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True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions

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TRUE TO CHARACTER: HONORING THE INTELLECTUAL FOUNDATIONS OF THE CHARACTER EVIDENCE RULE IN DOMESTIC VIOLENCE PROSECUTIONS

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I. INTRODUCTION

The law has condoned domestic violence¹ in America since the formation of the country. Two hundred and thirty years of the American experiment have witnessed three different phases of the legal system's condoning of domestic violence. During the early years of the United States, the common law expressly permitted violence against women.² This prerogative ended around the middle of the nineteenth century when states rejected the rule of

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1. Throughout this article, I refer to violence between intimate partners as domestic violence. For an interesting discussion of alternative terminology, see CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 3 (2001). By "domestic violence," I intend a pattern of violence by one partner for the purpose of exerting power and control over the other. *See infra* text accompanying notes 65-116 for more complete discussion. The establishment of such a pattern of violent behavior creates a "battering relationship." Importantly, not all violence within an intimate relationship establishes a battering relationship. For the purposes of this paper, I am concerned about the admissibility of character evidence of a battering relationship, not simply violence within an intimate relationship. Although there are interesting parallels, for the purposes of this paper, I am excluding child abuse.

2. Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 627-30 (1980) [hereinafter Schneider, *Equal Rights*]. While batterers are overwhelmingly heterosexual males, battering relationships are not limited to heterosexuals. I specifically use the gender-neutral terms "domestic violence" and "battering relationship" to recognize that violence and battering occurs within homosexual relationships and can be perpetrated on males. That said, however, because statistics demonstrate that nearly 95% of domestic violence victims are women, I will also employ gender-specific language throughout this paper. *See infra* note 129. While the day may come when domestic violence will be less strongly related to gender, now is not that day.

chastisement.³ Interestingly, legal prohibition has not impacted the prevalence of domestic violence. Domestic violence remains the leading cause of injury to women every year.⁴ This fact stems from the two more subtle periods of legal sanction of domestic violence. From the 1850s until the 1970s, the law reinforced a public-private dichotomy, assigned violence against women to the private sphere, and then refused to intervene in the private sphere.⁵ This phase of tacit sanction of domestic violence through non-intervention into the private realm lessened after the 1970s due to the impact of public recognition.⁶ This impact, however, has been significantly negated by the operation of the character evidence ban. The character evidence ban has taken the place of the rule of chastisement and non-intervention into the private sphere to perpetuate the legal sanction of domestic violence.

In general, the character evidence ban precludes the admission of evidence of the defendant's prior bad acts; its purpose is to isolate the charged incident from the defendant's past so the jury can assess the validity of the charged incident unencumbered by other behavior. Domestic violence, by its very nature, is not an isolated incident, but rather a pattern of behavior designed to exert power and control over another person.⁷ Inherent in domestic violence is repetitive conduct.⁸ Given the repetitive nature of battering relationships, the ban on prior bad act evidence is at issue in nearly every domestic violence

3. See *infra* notes 37-41 and accompanying text.

4. Benjamin Z. Rice, *A Voice from People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 939-40 (1996). "Violence is now leading cause of injuries to women ages 15 through 44 years." *Id.* (citing Antonio C. Novello, *From the Surgeon General, U.S. Public Health Service: A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992)).

5. Katherine Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape, and Stalking*, 78 MARQ. L. REV. 79, 91-92, 94 (1994).

6. See *id.* at 94-96, 102-07.

7. Debra Raye Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batterers Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361, 362 (1998/99). "Domestic violence is not an isolated event. One battering episode builds on past episodes and sets the stage for future episodes The incidents have one thing in common: the abuse is directed at controlling the intimate partner." *Id.* See *infra* notes 84-95 and accompanying text.

8. Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1468 (1996) (discussing studies indicating that 90% of women murdered by their batterers had previously called the police). See also Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 996 (1993). Additionally, studies have also found that 50% of murdered domestic violence victims had called police five or more times prior to their deaths. Raeder, *supra*, at 1468 n.22. Finally, a 1991 study found that "about one in five women victimized by a husband or former husband reported that they had been the victim of a series of similar crimes, with at least three assaults in the last six months, so similar that they could not remember them distinctly." Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 389 (1996).

prosecution. Because nearly four million American women are battered every year,⁹ the effect of the character evidence ban in the domestic violence context is significant. No other evidence rule goes to the heart of a crime the way that the character evidence ban does with domestic violence. The character evidence ban prevents the true nature of domestic violence from exposure to public scrutiny and, therefore, sanctions and perpetuates domestic violence.

This article calls for a new rule allowing the admission of prior acts of abuse within the context of a current domestic violence prosecution. Articles dealing with domestic violence that advocate a change in the law typically begin with a horrible fact pattern.¹⁰ Indeed, the use of such undeniably horrible stories reveals the emotional power of domestic violence and often compels the reader toward a particular viewpoint. Generally, such narratives are followed by arguments which flow as follows: domestic violence is a societal epidemic; domestic violence prosecutions are difficult; the particular rule change will make it easier to prosecute domestic violence perpetrators; more successful prosecution will reduce the societal epidemic of domestic violence; therefore, the law should be changed.¹¹

This article, by contrast, seeks to ground the need to change the character evidence ban for domestic violence prosecutions in reasons that have nothing

9. Joan Zorza, *Women Battering: High Costs and the State of the Law*, in NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* 11, 15 (2001). Statistics on the number of women who experience domestic violence range widely, mainly due to differences in methodology. In 2000, the National Institute of Justice estimated that 1.3 million women are victimized every year by intimate partners. PATRICIA TJADEN AND NANCY THOENNES, U.S. DEP'T OF JUSTICE, REP. NCJ-183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, & CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>. This study was limited to women over the age of 18 who lived in a house with a telephone. The study, therefore, excludes juveniles, homeless women, and women isolated by poverty or the batterer's design. Albert Roberts, *Spousal and Partner Abuse*, in *VIOLENCE IN AMERICA: AN ENCYCLOPEDIA* 207, 209 (Ronald Gottesman & Richard Maxwell Brown, eds., 1999). It has been estimated that a man beats a woman every twelve seconds in the United States, and thirty to fifty percent of the women murdered in the United States die at the hands of the intimate male partners. Rice, *supra* note 4, at 940; see also Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 *CARDOZO L. REV.* 525, 525 (1993); LAWRENCE A. GREENFELD ET. AL., U.S. DEP'T. OF JUSTICE, REP. NCJ-167237, *VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS* 5 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>. For an interesting discussion about analyzing domestic violence data, see *UNDERSTANDING VIOLENCE AGAINST WOMEN* 7-48 (Nancy A. Cromwell & Ann W. Burgess eds., 1996).

10. See De Sanctis, *supra* note 8, at 363-65; Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 *U. HAW. L. REV.* 221, 221-22 (1998); Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 *WASH. L. REV.* 973, 973 (2000).

11. See Lee, *supra* note 10, at 253-59. See also De Sanctis, *supra* note 8, at 397-400; Letendre, *supra* note 10, at 996-1003.

to do with making the prosecution easier. Historically, changes that make prosecution of particular types of cases easier are morally suspect and tend to reflect the will of powerful majorities as opposed to proper advances in the law. The difficulty lies in the fact that rules, protections, and civil liberties are jettisoned in order to combat a specific evil, yet the reasons for that tactic are not connected to the traditional rationale supporting the rules, protections, and civil liberties.¹²

This article proposes a specific evidence rule in the domestic violence context which would admit evidence of the defendant's character as it relates to battering and would allow that evidence to be used substantively in a prosecution for domestic violence. The argument here grounds the need for a new rule regarding admissibility of prior bad acts in domestic violence cases in the very rationale which supports the general ban on character evidence. It is the position of this paper that the rationale supporting the current rule actually calls for a rule change in the domestic violence context and supports such a change, thereby preserving the ideals behind the original rule.

This article will proceed in the following fashion. Section II will discuss the history of domestic violence in America. That section will explore the three ways that the law has condoned domestic violence: express sanction through the rule of chastisement, tacit sanction through non-intervention in the private sphere, and implicit sanction through the effect of the character evidence rule. Section III will examine the intellectual background of the character evidence ban. Specifically, that section will identify how the character evidence ban embodies major developments in intellectual history prior to, and during, the creation of the American Republic: the rejection of virtue ethics, the Reformation, the development of the liberal state, the rise of modern science, the Enlightenment, and the breakdown of social stratification. Section III will then explore the conflict between the character evidence rule and the law's recognition of domestic violence. In addition, Section III will demonstrate how the character evidence ban violates its underlying principles in the domestic violence context. That section will also articulate rationale for a new character evidence rule in the domestic violence context – a rule consistent with the rule's original intellectual underpinnings.

12. Unfortunately, this phenomenon can be seen clearly in the government's response to terrorism.

II. THE HISTORY OF LEGAL SANCTION OF DOMESTIC VIOLENCE

A. *The Rule of Chastisement*

American common law largely derived from English law, which fully recognized the right of men to engage in violence against their wives.¹³ Ten years prior to the American Revolution, William Blackstone published his *Commentaries on the Laws of England*.¹⁴ This work had significant impact on the development of American laws relating to domestic violence.¹⁵ Blackstone articulated the common law rule which authorized a husband to beat his wife with either “moderate chastisement” or “severely with scourges and cudgels.”¹⁶

According to Blackstone, the rule of chastisement stemmed directly from the inferior legal status of women upon marriage.¹⁷ Under English and American common law, married women had no legal status.¹⁸ The complete legal subjugation of women was primarily accomplished through two doctrines: coverture and unities.¹⁹ According to the doctrine of coverture, the wife was under the protection, or cover, of the husband.²⁰ The second and related doctrine was the theory of unities.²¹ According to Blackstone, “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”²² Married women could not own real or personal property, enter into a contract, sue or be sued,

13. Virginia H. Murray, *A Comparative Study of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 442 (1998); Schelong, *supra* note 5, at 90. Schelong identifies that the roots of state sanctioned domestic violence can be traced back to Roman law. Roman law allowed men to beat their wives, even to death, for offenses that impugned their honor or property. *Id.* at 84. *See also* Rice, *supra* note 4, at 940; Schneider, *Equal Rights*, *supra* note 2, at 627-30.

14. Dennis Nolan, *Sir William Blackstone and the New American Republic*, 51 N.Y.U. L. REV. 731, 735 (1976).

15. Murray, *supra* note 13, at 442; Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2124 n.21 (1996) (discussing the importance and the impact of Blackstone’s commentaries on American law, lawyers, and development of domestic violence law). For a general discussion of Blackstone’s influence on American law, see Nolan, *supra* note 14.

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *444-45.

17. Schelong, *supra* note 5, at 86-87.

18. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 321, 326 (1997). *See also* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 361-65 (1989).

19. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 7 (2000).

