[315]

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.[316]

(criticizing "knee-jerk" approach courts take to Rule 404(b) rulings); Sonenshein, *supra* note 134, at 218.

[307] *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).

[308] *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).

[309] *E.g.*, White Commc'ns, LLC v. Synergies3 Tec Servs., 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).

[310] *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).

[311] *See, e.g.*, Fresquez v. BNSF Ry. Co., 52 F.4th 1280, 1313–14 (10th Cir. 2022) (claim under Federal Railroad Safety Act); Secs. & Exch. Comm'n v. Teo, 746 F.3d 90, 96 (3d Cir. 2014); Secs. & Exch. Comm'n v. DiBella, 587 F.3d 553, 570–71 (2d Cir. 2009) (claim under Securities Exchange Act of 1934); Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of the Fox Masonry & Expert Restorations, 140 F.3d 661, 667 (7th Cir. 1998) (suit seeking sanctions against an attorney).

[312] Fudali 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.").

[313] *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.").

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

[315] *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).

[316] 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

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. Moreover, allowing courts to consider the probative value of character evidence would correct a perverse feature embedded in the manner by which courts must currently make Rule 403 rulings.

Recall the *J & R Ice Cream Corporation* case discussed earlier.[317] 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.[318] 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."[319] 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.[320]

Lawsuits involving claims of police misconduct often raise questions about the admissibility of other-acts evidence.

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entities. *See* 22B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5234 (2d ed.), Westlaw (database updated Apr. 2023); 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, *Criminal Corporate Character*, 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, 191–94 (3d Cir. 2000); *In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804, 823 (2d Cir. 1994); Monger v. Cessna Aircraft Co., 812 F.2d 402, 406 (8th Cir. 1987); *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., 518 F. Supp. 3d 1028, 1034–38 (S.D. Ohio 2021).

317 *See supra* notes 67–71 and accompanying text.

318 J & R Ice Cream Corp. v. Cal. Smoothie Licensing Corp., 31 F.3d 1259, 1268–69 (3d Cir. 1994).

319 *Id.* at 1269.

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

Sometimes courts, as in *Wilson v. City of Chicago*,[321] 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*, for example, the defendant police officer approached the plaintiffs, two women who were in an Albuquerque park after it had closed.[322] The parties hotly disputed the details of their encounter.[323] It ended with both women being handcuffed and charged with several offenses,[324] all of which were ultimately dropped. The plaintiffs filed suit, alleging both false arrest and excessive force claims.[325] 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,[326] and two resulted in court rulings that the officer had violated the Fourth Amendment.[327] The Tenth Circuit affirmed the trial court's exclusion of the evidence, ruling that it was inadmissible character evidence.[328] Other plaintiffs alleging police misconduct have met the same fate.[329]

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[321] Wilson v. City of Chi., 6 F.3d 1233 (7th Cir. 1993), discussed *supra* in notes 302–305 and accompanying text.

[322] Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005).

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

[324] They were charged with resisting arrest, disobeying a police officer, and being in a park after closing. *Tanberg*, 401 F.3d at 1155–56.

[325] 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. *Id.*

[326] The first occurred about twenty-one months before the incident in question; the last, a month after. Appellant's Opening Brief, *supra* note 323, at 11, 55–57.

[327] *Id.* at 55–57.

[328] *Tanberg*, 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.*

[329] *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 a suit alleging that 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 a suit making federal excessive force and various state claims); Clark v. Martinez, 295 F.3d 809, 812–14 (8th Cir. 2002) (excluding evidence of previous assault by defendant officer in a 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 a civil rights suit brought by parents of son shot by defendant police officer, evidence that defendant was involved in another shooting three days later).

In some misconduct cases against law-enforcement officers, however, it has been the defendant who has been stymied. The plaintiff in *Hynes v. Coughlin* claimed that a number of prison guards beat him in retaliation for his complaining about prison conditions.[330] After Zemken, one of the guards, escorted Hynes to the shower and removed the restraints around his hands, ankles, and waist, a fight broke out.[331] The central issue at trial was who started the fight.[332] Hynes testified that Zemken started it and other guards joined in.[333] 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.[334] 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.[335] 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."[336] The court of appeals reversed, holding that the five other incidents constituted impermissible character evidence.[337]

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.[338] Courts, however, don't always admit such evidence. In *Wilson v. Muckala*, 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.[339] She tried

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330 Hynes v. Coughlin, 79 F.3d 285, 287 (2d Cir. 1996).

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at 288. The trial court excluded evidence of ten other such incidents. *Id.*

336 *Id.* at 289.

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

338 *See* Marshall, *supra* note 313; Goode, *supra* note 139, at 744–50 (discussing how using other-act evidence offered to establish motive may require propensity inference).