20. Dalton, *supra* note 18, at 326.

21. *Id.*

22. 1 BLACKSTONE, *supra* note 16, at *442.

make a will, deny a husband's sexual advances, or testify in a court of law, especially against her husband.²³

According to Blackstone, the husband's right to beat his wife was the result of women having no legal identity upon marriage:

For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children²⁴

The right of correction granted the husband, and father, the right to use physical violence, including a rod or whip, against his wife, children, servants, and apprentices.²⁵ Prior to being imported into the United States, the English right to chastisement had two limitations. First, the husband could not inflict death or serious permanent disfigurement.²⁶ Second, the rule of thumb limited the size of the stick with which the husband could beat his wife to one smaller than the width of his thumb.²⁷ Importantly, the right of correction, although intellectually separate from abuse, justified nearly all forms of assault by parents and husbands so long as it did not cause permanent injury.²⁸

The right to chastise a wife became part of the American common law during the colonial period and continued in many states well past the Civil War. As early as 1681, courts throughout the country expressly acknowledged the existence of the English rule of chastisement.²⁹ Importantly, in each case,

23. Schelong, *supra* note 5, at 86. See Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1047-52 (1996) (discussing origins of spousal immunity); Siegel, *supra* note 15, at 2153 n.132.

24. 1 BLACKSTONE, *supra* note 16, at *444. See also Dalton, *supra* note 18, at 326. According to some commentators, the right of chastisement or "correction" that Blackstone acknowledged originally derived from the Christian church in the 14th Century Rules of Marriage:

When you see your wife commit an offense, don't rush at her with insults and violent blows Scold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.

Schelong, *supra* note 5, at 85; see also Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 153 n.69 (1995).

25. ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 8-9 (1987).

26. *Id.* at 9.

27. Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. (N.S.) 241 (1917).

28. PLECK, *supra* note 25, at 9.

29. Stedman, *supra* note 27, at 243-46. The earliest reported case appears to be *Bread's Case*, 2 Bland 563 (Chancery 1681), in which a Maryland chancery court ordered a husband not to harm his wife greater than that permitted by chastisement.

the court relied on either Blackstone or English common law.³⁰ For example, in 1824, the Supreme Court of Mississippi explicitly recognized the right of chastisement in the case of *Bradley v. State*.³¹ The court quoted both Blackstone and an English case.³² Relying on these precedents, the court held:

To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.³³

In addition, the court acknowledged the right must be exercised within limitations of “reasonableness,” including using a “whip or rattan, no bigger than my thumb.”³⁴ In 1836, the New Hampshire Supreme Court relied on English common law to acknowledge the husband’s right to control his wife by force.³⁵ North Carolina, Mississippi, Alabama, and Pennsylvania all followed suit.³⁶

Toward the last half of the nineteenth century, courts began to reject the husband’s right of chastisement.³⁷ The retreat from Blackstone’s position regarding the right of a husband to beat his wife can be observed in the works

30. See, e.g., *Fulgham v. State*, 46 Ala. 143, 146-48 (1871) (citing 2 Kent’s Comm. 181).

31. *Bradley v. State*, 1 Miss. (1 Walker) 156 (1824).

32. *Id.* at 157.

33. *Id.* at 158.

34. *Id.* at 157.

35. *Poor v. Poor*, 8 N.H. 307, 316 (1836). In this case, the wife sought a divorce based on extreme cruelty from being beaten with a club and whipped with a horse whip. The court denied her claims, citing to the English case, reported at 2 Eng. Ecclesiastical R. 163, 164. While the court rejected a blanket right of chastisement, the court found that the husband’s actions were justified in response to the actions of the wife. As the court stated:

And we are of opinion, on the whole, that however obnoxious to censure the conduct of the husband may have been on any, or on all the occasions to which we have adverted, the wife has no right to complain; because it is in the highest degree probable that in every instance she drew down upon herself the chastisement she received, by her own improper conduct. And it does not appear that on any occasion the injury she received was much out of proportion to her offence. Her remedy is to be sought, then, not in this court, but in a reformation of her own manners. Let her return to the path of duty; and if to a discreet and prudent exercise of her just rights and privileges as a wife, she will join that meekness, patience and kindness which the religion she professes inculcates, and temper all her conduct towards her husband with that sweetness and goodness which belong to the true character of a wife, we think she will have no reasonable ground to apprehend any further injury to her person. Let her submit to the authority of her husband, and remember that the dignity of a wife cannot be violated by such submission. Let her return to the path of duty; and by displaying in all her conduct the mild and gentle spirit of the gospel, make that path a path of peace and safety.

Poor, 8 N.H. at 319-20.

36. *Murray*, *supra* note 13, at 442.

37. *Stedman*, *supra* note 27, at 246-48.

of several American legal scholars. In 1848, Francis Wharton stated that, “By the ancient common law, the husband possessed the power of chastising his wife, though the tendency of criminal courts in the present day is to regard the marital relation as no defence to a battery.”³⁸ The first states to legislate against domestic violence were Tennessee in 1850 and Georgia in 1857.³⁹ In 1871, the Supreme Court of Alabama rejected the right of chastisement.⁴⁰ Its rejection, however, acknowledged the recent existence of the right of chastisement:

Judge Blackstone . . . published his commentaries above one hundred years ago, when society was much more rude . . . than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here The wife is not to be considered as the husband’s slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.⁴¹

It is clear, therefore, that the American judicial system expressly sanctioned domestic violence until the middle of the nineteenth century.⁴²

B. The Rise of Privacy Discourse and Implicit Sanction of Domestic Violence

The movement away from the rule of chastisement was brought about by reform that expanded the legal rights of women. This transformation, however, did not end the legal sanction of domestic violence. On the contrary, at the same time that courts were rejecting the husband’s right to beat his wife, courts employed a growing societal privacy discourse, thereby removing domestic violence from the purview of the law. The result was that at the exact moment when the law rejected express permission to domestic violence, the courts implicitly condoned domestic violence by adhering to notions of domestic privacy.

38. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 314 (1846).

39. PLECK, *supra* note 25, at 63.

40. *Fulgham v. State*, 46 Ala. 143 (1871).

41. *Id.* at 146-47.

42. The connection between the rejection of the rule of chastisement and the rise of abolitionism is interesting. The courts appear to have made a distinction between the rights of white men and those of black slaves. See Siegel, *supra* note 15, at 2134-41. See also COTT *supra* note 19, at 80 (comparing the rights of freed slaves after the Civil War with the rights of women). For a general discussion of domestic violence and the Thirteenth Amendment, see Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

1. The Changing Legal Status of Women in America

The English common law of coverture and unities remained the law in America until nearly the 1850s. Toward the middle of the nineteenth century, states began to recognize that women remained individuals, even during marriage.⁴³ Changes in the legal status of women — and inroads into the rejection of the concepts of coverture and unities — were reflected in the married women's property and earnings acts of that period.⁴⁴ Although there was often a difference between recognition of full equality and the ability to exercise that equality,⁴⁵ there is no question that the legal status of women was dramatically different in the mid 1800s. Women now had the legal right to contract, to sue, and to testify.⁴⁶

2. Rise of Privacy Discourse and Creation of Private Realm

The increased rights of women in the middle of the nineteenth century began to alter the balance of power between husbands and wives.⁴⁷ In addition, the expanding legal rights of women challenged traditional male dominance and authority over the family.⁴⁸ While legal reforms secured women greater rights, these efforts were unsuccessful at legally establishing actual equality for women.⁴⁹

43. Dalton, *supra* note 18, at 327.

44. *Id.* See, e.g., *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (discussing Missouri's Married Women's Act). The Act recognized a woman's right to "transact business . . . to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and [to] sue and be sued at law or in equity, with or without her husband being joined as a party." *Id.* at 647-48. Missouri first recognized these rights by case law in 1855. *Id.* at 647. See also PLECK, *supra* note 25, at 94.

Lucinda Chandler [a Quaker reformer] attempted in 1873 to repeal the law of coverture in the District of Columbia. Chandler wanted to give every woman "the legal custody and control of her person in wifehood to govern according to her wisdom and instinct the maternal office and protect her children as well as she may from the dangers of selfish passion, alcoholism, and vice."

Id.

45. See *Townsend*, 708 S.W.2d at 650. For nearly 100 years after the passage of the Missouri Married Women's Act, Missouri courts refused to enforce the rights included in the Act. Finally, in *Townsend*, the Missouri Supreme Court gave full effect to the 1889 statute. *Id.* See generally Dalton, *supra* note 18.

46. Dalton, *supra* note 18, at 327.

47. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 218 (2000).

48. *Id.* at 218; see COTT, *supra* note 19, at 80 (detailing a discussion surrounding the passage of the 13th Amendment prohibiting slavery, and noting that earlier versions of the amendment that might have been interpreted to allow for the equality of husbands and wives were rejected as being too broad).

49. PLECK, *supra* note 25, at 106-07.

Around this time, American society began to articulate a discourse of privacy that created and preserved a private realm for women. As Frances Olsen detailed:

In the early nineteenth century, as men's work was largely removed to the factory while women's work remained primarily in the home, there came to be a sharp dichotomy between "the home" and "the [workaday] world." This dichotomy took on many of the moral overtones developed in the theological dichotomy between heaven and earth. Often the home was referred to as "sacred" The family and home were seen as safe repositories for the virtues and emotions that people believed were being banished from the work of commerce and industry. The home was said to provide a haven from the anxieties of modern life – a shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy.⁵⁰

The economic realities were coupled with a powerful shift in public discourse regarding the role of women in society.⁵¹ Prior to the American Revolution, men were viewed as the primary embodiments of the American spirit of republicanism.⁵² Partially in response to a perceived erosion of public decency due to the economic explosion following the American Revolution, women were being discussed as the guardians of the future of the nation.⁵³

50. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983) (quotation omitted).

51. Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson*, in OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT 132 (Jean E. Friedman, William G. Shade, and Mary Jane Capozzoli eds., 1987).

The image of "the lady" was elevated to the accepted ideal of femininity toward which all women would strive. In this formulation of values lower class women were simply ignored. The actual lady was, of course, nothing new on the American scene; she had been present ever since colonial days. What was new in the 1830's was the cult of the lady, her elevation to a status symbol. The advancing prosperity of the early nineteenth century made it possible for middle class women to aspire to the status formerly reserved for upper class women. The "cult of true womanhood" of the 1830's became a vehicle for such aspirations. Mass circulation newspapers and magazines made it possible to teach every woman how to elevate the status of her family by setting "proper" standards of behavior, dress and literary tastes. *Godey's Lady's Book* and innumerable gift books and tracts of the period all preached the same gospel of "true womanhood" – piety, purity, domesticity. Those unable to reach the goal of becoming ladies were to be satisfied with the lesser goal - acceptance of their "proper place" in the home.

Id.

52. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 356 (1992).

53. CATHERINE CLINTON, THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY 147-48 (1984). "Christian morality and domestic ideology preached a hard line: women were the guardians of the family, the conscience of the household. Women were expected to fulfill the dictates of their domestic roles as well as provide the family with unimpeachable moral example." *Id.*

[W]ives and mothers were now urged to use their special talents to cultivate in their husbands and children the proper moral feelings – the virtue, benevolence, and social affections – necessary to hold a sprawling and competitive republican society together.⁵⁴

The result of the new economic realities and the new republican virtue discourse was the creation of separate spheres for men and women.⁵⁵ Women were in charge of the private sphere of the household and raising and educating children and as such were the guardians of the spirituality of the nation.⁵⁶ Men were in charge of the public sphere of commerce and the economy.⁵⁷ While the relegation of women to the private sphere of family and home had important impacts on women,⁵⁸ in the context of domestic violence, its significance lay in non-intervention of the law into the private realm.⁵⁹

3. Reflection of Privacy Discourse in the Criminal Law

The same court decisions that rejected the rule of chastisement incorporated the public-private dichotomy discourse to limit the reach of the criminal law. In her discussion of the 1868 North Carolina case of *State v. Rhodes*, Reva Siegel details the transformation from the outright legality of domestic violence to tacit sanction through non-intervention based on preservation of the private sphere.⁶⁰ In *Rhodes*, the husband beat his wife with

54. WOOD, *supra* note 52, at 357.

55. *Id.* See also Lerner, *supra* note 51, at 134.

56. John S. C. Abbott, *The Mother at Home; or the Principles of Maternal Duty, Familiarly Illustrated* (1833), in EARLY AMERICAN WOMEN: A DOCUMENTARY HISTORY, 1600-1900, at 209 (Nancy Woloch, ed. 1992).

When our land is filled with pious and patriotic mothers, then will it be filled with virtuous and patriotic men . . . O mothers! reflect upon the power your Maker has placed in your hands! There is no earthly influence to be compared with yours. There is no combination of causes so powerful in promoting the happiness or the misery of our race, as the instructions of home. In a most peculiar sense God has constituted you the guardians and the controllers of the human family.

Id.

57. Olsen, *supra* note 50, at 1499-1501.

58. *Id.* at 1500.

The market/family dichotomy tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere. The dichotomy encouraged women to be generous and nurturant but discouraged them from being strong and self-reliant; it insulated women from the world's corruption but denied them the world's stimulation. While the dichotomy tended to mask the inferior, degraded position of women, it also provided a degree of autonomy and a base from which women could and did elevate their status.

Id.

59. *Id.* at 1504-07.

60. Siegel, *supra* note 15, at 2154-61.

a switch.⁶¹ While the North Carolina Supreme Court affirmed the conviction, stating it would not recognize proper chastisement, it went on to say that the court in the future will not intervene into the private realm of domestic relations:

The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations – such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because those relations are not subject to law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government . . . [T]he ground upon which we have put this decision, is not, that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife, than where the wife whips the husband; and yet we would hardly be supposed to hold, that a wife has a right to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.⁶²

In order to preserve the private sphere, the law would not interfere. Violence against women occurring within that private sphere, therefore, was beyond the protection of the law.⁶³ The public-private dichotomy had the practical effect of sanctioning violence against women, though, unlike chastisement, it did not explicitly sanction such violence.⁶⁴

C. *The Battered Women's Movement and the Feminist Critique of the Public-Private Dichotomy in Domestic Violence*

Beginning in the 1970s, the women's movement questioned the relegation of women to the private sphere.⁶⁵ Specifically, the battered women's movement challenged the relegation of violence against women to the private sphere and the law's non-intervention into that sphere. The efforts of the battered women's movement contributed to a significant shift in the way society viewed domestic violence. It enabled public recognition of the private harm.⁶⁶

One of the central insights of feminist legal scholarship has been to identify public-private dichotomies in the American legal system and to assess

61. *State v. Rhodes*, 61 N.C. (Phil. Law) 453 (1868).

62. *Id.* at 454-59.

63. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 984-85 (1991) [hereinafter Schneider, *Privacy*]. See also Raeder, *supra* note 8, at 1466.

64. Dalton, *supra* note 18, at 329.

65. Rice, *supra* note 4, at 941.

66. *Id.* (citing A. René Callahan, *Will the "Real" Battered Woman Please Stand Up?* In *Search of a Realistic Definition of Battered Women's Syndrome*, 3 AM. U. J. GENDER SOC. POL'Y & L. 117, 119-120 (1994)).

the impact of such dichotomies.⁶⁷ According to feminist scholars, the impact of the creation of separate spheres and the isolation of women in the private sphere is twofold.⁶⁸ First, women are confined to the private sphere of family and domestic life; men are free to operate in the public world of the marketplace and government.⁶⁹ Women, therefore, are limited in their options and are shielded from public scrutiny. According to feminist scholarship, the isolation of women into the private sphere has contributed to the subjugation of women in American society. As Elizabeth Schneider comments:

The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation These are important messages, for denying woman's humanity and the value of her traditional work are key ideological components in maintaining woman's subordinate status. The message of women's inferiority is compounded by the totality of the law's absence from the private realm. In our society, law is for business and other important things. The fact that the law in general claims to have so little bearing on women's day-to-day concerns reflects and underscores their insignificance. Thus, the legal order's overall contribution to the devaluation of women is greater than the sum of the negative messages conveyed by individual legal doctrines.⁷⁰

Second, the public-private dichotomy serves to remove the law from the private sphere and reserve it for the public sphere as the "proper" consideration of government.⁷¹ The State preserves the private realm which – by definition – is beyond the protection of the law.⁷² The result is, as Robin West states:

The Constitution protects the individual against abusive and violent state conduct, but not only does it not protect women against the abuse and violence

67. See, e.g., Sally Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000); Olsen, *supra* note 50.

68. Several scholars have questioned the validity of a complete separation of the public and private. As Elizabeth Schneider states:

There is no realm of personal and family life that exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere. "Private" and "public" exist on a continuum. Thus, in the so-called private sphere of domestic and family life, which is purportedly immune from law, there is always the selective application of law. Significantly, this selective application of law invokes "privacy" as a rationale for immunity in order to protect male domination.

Schneider, *Privacy*, *supra* note 63, at 977.

69. Hannah L. Meils, *A Lesson from NAFTA: Can the FTA Function as a Tool for Improvement in the Lives of Working Women?*, 78 IND. L.J. 877, 886 (2003).

70. Schneider, *Privacy*, *supra* note 63, at 978.

71. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869 (1996).

72. See generally Schneider, *Privacy*, *supra* note 63.

that most threatens them, it perversely protects the sphere of privacy and liberty within which the abuse and violence takes place.⁷³

In the context of domestic violence, feminist legal scholars have identified two primary impacts of the public-private dichotomy: sanctioning violence against women and encouraging the individualization of domestic violence.⁷⁴ Viewing domestic violence as a private issue sanctions violence against women because the law refuses to intervene into the private realm in which the violence occurs.⁷⁵

The second insight of feminist scholarship in the domestic violence context is that the public-private dichotomy allows the issue of domestic violence to be viewed as a private, individual matter, not a subject for public concern. As Schneider says, "By seeing woman-abuse as 'private,' we affirm it as a problem that is individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy."⁷⁶ The public-private dichotomy, therefore, allows the individualization of domestic violence. Society is free to view the issue not as a social epidemic but as an individual pathology. The true nature of the issue is shielded from society at large or is denied by society at large.

As a result of the battered women's movement, the public-private dichotomy in the domestic violence arena began to break down.⁷⁷ Society started to recognize domestic violence as a public harm, which justified state intervention into the private sphere. Most states have enacted legislation specifically designed to overcome the private nature of the offense and to emphasize the public aspect of the issue.⁷⁸ States adopted mandatory arrest laws, enabled battered women to obtain restraining orders, and enforced no-drop policies which emphasized that the state – not the victim – was prosecuting the offense.⁷⁹ In 1994, Congress enacted the Violence Against Women Act ("VAWA"), recognizing that domestic violence has national impact.⁸⁰ VAWA also funded many police and prosecution efforts to combat domestic violence and made several domestic violence crimes federal offenses.⁸¹ The impact of increased public recognition of the private harm of

73. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 120-21 (1994).

74. See generally Hanna, *supra* note 71, at 1869; Schneider, *Privacy*, *supra* note 63, at 983.

75. Hanna, *supra* note 71, at 1869. See also CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100 (1987).

76. Schneider, *Privacy*, *supra* note 63, at 983.

77. See generally Goldfarb, *supra* note 67.

78. Hanna, *supra* note 71, at 1857, 1859, 1869.

79. *Id.* at 1857-65.

80. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

81. Sally F. Goldfarb, *No Civilized System of Justice: The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 504-05 (2000) (discussing various provisions of VAWA).

domestic violence has been mixed. The beginning of the breakdown in the public-private dichotomy has brought relief to millions of American women who previously had suffered in silence. This has been a significant and important move forward in the battle against domestic violence.

Unfortunately, the numbers tell a less positive story. According to the United States Department of Justice, the greatest cause of injuries to women in the United States is still domestic violence.⁸² The statistics are compelling and can be broken down into many permutations.⁸³ A batterer beats a woman approximately every twelve seconds.⁸⁴ Four million women a year are victimized by domestic violence,⁸⁵ and nearly 2000 women die every year from domestic violence.⁸⁶ According to some estimates, half of all the women in the country suffer an abusive relationship during their lifetime.⁸⁷ Women are two hundred times more likely to be assaulted by a family member than by someone who is not a family member.⁸⁸ Standing alone, these statistics should give pause. Even more alarming is the fact that these figures have remained essentially unchanged despite legal efforts to overcome domestic violence. Even after thirty years of both express sanction *against* domestic violence *and* public recognition of domestic violence, domestic violence remains the single greatest cause of injury to women in America.⁸⁹

VAWA also created a civil remedy for victims of domestic violence. The Supreme Court struck down the civil remedy as unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000).

82. See *supra* note 4.

83. For example, "If every woman victimized by domestic violence in 1989 alone were to join hands in a line, the string of people would span from New York to Los Angeles and back again." Ogden, *supra* note 7, at 363.

84. Rice, *supra* note 4, at 940.

85. See *supra* note 9 and accompanying text.

86. Female homicides committed by intimates were estimated in the year 2000 to be approximately 1,300. See U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S., INTIMATE HOMICIDE, available at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (revised Nov. 21, 2002). Estimates of female homicides by intimates reveal a larger number in 1976 (approximately 1,600) with declining figures through 1995 (approximately 1,300). See SILENT WITNESS NATIONAL INITIATIVE, STATISTICS ON DOMESTIC VIOLENCE available at <http://www.silentwitness.net/sub/violences.htm> (last visited Jan. 6, 2004). But other sources have estimated that as many as 3,000 women were murdered by their intimates in 1976 and 2,000 women died at the hands of their spouse, former spouse, or boyfriend as recently as 1996. See GREENFELD, *supra* note 9, at v, l.