339 Wilson v. Muckala, 303 F.3d 1207, 1208 (10th Cir. 2002).

to offer evidence that the defendant sexually harassed other women but ran into the character-evidence barrier.[340] The court excluded the evidence, stating that the plaintiff was seeking to use the other harassment incidents "to prove the fact of the harassment itself—exactly the purpose prohibited by . . . Rule 404(b)."[341]

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 International*, the plaintiffs, survivors of passengers killed in an airplane crash, named the federal government as a defendant.[342] They claimed that when the pilot called the Federal Aviation Administration's (FAA) service station for a weather briefing, the FAA briefer negligently failed to inform the pilot of dangerous weather conditions on his flight path.[343] The government contended that it was the pilot's negligence that caused the crash.[344] 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.[345] The court of appeals reversed, holding that this was impermissible character evidence.[346]

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[340] *Id.* at 1217–18.

[341] *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. *Id.* 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).

[342] Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 278 (5th Cir. 1987).

[343] *Id.* at 280–81.

[344] *Id.* at 285–87.

[345] *Id.* at 287.

[346] *Id.* ("The contested evidence has no probative value other than to prove action in conformity with Baker's past conduct."). *See also* Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, Div. of Textron, Inc., 805 F.2d 907, 916 (10th Cir. 1986) (excluding, in a 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); Kula v. United States, No. 4:17-CV-02122, 2021 WL 1600140, at *4–5 (M.D. Pa. Apr. 23, 2021) (excluding evidence that pilot flunked instrument knowledge test four times); Bair v. Callahan, 664 F.3d 1225, 1229 (8th Cir. 2012) (excluding, in a medical malpractice case, evidence that, in same year as plaintiff's surgery, defendant surgeon made same error in four other surgeries); Weil v. Seltzer, 873 F.2d 1453, 1460–61 (D.C. Cir. 1989) (excluding testimony that defendant doctor prescribed steroids to five other allergy patients while representing the drugs to be antihistamines or decongestants).

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*, discussed in Part I, the jurors had to decide how an avid bow hunter, sitting in his computer room, came to have his skull pierced by the metal cable guard rod of his compound bow.[347] 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.[348] Had the defendants wanted to call his fellow bow hunters to testify that Sandifer was reckless around weapons, Rule 404 would have precluded that as well.

Crumpton v. Confederation Life Insurance also involved the admissibility of evidence about a dead man's character.[349] 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.[350] The defendant presented evidence that the father had raped a neighbor and threatened to kill her children if she reported the incident.[351] Five days later, the neighbor went to the police.[352] That night, she went out to her garage and saw Crumpton's father.[353] When he approached her, she shot him without any warning.[354] According to the insurance company, the insured should have anticipated that his actions would cause him bodily injury; therefore, his death was not accidental.[355] Crumpton denied her father raped the neighbor, and much of the trial focused on the rape accusation.[356] Crumpton called several witnesses to testify to her father's good character, both as to peaceableness and his conduct toward women.[357] Remarkably, the Fifth Circuit held this evidence was admissible.[358] Had Crumpton's father been tried for rape, the court explained, the exception to the character-evidence rule

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[347] Sandifer v. Hoyt Archery, Inc., 907 F.3d 802, 804 (5th Cir. 2018), discussed in *supra* notes 48–63 and accompanying text).

[348] Brief of Appellees, *supra* note 48, at 29–30 (enumerating excluded lay testimony that Sandifer was "safety conscious," "safe" around weapons, a "'safe' hunter" and a "type of person" who would recognize obvious dangers).

[349] Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1250–51 (5th Cir. 1982).

[350] *Id.* at 1250.

[351] *Id.* at 1251.

[352] *Id.* at 1250.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 1250–51.

[356] *Id.* at 1251.

[357] *Id.* at 1251–52.

[358] *Id.* at 1255.

that allows criminal defendants to offer evidence of their good character would have applied;[359] because the facts of this case were "of a criminal nature,"[360] this exception should apply.[361] To reach this result, however, the court had to disregard the plain text of the rule,[362] as well as the Advisory Committee's note.[363] And Rule 404 was subsequently amended to make crystal clear that this exception applies only in criminal cases.[364] 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.

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. 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.[365]

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[359] *Id.*; FED. R. EVID. 404(a)(1).

[360] *Crumpton*, 672 F.2d at 1253.

[361] 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.

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

[363] *See* FED. R. EVID. 404 advisory committee's note to 1972 amendment (expressly rejecting proposal to extend Rule 404(a) exceptions to civil cases).

[364] 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." FED. R. EVID. 404(a)(2). 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." FED. R. EVID. 404 advisory committee's note to 2006 amendment.

[365] *See* Hunt & Budesheim, *supra* note 146, 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) advisory committee's note to 1972 amendment. Without a civil character-evidence rule, the jury might well learn about these other acts anyway.