87. Ogden, *supra* note 7, at 363.

88. "[W]omen suffering violent victimizations are almost twice as likely to be injured if the offender was an intimate rather than a stranger." Raeder, *supra* note 8, at 1467 (citing RONET BACHMAN, UNITED STATES DEP'T. OF JUSTICE, VIOLENCE AGAINST WOMEN iii (1994)). "Women and children die at a rate of three per day due to beatings at the hands of someone they love." Ogden, *supra* note 7, at 363.

89. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 372 (2003).

In an effort to expose the true repetitive nature of domestic violence – and to explain why women stayed in violent relationships – the battered women’s movement attempted to articulate and analyze the dynamics of a domestic violence relationship. The first attempt embraced the paradigm of the “cycle of violence.”⁹⁰ Violence within intimate relationships was presented as following fairly typical patterns and phases.⁹¹ These phases were defined as the tension-building phase, the violent phase, and the honeymoon phase,⁹² and together they constituted the cycle of violence.⁹³ At the same time, the battered women’s movement sought to defend women accused of killing their batterers.⁹⁴ The culmination of this effort was the recognition of the battered woman syndrome.⁹⁵ A negative result of the public presentation of domestic violence as a cycle of violence and the creation of the battered woman syndrome was that domestic violence relationships and parties were cast in stagnant roles with readily recognizable characteristics.⁹⁶ Without question, these two efforts were critical to raising public awareness of the epidemic of domestic violence. However, they presented significant problems to prosecution of domestic violence.⁹⁷ The bottom line was that the roles assigned to the parties of a domestic violence relationship did not fit reality.

90. See De Sanctis, *supra* note 8, at 369 (citing LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979)); Letendre, *supra* note 10, at 976.

91. See *id.* at 369-70.

92. Unfortunately, it is during the honeymoon phase when the batterer is seeking forgiveness and the victim sees hope of reconciliation that efforts toward prosecution of the batterer also occur, which often causes initially cooperative victims to begin actively working against the prosecution, sometimes to the point of cooperating with defense attorneys, hiring defense attorneys for the batterer, and posting bail for the batterer’s release. De Sanctis, *supra* note 8, at 369-70.

93. See Letendre, *supra* note 10, at 976.

Minor episodes of violence may occur in the tension-building stage where individuals cope by avoiding or placating their batterers. In the next phase, explosive or acute battering incidents occur, which may last from a few minutes to several days. [In the honeymoon phase . . . the batterer showers the victim with apologies, love, and affection. *Id.* at 976 (citing WALKER, *supra* note 90, at 56-70). But see R. Emerson Dobash & Russell P. Dobash, *The Nature and Antecedents of Violent Events*, 24 BRIT. J. CRIMINOLOGY 269, 283 (1984) (indicating that some batterers proceed directly from inflicting physical violence back to a tension-building stage).

94. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 112-47 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*].

95. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 420-23 (1991) (discussing rules of evidence which allow certain types of evidence in cases raising the “battered woman” defense).

96. SCHNEIDER, *BATTERED WOMEN*, *supra* note 94, at 60-62, 72, 120. See also LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 75-94 (1984) (discussing the personality characteristics of the battered woman).

97. “For every 100 domestic assaults, only 14 assaults are reported, 1.5 batterers are arrested, and 0.49 defendants are convicted.” Letendre, *supra* note 10, at 978 (citing DONALD G.

In recent years, domestic violence advocates have proposed a different framework for conceptualizing battering relationships. These theorists posit that the domestic violence relationship is not about conflict; rather, it is simply about power and control.⁹⁸ According to this theory, domestic violence is a pattern of verbal and physical abuse directed at an individual in order to control the behavior of that person.⁹⁹ Because the inherent goal of the abuse is control over the victim, batterers seldom stop at a single violent incident, and past violent behavior in a relationship is a good predictor of future violence, as

DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 223 (1995) [hereinafter DUTTON, PERSPECTIVES]]. See also De Sanctis, *supra* note 8, at 367. “Victims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.” *Id.* Domestic violence prosecutions are also complicated by recanting victims, lack of corroborating witnesses and physical evidence, lack of meaningful punishments, and juror bias against domestic violence victims. Various reasons for domestic violence victims’ reluctance have been noted by both researchers and the courts including: fear of retaliation, coercion by the perpetrator via promises that future violence will stop if the victim recants, and a lack of faith in the justice system as a means of protection from future violence. Ogden, *supra* note 7, at 373-74 (citing *State v. Grant*, 920 P.2d 609, 613 n.5 (Wash. 1996)) (discussing research as to why domestic violence victims may appear inconsistent when responding to abuse). Letendre, *supra* note 10, at 980-82 (providing a detailed discussion of male juror bias, female juror bias and general juror expectations of domestic violence situations that combine to create a tendency for jurors to accept the notion that the victim is partly to blame for her own battering). “Without evidence [such as would be offered except for the character evidence prohibition] to dispel these biases, jurors are inclined to believe the batterer over the victim, thereby increasing the difficulty of convicting domestic violence perpetrators.” *Id.* at 982. See also De Sanctis, *supra* note 8, at 371-73, (providing additional discussion of gender bias in domestic violence cases).

The lingering effects of this country’s history of sexism include according a woman’s testimony less credibility than that granted to a man’s testimony. The woman witness is thought to be less rational and have less accurate testimonial qualities such as memory, perception, and narration. She is also thought to be less trustworthy and more willing to exaggerate.

Id. at 373 (citing CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR MEN AND WOMEN IN THE COURTS § 6, 4-5 (1990)).

98. Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 218, 222-23 (Daniel Jay Sonkin ed., 1987); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53 (1991). Some scholars have also noted that “[t]he psychological control of abused parties through intermittent use of physical assault along with psychological abuse (verbal abuse, isolation, threats of violence, etc.) is typical of domestic violence and is the same set of control tactics used by captors against prisoners of war and hostages.” Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases*, in DOMESTIC VIOLENCE MANUAL FOR JUDGES 2-5 to 2-6 (Helen Halpert et. al. eds., 1997).

99. James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1167 (1995).

“data indicate that, about 63% of the time, if assaults occur once, they are likely to be repeated.”¹⁰⁰

The batterer’s behavior can take many forms.¹⁰¹ Some common manifestations of that behavior are economic or financial restrictions,¹⁰² physical and emotional isolation, repeated invasions of privacy and monitoring of behavior, severing support from family or friends, threats of violence toward the victim, threats of suicide, addicting the victim to drugs or alcohol, and physical or sexual assaults.¹⁰³

The purpose of the abusive behavior is to subjugate the victim and to establish the superiority of the batterer.¹⁰⁴ Subjugation and superiority create constant tension.¹⁰⁵ The notion of cycles of violence with alternating periods of violence and respite do not reflect reality.¹⁰⁶ Women report varying degrees of tension, but rarely describe periods of relief from the efforts of the batterer to subjugate them.¹⁰⁷ The concept of power and control better reflects the reality that each victim is unique, that each batterer presents a different combination of battering behavior, and that each victim responds differently to that pattern of behavior.¹⁰⁸ The success of the superiority/subjugation battle

100. DUTTON, PERSPECTIVES, *supra* note 97, at 8-9. Moreover, when an abuser moves on to another relationship, it is highly likely that he will continue to use abuse and violence as a mechanism for control over his new partner. Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 85 (1992).

101. “Injuries sustained by women as a result of marital violence range from bruises, cuts, black eyes, concussions, broken bones, and miscarriages to permanent injuries – such as damage to joints, partial loss of hearing or vision, scars from burns, bites or knife wounds, or even death.” Angela Browne, *Violence in Marriage: Until Death Do Us Part*, in VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES AND EFFECTS 50, 52 (Albert P. Cardarelli ed., 1977).

102. If a victim of domestic violence leaves her abuser “there is a 50% chance that her standard of living will drop below the poverty line.” De Sanctis, *supra* note 8, at 368 (citing National Clearinghouse for the Defense of Battered Women, Statistics Packet 39-40) (3d ed. Feb. 1994).

103. “[The] power and control wheel is commonly used to explain the many facets of domestic violence, which includes coercion and threats, intimidation, emotional abuse, isolation, minimization, denial and blaming, use of children to control the victim, use of male privilege and economic resource abuse.” Raeder, *supra* note 8, at 1471 (citing Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1206 (1993) [hereinafter Dutton, *Understanding*]). See also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975, 983 (1995).

104. Dobash & Dobash, *supra* note 93, at 286; NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* 29 (1998).

105. Dobash & Dobash, *supra* note 93, at 283.

106. *Id.*

107. *Id.* at 283; Dutton, *Understanding*, *supra* note 103, at 1206-07; Stark, *supra* note 103, at 975, 983.

108. Raeder, *supra* note 8, at 283.

varies with each woman and with each relationship.¹⁰⁹ As one scholar notes, “In domestic violence cases, this translates to individual acts of abuse, forming a blueprint that details how to control the victim, even though the act may differ in type and severity. Therefore, intimidation, stalking, assault and property crimes are all integral to the grand design.”¹¹⁰ Furthermore, the notion that tensions increase until a breaking point is reached suggests that the defendant is, at that point, not in control of the situation. Recent studies demonstrate exactly the opposite is true.¹¹¹ Rather than being a crime of passion, researchers are discovering that domestic violence is a calculated and focusing event for the batterer that reinforces his ability to control his victim.¹¹² The batterer may often be more in control during an act of violence than before or after.¹¹³

Contemporary scholarship provides crucial insights into the realities of domestic violence, realities that lend coherence to a new application of the character evidence rule in domestic violence cases.¹¹⁴ These realities of the battering relationship show that the crime of domestic violence is not an isolated instance of misbehavior that can be strictly defined as to date and time.¹¹⁵ Rather, it is a long-term pattern of behavior that involves a variety of behaviors.¹¹⁶

D. Perpetuation of the Privacy Discourse through the Character Evidence Ban

The increased prosecution efforts, spurred by the battered women’s movement, have come into conflict with the character evidence ban, which precludes evidence of the defendant’s prior acts of domestic violence from being introduced in the current prosecution. Given the repetitive nature of domestic violence, the character evidence ban is at issue in nearly every

109. Patterns of abuse naturally vary according to the interactive relationship of the batterer and his victim. The intimacy of the relationship offers the batterer the insight to know what psychological and physical abuses work to achieve control over his victim. “There is no single typology of psychological abuse which has been consistently used in social science, and there is no one profile of batterers.” Raeder, *supra* note 8, at 1471, (citing Dutton, *Understanding*, *supra* note 103, at 1205 and DONALD G. DUTTON & SOSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 25 (1995)).

110. Raeder, *supra* note 8, at 1496.

111. JACOBSON & GOTTMAN, *supra* note 104, at 28-29. Jacobson and Gottman studied 201 couples in conflict in controlled settings. *Id.* They discovered that the heart rate of nearly one fifth of batterers dropped during violence. *Id.* Jacobson and Gottman concluded that for these batterers, the violence was deliberate, focused, and controlled. *Id.*

112. Letendre, *supra* note 10, at 977.

113. JACOBSEN & GOTTMAN, *supra* note 104, at 29.

114. Raeder, *supra* note 8, at 1465, 1493, 1505.

115. *See generally* DUTTON & GOLANT, *supra* note 109, at 39-52.

116. *Id.* at 22-23.

domestic violence case. The result has been that the character evidence ban has limited the reach of the public recognition of the private violence and perpetuated the implicit sanction of domestic violence.

1. The Character Evidence Rule

Federal Rule of Evidence (“FRE”) 404 establishes the general prohibition on admission of the defendant’s character:

(a) Character Evidence Generally – Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused – Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim – Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness – Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.¹¹⁷

The general rule is that a defendant’s character – including evidence of prior acts of violence – is not admissible to show that, with regard to the charged crime, the defendant acted consistently with his established character.¹¹⁸ In other words, the defendant’s prior bad acts cannot be used to show that the defendant committed the present charged crime. While the rule allows for certain exceptions, the general character ban is included in the Federal Rules of Evidence and the evidence codes of every state. Indeed, the

117. FED. R. EVID. 404.

118. *See id.*

character evidence rule “is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions.”¹¹⁹

2. The Importance of the Character Evidence Rule in Domestic Violence Prosecutions

No other evidence rule goes to the heart of a particular crime the way that the character evidence rule does with domestic violence. The fundamental nature of domestic violence is that it is behavior repeated over time.¹²⁰ In the domestic violence context, the character evidence ban denies the nature of domestic violence, creates an unlevel playing field that reinforces negative and inaccurate stereotypes about women, and perpetuates violence against women.

i. Denial of Women’s Realities

One troubling statistic in domestic violence cases is that, on average, women do not involve the police until after the seventh incident of violence within the relationship.¹²¹ This statistic tells us that by the time women are involved in the criminal justice system as domestic violence victims, they have already been victimized repeatedly.¹²² Women do not enter courtrooms as victims of isolated incidents of violence. Rather, they suffer a pattern of violence meant to accomplish subjugation and control.¹²³ Each incident of violence is critical to creating the pattern and accomplishing the control.¹²⁴ Further, the repetition of violence committed by intimate partners changes the nature of the victims’ stories; their stories are fundamentally different from the stories of victims of isolated, random violence at the hands of strangers.¹²⁵

119. FEDERAL CRIMINAL CODE AND RULES 250-51, 56 F.R.D. 183, 219 (1972) (Advisory Committee Note on subdivision (a)).

120. See *supra* notes 7-8.

121. Dutton, *Understanding*, *supra* note 109, at 1213. See also BEVERLY FORD, *VIOLENT RELATIONSHIPS: BATTERING AND ABUSE AMONG ADULTS* 8 (2001) (indicating that only ten percent of domestic violence incidents are reported to the police).

122. See *supra* notes 7-8.

123. It is noteworthy that recent studies have shown a similar use of violence as a control mechanism over women in cases of heterosexual rape. “In some American subcultures, violence is a socially approved way of getting what one wants, including control over other persons. One way men can control women is to force them to submit to degrading activities, including sexual intimacy against their will.” Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 147 (citing A. Nicholas Groth & Ann W. Burgess, *Rape: A Sexual Deviation*, in *MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS* 231, 234-35 (Anthony M. Scacco, Jr. ed., 1982) and CHARLES H. MCCAGHY, *CRIME IN AMERICAN SOCIETY* 124-29 (1980)).

124. See *supra* note 7.

125. Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 792 (1996) [hereinafter Raeder, *Double-Edged*].

For example, consider the experience of the female bank teller who is ordered at gun point to turn over the contents of her cash drawer. To this woman, it matters little whether the robber has committed fourteen similar bank robberies. There is nothing about the bank teller's experience that is altered by the fact that it is the robber's fifteenth bank. Contrast this with the experience of the domestic violence victim who has been subjected to fourteen prior incidents of violence at the hands of her abuser. The fifteenth incident derives a portion of its meaning and importance in its connection to the fourteen other incidents. But the character evidence rule precludes discussing this pattern in court.

The character evidence rule denies the domestic violence victim's reality on two levels. First, the fact of repetitive violence does not exist within the courtroom. Second, the victim must discuss an isolated incident without its larger context of repetitive violence. Isolating the incident from its context denies that which gives it a substantial part of its meaning. A kick in the crotch is a significant violation of personal autonomy. However, a kick in the crotch in context of past forced sexual activities may convey a different meaning.¹²⁶ The current construction of the character evidence rule precludes the victim from discussing her more nuanced reality of the kick in the crotch.

This denial of the victim's reality within the courtroom has profound impact on the victim. When victims are prevented from discussing their reality, they often become frustrated, confused, and disenfranchised. The system that the victim turned to for protection mimics the abusive patterns of the relationship from which she is seeking refuge. The purpose of battering is to create an altered reality for the victim so that she will bear the abuse. One of the most powerful tools in the batterer's arsenal is the ability to engage the societal stigma against victims by convincing the victim that if she reports the violence, she will either not be believed or will be blamed for not leaving the relationship.¹²⁷ When the legal system denies the victim's reality, it

126. Intimidation and humiliation of the victim by the batterer is part of the pattern of domestic violence. Raeder, *supra*, note 8, at 1471. To illustrate this point, Raeder recounts a circumstance from the relationship of O.J. Simpson and Nicole Brown Simpson in which Simpson's actions toward his wife on two occasions were illustrative of the deeper meaning of the acts:

Simpson placed his hand on his wife's crotch and said that "this is where babies come from and this belongs to me, this is mine." [On another occasion] he [Simpson] told the police to get her [Nicole Brown Simpson] out of his bed because he had two women. These statements identified his wife's value as merely reflective of her husband's interest in her; she mattered only so long as he cared for her to matter. This attitude is one which exemplifies why violence in a battering relationship is often an aspect of control dependent upon the batterer's internal needs, not simply his wife's conduct.

Id. at 1471-72.

127. Justine A. Dunlap, *The Pitiless Double Abuse of Battered Mothers*, 11 AMER. U. J. GENDER SOC. POL'Y & L. 523, 524 (2003). "A battered woman is stereotyped as weak, helpless,

contributes to the social stigma against victims and directly reinforces the victim's sense that her story is not believable, that it is not important.

ii. Hides True Nature of Domestic Violence

Because it suppresses the reality of the relationship, the character evidence rule also hides the true nature of domestic violence from the public. When the victim is not permitted to place the charged incident into the pattern of abuse, the jury is permitted to believe that domestic violence incidents are isolated incidents, stemming primarily from conflict within the relationship. In addition, the jury members – as representatives of society – are allowed only a limited view into what constitutes domestic violence. The true nature of the problem is hidden from the jurors.

The character evidence rule works powerfully to the disadvantage of women in domestic violence cases in another way. At the same time that the legal system designed a ban on the character of the defendant, the rules evolved in such a way that the character of the victim was always relevant and admissible.¹²⁸ The overwhelming majority of victims of domestic violence are women, and their character is admissible while the batterer's character is not.¹²⁹ Ironically, men's character remains private, while women's character is exposed to public discussion and adjudication. The result of FRE 404 has been that the male abuser defines the discourse relating to the private sphere of the intimate relationship. Male defendants have been able to discuss the private life of the victim because that goes to her credibility, while his own private life is protected. In other words, FRE 404 creates an unlevel playing field that is tilted in favor of men. Male domestic violence defendants are permitted to paint the character of female victims as irrational, overly emotional, hysterical, and vindictive.¹³⁰ Due to FRE 404, the jury hears only about the charged act; viewing the act in isolation strengthens the defendant's arguments about the nature of the victim's character: she is over-reacting to a single incident.¹³¹ Through FRE 404, the legal system tells a truncated story about domestic violence. The story is that the violence is an isolated incident in the life of this particular dysfunctional relationship, due mainly to the irrational character of the woman. The story is at heart a fiction that perpetuates other fictions;

incapable or unwilling to redress the situation in which she finds herself. This stereotype faults the battered woman for her batterer's actions." *Id.*

128. See 1 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 62, 194 (2d ed. 1923).

129. See De Sanctis, *supra* note 8, at 367 n.47; DUTTON, PERSPECTIVES, *supra* note 97, at 45.

130. See *supra* note 97 (discussing juror bias in perceptions of domestic violence victims).

131. *Id.* Furthermore, "When the jury is not given a complete picture of the abusive relationship, it has a false perception of the relationship as normal. Without the [previous uncharged] acts, it is easier to portray the victim as a lying vengeful woman or to downgrade the seriousness of the attack." Raeder, *supra* note 8, at 1504.

namely, violence against women is somehow connected to, or caused by, the character or behavior of specific women. This serves to conceal the real truth: society and the law condone male violence against women.

There is a more subtle difficulty with FRE 404 at the intersection between the public's understanding of domestic violence and the exposition of a domestic violence incident in the courtroom. Due to the tremendous work of the women's movement in general and the battered women's movement specifically, society now has a better understanding of domestic violence. Even though much is still unknown about the magnitude of the problem, there is clearly more discussion of domestic violence in the media, movies, and magazines than at any other time in history. There are many positive results from greater public awareness. This greater public awareness, however, poses a significant problem in the courtroom, particularly in conjunction with FRE 404.

Due to the efforts of the public awareness campaign surrounding domestic violence, many jurors have preconceived notions of what constitutes a domestic violence relationship, regarding the characteristics and actions of battered women.¹³² The difficulty lies in the intersection of that preconceived understanding of domestic violence and the inadmissibility of prior acts of violence within the relationship. The result is that the jury, expecting to see evidence about the cycle of violence, discounts the experience of the victim as not being "real" domestic violence because she is allowed to discuss only one incident.¹³³

For example, the popular perception of the battered woman is one who resists the prosecution's efforts and who will recant the statements she gave to the police implicating the batterer. Jurors understand the fact that a victim will often recant her testimony due to coercion from the batterer or to protect herself or her children. The jurors are familiar with the idea that a victim will minimize the extent of the violence that occurred to her or attempt to take some of the blame for that violence. When a victim does not recant or minimize the violence – and jurors are only permitted to hear about the isolated incident – the victim, then, does not qualify as a true domestic violence victim. The disconnect between the public perception of the battered woman and the non-recanting victim often leads jurors to view the woman as vindictive, not as a victim.