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.[366] 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 illustrates this.[367] 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.[368] The defendant claimed that Mathis never filed an application.[369] It offered evidence that, around this time, Mathis had filed discrimination suits against six other Chicago-area dealerships.[370] One of the dealerships had offered Mathis an interview, but he left and never returned.[371] Three others claimed that Mathis had filled out an application but took it home with him and never submitted it.[372] Other dealerships said Mathis lied on his applications.[373] The district court excluded this evidence.[374] It seemed merely to be "an effort to show bad character on the part of the plaintiff."[375] The Seventh Circuit held that although the trial court correctly ruled that this evidence was inadmissible to prove Mathis's character,[376] it was probative for a non-character purpose—to prove that Mathis

366 *See supra* notes 133–137 and accompanying text.
367 Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771 (7th Cir. 2001).
368 *Id.* at 773.
369 *Id.*
370 *Id.* at 774.
371 *Id.*
372 *Id.*
373 *Id.* When Mathis testified, the trial court did allow the defendant to use these lies to impeach Mathis under Rule 608. *Id.*
374 *Id.*
375 *Id.*
376 *Id.* at 775–76.

"was engaged in a plan or scheme to harass Chicago-area car dealerships."[377] Nevertheless, the court affirmed the evidence's exclusion,[378] finding that the trial court had relied on Rule 403 as well as Rule 404 and so 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.[379] 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.[380] But it would count the actual probative value of the evidence as probative value and not as unfair prejudice.[381]

C. The Failure to Define Character

The courts' failure to define what constitutes character for purposes of the character-evidence rule[382] has been well

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[377] *Id.* at 776.

[378] *Id.* at 776–77.

[379] *Id.*

[380] *Id.* at 776. 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. City of N.Y., 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. *Mathis*, 269 F.3d at 776.

[381] *See also* Berkovich v. Hicks, 922 F.2d 1018, 1022–23 (2d Cir. 1991) (excluding, under Rule 403, evidence of other false arrests and assaults by defendant police officer offered for nonpropensity purpose of showing motive because jury might impermissibly consider it as evidence of defendant's propensity to falsely arrest and assault citizens); 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) (adhering to, despite courts' disagreement with, Eleventh Circuit precedent that Rule 404(b) does not apply to evidence of a non-party's character; but the court then illogically found that jury's possible consideration of other-acts evidence posed risk of unfair prejudice under Rule 403).

[382] Goode, *supra* note 139, at 715 ("No one knows what 'character' means.").

documented.[383] It should not be surprising, therefore, that it is 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?[384] Or representations about projected sales and profits that a sales agent made to other potential franchisees?[385] Or that a pilot had flunked the instrument-knowledge test four times before passing?[386] 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;[387] in another, evidence of a defendant's building design technique is treated as similar-happenings evidence.[388] Statements and actions made in the course of business dealings are sometimes classified as character evidence,[389] and sometimes not.[390] The same holds true for discriminatory attitudes and actions.[391] The unwillingness to define what counts as character

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[383] SAKS & SPELLMAN, *supra* note 32, at 143; 22B WRIGHT ET AL., *supra* note 316, § 5233, at 23; Anderson, *supra* note 72, at 1922–24; Blinka, *Character*, *supra* note 82, at 139–40; Goode, *supra* note 139, at 775–81.

[384] *See* Henderson v. George Wash. 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).

[385] *See* J & R Ice Cream Corp. v. Cal. Smoothie Licensing Corp., 31 F.3d 1259, 1268–69 (3d Cir. 1994), discussed in *supra* notes 67–71, 318–319 and accompanying text.

[386] *See* Kula v. United States, No. 4:17-CV-02122, 2021 WL 1600140, *4–5 (M.D. Pa. Apr. 23, 2021).

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

[388] Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 518–19 (5th Cir. 1981) (holding that the 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 the 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 266, § 200.1.

[389] *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 Mgmt. 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).

[390] *E.g.*, Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2d 817 (10th Cir. 1986) (holding that the 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 266, § 198.

[391] *Compare, e.g.*, Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 383–88 (2008) (discussing admissibility, in an age-discrimination suit, of other acts of discrimination only with reference to Rules 401 through 403 with no mention of Rule

will undoubtedly continue to plague criminal cases. The character-evidence rule is a fixture in criminal trials.[392] But we can eliminate the problem in civil cases by abolishing the civil character-evidence rule. Courts could simply treat the evidence as evidence and determine its admissibility under Rules 401 through 403.

D. Addressing 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.[393] 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 admit 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 that it has been yoked to criminal character evidence for centuries.