Rather than removing the defendant's character from the trial, the character evidence ban injects a false image of the defendant's good character into the trial. When the jury is precluded from hearing evidence of the defendant's prior battering, they cannot see the defendant as a batterer. The defendant can

132. SCHNEIDER, BATTERED WOMEN, *supra* note 94, at 124, 132.

133. Raeder, *Double-Edged*, *supra* note 125, at 794; Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 57 (1998).

hide behind the half-truth of his virtuousness-by-absence at the same time that he attacks the victim's character.¹³⁴ The resulting disparity not only obscures the true nature of domestic violence, but it does so in conjunction with jurors' expectations about domestic violence victims and defendants.¹³⁵

iii. Perpetuates Violence Against Women

Finally, the character evidence rule perpetuates the public-private dichotomy and correspondingly, violence against women. As discussed above, the rule denies the victim's reality and hides the nature of domestic violence from juries. The result is that fewer batterers are being held accountable.¹³⁶

The rule disenfranchises victims by denying their reality, at the same time that the rule allows the batterer to project a falsely positive, non-violent character. The result is that the rule mimics some of the dynamics present in domestic violent relationships to the disadvantage of women. Women are

134. "By forbidding the use of evidence concerning the ongoing nature of abuse within the relationship, the law denies reality, and asks the jury to do the same. There is no justice in this formula." Stuart H. Baggish & Christopher G. Frey, *A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony*, 68 FLA. B.J. 57, 59 (Oct. 1994).

135. Other writers agree that the rule frustrates the current understanding of the nature of domestic violence as a cyclical series of actions by a batterer toward his victim. For example, Raeder writes, "[The current rule] reflects a completely unsophisticated view of domestic violence which flies in the face of the extensive literature discussing battering relationships. Although each abusive act is different, it typically plays a part in a scheme aimed at obtaining control over the victim." Raeder, *supra* note 8, at 1492.

136. Scholars advocating a domestic violence exception to the character evidence prohibition have asserted that batterers would hesitate to abuse their victim(s) if they knew they would be tried, and more likely convicted, if prior conduct was more readily admissible against them. Rice, *supra* note 4, at 957. Support for the deterrence factor of enhanced admissibility of prior domestic violence conduct to achieve greater accountability for batterers may also be found in the results of increased enforcement and publicity surrounding the crime of driving while intoxicated:

Not long ago, drunk driving was not viewed as serious criminal behavior. Instead, the drunk drivers were treated sympathetically on the theory that anyone could commit the offense. As a result, extremely low sentences were the norm. Yet, over time, led by Mothers Against Drunk Driving, attitudes began to change. Today, when people attend social events it is commonplace to designate a driver who will not drink. No longer do judges give light sentences on the theory that the defendant was simply unlucky and not blameworthy. Similarly, legislatures have enacted more stringent laws concerning arrest, definition of offenses and mandatory sentencing, as well as required treatment programs. Society now reflects zero tolerance for behavior which was once acceptable . . . So, too, the publicity focused on domestic violence can be used to change attitudes.

Raeder, *supra* note 8, at 1482-83 (citing Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245, 1251 (1995) [hereinafter Schneider, *Epilogue*]). See also Letendre, *supra* note 10, at 1003-04. "[The] Washington domestic violence task force found that the law's failure to address domestic violence 'directly and appropriately' fosters continued abuse." *Id.* (citing WASHINGTON STATE DOMESTIC VIOLENCE TASK FORCE, FINAL REPORT 2 (1991)).

more reluctant to return to a system that treated them in a fashion similar to that of their abusers. Women often feel forced to endure the violence or seek self-help.

The character evidence rule's preservation of a public-private dichotomy means that the private sphere remains shielded from legal action. Within this private sphere, violence against women will continue to be considered a private matter and not the appropriate business of the state. Because the vast majority of victims are women, preserving the private sphere works profoundly to the disadvantage of women. Women will continue to be beaten in astounding numbers.

III. A CALL FOR A NEW RULE IN DOMESTIC VIOLENCE CASES

The current use of the character evidence rule in the domestic violence context constitutes the legal system's third means of protecting domestic violence from effective prosecution. The character evidence ban has been a part of the common law for centuries and is often described as one of the three most important aspects of the Anglo-American legal system.¹³⁷ A close examination of the intellectual foundations for the rule suggests a change in the rule for domestic violence cases.

A. *Wigmore and the Character Evidence Ban*

In 1904, John Wigmore produced his ten-volume work, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*.¹³⁸ Wigmore's work was hailed at the time as being one of the finest pieces of legal scholarship ever produced.¹³⁹ Wigmore remains the "fundamental working source for scholars, practitioners and courts."¹⁴⁰ In many respects, Wigmore is the beginning and end of the discussion regarding a rule of evidence. Time and again, legal scholarship pertaining to a rule of evidence grounds its discussion in Wigmore. Exploration of the character evidence rule is no exception.¹⁴¹

137. See 1 WIGMORE, *supra* note 128, § 194, at 415-16.

138. JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1904).

139. Jon R. Waltz & Norman M. Garland, Book Review, *Evidence in Trials at Common Law*, 120 U. PA. L. REV. 402 (1971). See also Book Review, 39 AM. L. REV. 478 (1905) (Volumes III & IV). The American University Law Review noted: "No one would ever dare to write on the same subject except to make supplements thereto. Other writers may well study this work for system and thoroughness in detail; and when they have done this they will doubtless stop in despair." *Id.*

140. Ronan E. Degnan, Book Review *Evidence in Trials at Common Law*, 87 HARV. L. REV. 1590 (1974).

141. David P. Leonard, *In Defense of Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1166 (1998). See also Susan Marlene

In attempting to discern the policy for the character evidence ban, Wigmore reviewed cases from 1684 to 1921.¹⁴² He distilled from the cases three primary arguments in support of the character evidence ban: the ban prevents (1) undue prejudice, (2) unfair surprise, and (3) confusion of the issues.¹⁴³ Virtually every commentator quotes these same three rationales.¹⁴⁴ In fact, it is difficult to find much analysis of the character evidence ban beyond these three arguments.

Interestingly, Wigmore cast doubt on his own rationales. First, he asserts that only the avoidance of undue prejudice has any support:

The policy of avoiding undue prejudice is based on weaknesses of human nature which are today as obvious as ever. In criminal cases, this policy is one of those that mark off the Anglo-American system from the rest of the civilized world Our own rule represents a safeguard against a real danger to which the search for truth will always be liable so long as the decision of facts is committed to any but Solomons.¹⁴⁵

Second, Wigmore noted that other evidentiary rules excluding extrinsic evidence resolves confusion of the issues.¹⁴⁶ Third, he stated that the policies of preventing unfair surprise and confusion of the issues have been “greatly

Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 504 (1991); Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 511 n.52, 531 n.190, 538 n.231 (1996); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 23 (1994); Raeder, *supra* note 8, at 1489.

142. Wigmore's first volume came out in 1904-05. Later volumes contained cases dating to 1921.

143. 1 WIGMORE, *supra* note 128, § 194, at 418-19.

“The reasons thus marshaled in various forms are reducible to [four]: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses; both of these represent the principle of Undue Prejudice; (3) the injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated; this represents the principle of Unfair Surprise. It is also said, by some judges (4) that the Confusion of new Issues is a reason for avoiding such evidence”

Id.

144. *But see* Karp, *supra* note 141, at 27 (noting that the concern over undue prejudice to the defendant was not voiced in the cases most often cited when discussing the origins of the character evidence prohibitions. Instead, he observes that the early decisions in *Hampden's Trial*, 9 How. St. Tr. 1053 (K.B. 1684) and *Harrison's Trial*, 12 How. St. Tr. 833 (Old Bailey 1692), reflected concern over unfair surprise and the need to limit the proceedings, not concern over undue prejudice) (asserting that the absence of concern for undue prejudice in these cases suggests that different reasons lay behind the establishment of the character evidence rule).

145. 1 WIGMORE, *supra* note 128, § 8a, at 131-32.

146. *Id.* § 194, at 419. Wigmore does not refer to the rules regarding character or impeachment of witness, although he appears to be discussing these rules.

overworked.”¹⁴⁷ Fourth, he noted that the reasons he cited “represent general policies and constant quantities in our law of Evidence, and reappear individually in other parts of it.”¹⁴⁸ Fifth, he suggested that judges have misapplied the rule out of leniency for the defendant rather than to protect the innocent.¹⁴⁹ Finally, Wigmore lamented that the shortcomings of the rules of evidence derive primarily from a lack of acquaintance with legal history, philosophy, and jurisprudence.¹⁵⁰ Wigmore asserts that:

Another shortcoming is the *over-emphasis* on the *technique* of legal rules in detail, with corresponding under-emphasis on policies, reasons, and principles. This is a difficult thing to describe to those who do not sense it without description; but it is very marked. It is the kind of thing that is like the dead bark on the outside of a tree, in contrast to the living, growing inner core. Too much of our law is dead bark, – at least in the judicial opinions. Two thirds or more of them are needless, – dry repetitions of well-settled things. The treatment tends to become mechanical. Reasons are lost from sight. The new generation of judges thus never hears the reasons. And so gradually “you cannot see the forest for the trees.”¹⁵¹

The first step in vitalizing the character evidence rule, therefore, is to review the history of the rule and reasons which support it.

B. *History of the Character Evidence Ban*

The American character evidence rule derives from the English common law and was imported into this country from England prior to the American Revolution. The history in England is difficult to trace, but what is present suggests a growing trend through the seventeenth century toward acceptance of the character evidence ban. Wigmore cited evidence that character evidence was widely used in English courts during the 1600s.¹⁵² He also noted, however, several cases toward the end of that century in which prior bad act evidence was not admissible.¹⁵³ In 1684, a court refused evidence of a defendant’s prior forgeries during his forgery trial.¹⁵⁴ In 1692, in the case of *Harrison’s Trial*, the court rejected prior bad act evidence during the

147. *Id.* § 8a, at 132.

148. *Id.* § 194, at 419.

149. *Id.* § 194, at 419-20.

150. 1 WIGMORE, *supra* note 128, § 8a, at 115.

151. *Id.* § 8a, at 117.

152. *Id.* § 194, at 415 n.1.

153. *Id.* at 416. Modern scholars have asserted that the character evidence ban can be traced to the waning of feudalism in England and the development of industrialization. See also Leonard, *supra* note 141, at 1193; Fingar, *supra* note 141, at 510; Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 717 (1981).

154. 1 WIGMORE, *supra* note 128, § 194, at 416 (discussing *Hampden’s Trial*, 9 How. St. Tr. 1053, 1103 (1684)).

defendant's murder trial, stating, "Are you going to arraign his whole life?"¹⁵⁵ While he acknowledged that the practice of using the defendant's character "died hard and slowly," Wigmore asserted that the character evidence ban was a settled rule by the end of the 1600s.¹⁵⁶

In early practice this class of evidence [prior bad acts of the defendant] was resorted to without limitation. But for more than two centuries, *ever since the liberal reaction which began with the Restoration of the Stuarts*, this policy of exclusion, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence.¹⁵⁷

During the colonial period, American courts appear to have followed their English counterparts in precluding prior bad act evidence. For example, in 1763, the Massachusetts Supreme Court precluded evidence pertaining to the defendant's prior misconduct.¹⁵⁸ Indeed, there is strong evidence to suggest that the character evidence rule was becoming firmly established in America after the Revolution.¹⁵⁹ Evidence scholars report cases from the early 1800s that employed the character evidence rule.¹⁶⁰ By 1891, the rule had become so firmly entrenched that the United States Supreme Court stated:

Proof of [prior crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings However depraved in character, and however full

155. *Id.* § 194, at 416.

156. *Id.* § 194, at 416 n.1; *id.* § 8, at 109. *But see* JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 180, 190-96 (2003). Langbein argues that Wigmore placed the adoption of the character evidence rule too early. Langbein suggests that the rule gained acceptance from 1684 to 1714 and was not fully established until 1744. *Id.* at 195-96.

157. 1 WIGMORE, *supra* note 128, § 194, at 415-16 (emphasis added).

158. *Rex v. Doaks, Quincy's Mass. 90* (Mass. Super. Ct. 1763).

159. Two important issues need to be raised at this point. The character evidence ban is not absolute, and it does not apply to the parties equally. The rule precluding evidence of the defendant's character was limited to that evidence which would show the defendant acted in conformity with his character. Therefore, exceptions were created to allow admission of evidence of the defendant's character when it was either at issue in the dispute or if the evidence established something other than conformity with the character. Secondly, the character evidence ban does not apply equally to the parties. In a criminal case, the ban on character evidence generally does not include the character of the victim. In fact, the rules allowed and encouraged the admission of the victim's character. The victim's character has been and continues to be an important component of many trials, especially domestic violence trials. *See supra* note 134 and accompanying text.

160. *See, e.g., Leonard, supra* note 141, at 1170 (citing SAMUEL MARCH PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 70 n.b (London, J. Butterworth & Son 1814)).

of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.¹⁶¹

The universality of the acceptance of the character evidence rule can also be circumstantially established through the strength of statements endorsing the rule. In 1901, the New York Court of Appeals stated:

This [character evidence ban] rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common-law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.¹⁶²

More recently, courts have equated the character evidence rule with the presumption of innocence.¹⁶³

The character evidence rule was formally embodied into FRE 404 by the United States Supreme Court in 1972 with the adoption of the Federal Rules of Evidence.¹⁶⁴ Contemporary commentators have traced the history of FRE 404 and the ban on character.¹⁶⁵ These commentators generally concur with Wigmore that the character evidence ban has been universally accepted in the United States since the time of the American Revolution.¹⁶⁶ One scholar posits

161. *Boyd v. United States*, 142 U.S. 450 (1892).

162. *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901).

163. *United States v. Meyers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

164. The United States Supreme Court's adoption of the rules of evidence in 1972 culminated nearly a dozen years of work on the issue. In 1961, the Judicial Conference of the United States authorized Chief Justice Warren to study the feasibility of promulgating uniform rules of evidence. After an initial study into whether uniform evidence rules were advisable, an advisory committee was appointed in 1965 to propose uniform rules. By 1969, the committee submitted proposed rules for comments. The Supreme Court adopted the rules in 1972, and Congress passed them in 1975. See William L. Hungate, *Federal Rules of Evidence*, H.R. Rep. No. 93-650, at 2-3 (1973). Interestingly, the process of developing the uniform rules occurred before the most significant advances of the Battered Women's Movement. Therefore, while the adoption of the uniform rules might have been an opportunity to address the appropriateness of FRE 404 in the domestic violence context, the model rule was adopted before the developments that began to question the impact of the rules of evidence.

165. Drew D. Dropkin & James H. McComas, Article, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 179, 188-96 (2001); Leonard, *supra* note 141.

166. *But see* Karp, *supra* note 141, at 28 (discussing certain debates over ratification of the U.S. Constitution that included issues of character evidence). Regarding the "same vicinage" requirement, Patrick Henry extolled the virtues of character evidence at trial:

Will gentlemen tell me the trial by a jury of the vicinage where the party resides is preserved? . . . [T]his state . . . is so large that your juries may be collected five hundred miles from where the party resides – no neighbors who are acquainted with their

that the character evidence ban is “one of the oldest principles of Anglo-American law” and that the “rule’s longevity can be measured in terms of centuries rather than only years or decades.”¹⁶⁷ Another author writes:

The historical evidence supporting exclusion of pure propensity evidence is compelling. From the days of England’s Glorious Revolution until the present day, courts have demonstrated a steadfast commitment to the principle that pure propensity evidence should not be admitted, fearing that juries will infer present guilt from previous conduct. Beginning in the late 1600s, courts in England – and eventually pre-colonial America as well – recognized the threat to fairness created by pure propensity evidence and sought to exclude it from criminal trials. The principle has enjoyed longstanding status as a fundamental principle of American criminal justice.¹⁶⁸

C. *Beyond Wigmore: Intellectual Foundations for the Character Evidence Rule*

Following Wigmore, it is possible to narrow the search for the intellectual foundations of the character evidence rule to the hundred years from the Restoration of the Stuarts in 1660 to the Declaration of Independence in 1776. However, to truly understand the intellectual foundations for the character evidence rule, one must move beyond Wigmore. During this hundred year period, England and America experienced the birth of liberalism, the rise of modern science, the final rejection of virtue ethics, the development of the Enlightenment, and a breakdown in social stratification.¹⁶⁹ It was in the

characters, their good or bad conduct in life, to judge of the unfortunate man . . . By the bill of rights of England, a subject has a right to a trial by his peers. What is meant by his peers? Those who reside near him, his neighbors, and who are well acquainted with his character and situation in life. Is this secured in the proposed plan before you? No sir.

III JONATHAN ELLIOT, *ELLIOT’S DEBATES* 578-79 (1836).

167. Leonard, *supra* note 141, at 1162-64. Interestingly, political opposition to changes to the rule has sometimes led to exaggerated claims about the longevity of the character evidence rule. In 1994 President Bill Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, which contained provisions that significantly changed Fed. R. Evid. 404 and created exceptions for admissibility of evidence of similar crimes in sexual assault and child molestation prosecutions. Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing The Credibility Quotient*, 57 U. PITT. L. REV. 107, 108 (1995). Senator Joseph Biden voiced opposition to the character evidence exceptions when he asserted that the rule had developed from “800 years . . . under our English jurisprudence system” and should not be changed by legislative action “to blind people to looking at the real facts before them and making an independent judgment.” *Id.* at 119 (quoting 139 Cong. Rec. S15020-01, S15072 (daily ed. Nov. 4, 1993) (statement of Sen. Biden)). Based on other scholarly research, it seems safe to conclude that Senator Biden’s historical tracings of the character evidence rule can be relegated to the category of political hyperbole.

168. Dropkin, *supra* note 165, at 190-91.

169. Leonard argues that the historical, religious, and philosophical roots of the character evidence rule are the breakdown in social stratification due to industrialization and urbanization

cauldron of these five developments in intellectual history that the creation of the character evidence ban was born and in context of which the character evidence ban makes intellectual sense.¹⁷⁰

1. The Birth of Liberalism

When Wigmore spoke of the “liberal reaction which began with the Restoration of the Stuarts,”¹⁷¹ he was referring to the reign of Charles II which ran from 1660 to 1685. In 1660, Charles II returned to the monarchy in England, ending the civil wars of the preceding hundred years and laying the groundwork for two major advances in intellectual history: the seeds of the liberal state and the rise of modern science.

The roots of the liberal state can be evidenced in three aspects of Charles II's reign. First, as a condition of his return to power, Charles II issued the Declaration of Brea.¹⁷² Central to the Declaration of Brea was the agreement to guarantee liberty of conscience.¹⁷³ In an attempt to end the political upheavals surrounding the wars of religion, Charles II advanced the notion of toleration of religious differences.¹⁷⁴ This notion of tolerance gave birth to the separation of church and state. As historian George Trevelyan noted:

The division of the religious world into Church and Dissent made freedom of thought a possibility for the future. The English could not be argued into

in England, the rise of Calvinism, and the moral philosophy of Kant. See Leonard, *supra* note 141, at 1193-1200. While Leonard identified several important aspects, his treatment of even the important aspects is limited. He failed to fully grasp the importance of the rise of science and the rejection of virtue ethics. Leonard focuses on Calvinism and predestination. In this, he misses the broader implications of the Reformation and the changing nature of the individual's relationship to God, church, society, and the state. Leonard also views the breakdown of social stratification as due to industrialization. This misses the importance of the social and religious changes stemming from the Reformation. In addition, Leonard fails to confine himself to the period of time during which the character evidence rule was established. For example, Leonard relies on the writings of Kant. Kant, however, wrote *The Metaphysics of Morals* in 1797, well after the establishment of the character evidence rule. Also, Leonard cites to industrialization in America which did not occur until after the Civil War. Again, this is long after the character evidence rule was adopted in American common law. While industrialization in England did contribute to the breakdown of social hierarchy, it was but one factor. Also, industrialization occurred long after the establishment of the rule. In fact, Leonard cites to Weber who posits that industrialization was contingent upon the Protestant ethic. Further, the breakdown of social stratification that occurred in America was not driven by industrialization. Rather, it reflects the social and religious changes stemming from the Reformation. For further explication, see *infra* notes 171-262 and accompanying text.

170. The five developments are inter-related; for purposes of clarity, I discuss each individually.

171. 1 WIGMORE, *supra* note 128, § 194, at 415-16.