More importantly, 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-,

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404); United States v. Abel, 469 U.S. 45, 49–56 (1984) (treating membership in Aryan Brotherhood as probative of bias and not as character evidence), *and* 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 a race-discrimination suit, of evidence of other racist acts under Rule 404); Ansell v. Green Acres Contracting Co., 347 F.3d 515, 521–22 (3d Cir. 2003) (deciding admissibility, in an age-discrimination suit, of evidence of how plaintiff's supervisor treated other older employees under Rule 404);, *and* Outley v. City of N.Y., 837 F.2d 587, 591–93 (2d Cir. 1988) (treating plaintiff's grudge against white police officers as evidence of character, not bias).

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

[393] *See supra* notes 148–163, 201–222 and accompanying text.

or four-part test for evaluating the admissibility of other-acts evidence that incorporates a Rule 403 balancing test.[394] 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.[395] For example, in *Barber v. City of Chicago*,[396] a false-arrest and excessive-force case, the court explained why evidence of the plaintiff's subsequent felony conviction was inadmissible.[397] 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,[398] 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."[399] Numerous cases echo this particular sentiment,[400] as well as an awareness of other ways in which unfair prejudice can genuinely arise.[401]

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 who shot and killed their family member had twice fired his gun at dogs that he perceived to be threatening him while on patrol.[402] Even when the evidence is not as inflammatory, courts

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394 *See* STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM HANDBOOK ON FEDERAL EVIDENCE 297–99 (2023) (compiling tests).

395 *E.g.*, Pressman v. Franklin Nat'l Bank, 384 F.3d 182, 187–88 (6th Cir. 2004); Aetna Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153, 1158–59 (11th Cir. 1986).

396 Barber v. City of Chic., 725 F.3d 702 (7th Cir. 2013).

397 *Id.* at 712–18.

398 *Id.* at 712–14.

399 *Id.* at 714.

400 *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'") (citing Barber v. City of Chi., 725 F.3d 702, 714 (7th Cir. 2013)) (quoting Llaguno v. Mingey, 763 F.2d 1560, 1570 (7th Cir. 1985) (en banc)) (alteration in original). *Howard* also expresses 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.* (quoting *Barber*, 725 F.3d at 717); Seidelman v. Gomez, 62 F. Supp. 3d 702, 705 (N.D. Ill. 2014) (quoting *Barber* and noting the "significant danger of unfair prejudice . . . [that] a jury might view [plaintiff] as somehow less than deserving of protection against alleged violations of his rights").

401 Courts, for example, repeatedly warn about the danger of jury bias against chronic litigants. *E.g.*, Nelson v. City of Chi., 810 F.3d 1061, 1071 (7th Cir. 2016); Batiste-Davis v. Lincare, Inc., 526 F.3d 377, 380–81 (8th Cir. 2008); Outley v. City of N.Y., 837 F.2d 587, 592 (2d Cir. 1988).

402 Callahan v. Wilson, 863 F.3d 144, 153–54 (2d Cir. 2017). *See also In re* DePuy Orthopaedics, Inc., 888 F.3d 753, 784–86 (5th Cir. 2018) (holding that the trial court abused its discretion in admitting evidence that non-party subsidiaries of products liability defendant had paid bribes to Hussein regime in Iraq); Aetna Cas. & Sur. Co. v.

have consistently resisted attempts to offer other-acts evidence where it is clear that the evidence bears slight or no probative value.[403] 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.

CONCLUSION

The civil character-evidence rule is an anachronism that precludes 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—given that courts often circumvent the rule—there still exists 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.

Gosdin, 803 F.2d 1153, 1158–59 (11th Cir. 1986) (affirming the 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).

[403] *E.g.*, Kebede v. Hilton, 580 F.3d 714, 716–18 (8th Cir. 2009) (defendant's other affairs); Surprenant v. Rivas, 424 F.3d 5, 22–23 (1st Cir. 2005) (plaintiff's involvement in prior prison incident); Tennison v. Circus Enters., Inc., 244 F.3d 684, 689 (9th Cir. 2001) (defendant's remote acts of sexual harassment where the court admitted more timely acts); Jankins v. TDC Mgmt. Corp., 21 F.3d 436, 439–41 (D.C. Cir. 1994) (plaintiff's offering of other subcontractors' testimony); Veranda Beach Club Ltd. P'ship v. W. Sur. Co., 936 F.2d 1364, 1372–73 (1st Cir. 1991) (evidence of earlier fraud by defendant's agent to prove defendant had reason to suspect agent might exceed express authority); Wierstak v. Heffernan, 789 F.2d 968, 972–73 (1st Cir. 1986) (evidence of plaintiff's criminal activity earlier in day to prove defendant was justified in pursuing plaintiff ruled inadmissible in light of stipulation and other testimony that defendant had probable cause to pursue and arrest plaintiff).