172. G.N. CLARK, *THE LATER STUARTS: 1660-1714*, at 3 (1934).

173. *Id.*

174. GODFREY DAVIES, *THE EARLY STUARTS: 1603-1660*, at 255 (1937).

toleration by their reason, but they could be forced into it by their feuds Thus the laws of the . . . Parliament [during Charles II's reign] . . . have helped to secure freedom for a hundred religions, and a thousand ways of thought.¹⁷⁵

A second critical component of the developing liberal state was freedom of speech. Prior to Charles II, freedom of speech, even in Parliament, had been curtailed.¹⁷⁶ Charles II restored the freedom of speech within Parliament and the country.¹⁷⁷

Critics of Government policy can hardly be said to have had any liberty of person or speech guaranteed to them under the old Tudor and Stuart regime, except in the case of defined privileges, uncertainly enjoyed, within the walls of Parliament; but after the Restoration men no longer talked in whispers.¹⁷⁸

The right of speech, particularly of dissent, was critical to the future of the liberal state.¹⁷⁹

Lastly, Charles II abolished the Star Chamber.¹⁸⁰ The Star Chamber had been a special government court which punished political opponents of the King. The judges in the Star Chamber were politicians, and they had extraordinary powers, unconstrained by the rules of procedure and evidence that existed in the ordinary courts.¹⁸¹ The abolition of the Star Chamber¹⁸² had three important impacts. First, it contributed to the movement toward recognition of free speech.¹⁸³ Second, the abolition recognized the importance of a separation between the executive and the judiciary.¹⁸⁴ Lastly, the abolition advanced the belief that the law and the courts applied equally to all persons.¹⁸⁵ As Trevelyan notes, after the abolition of the Star Chamber, "The law of the land judged impartially all cases between officials and private citizens, and there was no longer a prerogative law and a special court to which Government could, as in other lands and in earlier times, appeal."¹⁸⁶

175. GEORGE M. TREVELYAN, *ENGLAND UNDER THE STUARTS* 346 (1912). See also WILLIAM CECIL DAMPIER, *A HISTORY OF SCIENCE AND ITS RELATIONS WITH PHILOSOPHY AND RELIGION* 109 (1966).

176. TREVELYAN, *supra* note 175, at 163-64.

177. *Id.* at 339.

178. *Id.*

179. *Id.* at 346.

180. *Id.* at 339.

181. TREVELYAN, *supra* note 175, at 164-65.

182. Some scholars have observed that the ban on character evidence originated as a direct procedural response to the inquisitorial practices of the Star Chamber. See Rice, *supra* note 4, at 945 (citing Edward G. Mascolo, *Uncharged-Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 *CONN. B.J.* 281, 283-84 (1993)).

183. TREVELYAN, *supra* note 175, at 166.

184. *Id.* "There could indeed be no more complete and dangerous example of merging the judiciary with the executive." *Id.*

185. CLARK, *supra* note 172, at 9.

186. TREVELYAN, *supra* note 175, at 339.

Interestingly, it was these steps of Charles II's which sowed the seeds for the birth of liberalism. But, liberalism also grew out of the political upheavals surrounding the religious wars in Europe after the Reformation.¹⁸⁷ Here, the aim was to justify the creation of a secular state that could coexist with divergent religious beliefs. Toleration, freedom of individual choice, and the absence of a state-determined conception of the good life were critical components of liberalism.¹⁸⁸ On this view, liberalism has been defined as the shared public values that determine the fundamental terms of political and social cooperation.¹⁸⁹ Liberalism is thus concerned with structuring state institutions to allow individuals the opportunity to flourish in individual ways.¹⁹⁰ Primarily, liberalism demands that the government allow and protect individuals' freedom of choice as to religious preference, social relations, and economic commitments.¹⁹¹

Consistent with its historical foundations, liberalism in America incorporated the concept of separation of church and state, religious freedom and toleration, and freedom of speech. In addition, the Constitution embodied both liberalism's emphasis on protecting individual rights and the development of institutions that allow for personal freedom.¹⁹²

2. Rise of Modern Science

The second lasting contribution of the reign of Charles II was his contribution to the birth of modern science. In 1662, Charles II formed the Royal Society and lent state credibility and support to the organization.¹⁹³ The

187. RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 41-42 (1999); JOHN RAWLS, POLITICAL LIBERALISM xxiv (1993).

188. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1 (1982). Sandel defines liberalism as the belief that:

[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it.

Id. (emphasis in original). John Rawls defines a "conception of the good" as a "comprehensive doctrine." See RAWLS, *supra* note 187, at 13, 175. For Rawls, a state-advanced conception of the good is synonymous with state policies that advance a comprehensive doctrine. *Id.* at 223.

189. Linda McClain, *Atomistic Man Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1205 (1992) (citing Rawls's conceptions of liberalism).

190. HARDIN, *supra* note 187, at 1.

191. *Id.* at 6.

192. Goldfarb, *supra* note 67, at 34-35.

193. GEORGE H. DANIELS, SCIENCE IN AMERICAN SOCIETY: A SOCIAL HISTORY 38 (1971); A. WOLF, A HISTORY OF SCIENCE, TECHNOLOGY, AND PHILOSOPHY IN THE 16TH & 17TH CENTURIES 60 (1950). The charter of the Royal Society called for the creation of society devoted

Royal Society's early members were Issac Newton,¹⁹⁴ John Locke,¹⁹⁵ and Robert Boyle,¹⁹⁶ among others.¹⁹⁷ As Peter Gay described:

The Royal Society lived up to its name. It held meetings to encourage scientific inquiry, engaged in correspondence in aid of the "new philosophy," and reported on experiments, discoveries, and inventions in its famous publication, *Philosophical Transactions*. Every prominent natural philosopher in England belonged to it, and so did many distinguished scientists on the Continent. So, too, did gifted amateurs like the diarist Samuel Pepys, the American clergyman Cotton Mather, and the American statesman-scientist Benjamin Franklin. The list of its Fellows is a list of the leaders of the Scientific Revolution¹⁹⁸

The Royal Society in London was one of several scientific societies founded in the seventeenth century.¹⁹⁹ These societies played a critical role in the development of modern science because they were not limited by the authorized epistemologies of either the universities or the churches.²⁰⁰ These societies contributed to an amazing breadth of fields, including astronomy, physics, anatomy, botany, mathematics, agriculture, social sciences, mechanics, electronics, chemistry, geology, medicine, textiles, mining, psychology, and geography.²⁰¹

The establishment of the Royal Society, and the other scientific societies, brought about the development of the scientific method.²⁰² It was during this period of time that the "[s]pecial activity which we call scientific began to be a leading element in European thought. That activity is one of unbiased inquiry, shrinking from no conclusion merely because it is unorthodox. It is also positive and experimental: it tests its conclusions not only by reasoning but

to the pursuit of experimental knowledge. *Id.* For a general discussion of the role of the Royal Society in the "scientific colonization" of the American colonies, see DANIELS, *supra*, at 30-46.

194. CLARK, *supra* note 172, at 359. Newton discovered the law of gravity and settled the main principles of mathematics, physics, astronomy, and optics once and for all. *Id.*

195. *Id.* at 370-71. Locke was a central figure in Enlightenment thought and published several works that were instrumental in the creation of the American Republic. See 2 THE ENCYCLOPEDIA OF PHILOSOPHY 519 (Paul Edwards ed., 1967).

196. CLARK, *supra* note 172, at 360. Boyle discovered "the relation between the volume, density, and pressure of gases," commonly referred to as Boyle's Law. Boyle's law was critical in the development of the steam engine. *Id.*

197. *Id.* at 28-29.

198. PETER GAY, AGE OF ENLIGHTENMENT 17 (1966).

199. WOLF, *supra* note 193, at 54-55. The Accademia del Cimento was also founded in Florence in 1657 and the Academie des Sciences in Paris in 1666. *Id.* at 8-9.

200. *Id.* at 54-55.

201. See generally *id.*

202. GAY, *supra* note 198, at 19-20. Gay credits Isaac Newton with cementing the scientific method as the primary mode of inquiry of the Enlightenment and beyond. *Id.*

also by observation.”²⁰³ The scientific method is premised on the ability of individuals to observe the world through their own eyes and to interpret their observations using their own intelligence.²⁰⁴ Specifically, the scientific method emphasizes observation, experience, experiment, and a commitment to cause and effect.²⁰⁵ Importantly, the scientific method focused on *how* things worked rather than *why* things worked.²⁰⁶ The emphasis was on placing the item in its proper context within the physical world.²⁰⁷

An important aspect of the scientific method and the rise of modern science was the “secularization of knowledge.”²⁰⁸ Prior to the Reformation, knowledge, including science, was deemed to be divinely revealed by the Catholic Church.²⁰⁹ During the religious wars following the Reformation, many intellectuals became frustrated with the authoritarian positions of churches. In addition, the concept of toleration undermined the position of the Catholic Church – or any church – as the sole source of knowledge.²¹⁰ As a result, a growing number of individuals sought knowledge of the world through the use of reason, rather than divination.²¹¹ This process contributed to the general freedom of individuals to use reason to assess their own world.²¹²

As Treveleyan noted, the impact of the scientific movement reached far beyond science:

The secular reaction among the libertines of life and politics at the capital would not have outlasted the generation that had suffered under Oliver [Cromwell], if it had not become joined to the more solid and respectable influence of a scientific movement springing up in the same time and place. The Royal Society was Royal in more than name . . . Charles II extended an

203. CLARK, *supra* note 172, at 27. See also L. W. H. HULL, HISTORY AND PHILOSOPHY OF SCIENCE 194 (1965) (describing the scientific method as a “subtle blend of observation, hypothesis, mathematics and planned experiment”).

204. WOLF, *supra* note 193, at 54.

205. *Id.* at 4-5; see also GAY, *supra* note 198, at 20; HULL, *supra* note 203, at 191-195; Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 412 (1995).

206. SIR WILLIAM CECIL DAMPIER, A HISTORY OF SCIENCE AND ITS RELATIONS WITH PHILOSOPHY & RELIGION 146 (1966).

207. *Id.*

208. WOLF, *supra* note 193, at 8.

209. *Id.*

210. *Id.*; see also GAY, *supra* note 198, at 31 (asserting that the “claim of Christianity to be the one true faith was thrown into doubt” by the secularizing impact of global exploration and greater interaction with non-Western civilizations).

211. WOLF, *supra* note 193, at 8; see also GAY, *supra* note 198, at 31, 40 (discussing how a greater number of religious leaders themselves employed “rational inquiry” to examine the history of religion).

212. HULL, *supra* note 203, at 185. “Men began to see that by applying their own intelligence they might make for themselves an oracle wiser and less capricious than that of Delphi, and so command their fate more fully than ever before.” *Id.*

intelligent patronage to science, when the time was ripe; bigotry could never exile nor years efface the native achievements of Newtonian discovery; while the idea of the rule of law in the universe slowly penetrated downwards from class to class, remoulding by unopposed and unsuspected influence the unconscious forms of thought, and even of religion itself.²¹³

Primarily because of the relationship between England and the American colonies, the impact of the scientific movement was strongly felt in America prior to the American Revolution.²¹⁴ Many colonial Americans became members of the Royal Society of London.²¹⁵ In addition, several scientific societies, such as the American Philosophical Society, were founded in the fledgling colonies.²¹⁶ Benjamin Franklin stated that the purpose of the Philosophical Society was to “let light into the nature of things and tend to increase the power of man over matter, and multiply the conveniences or pleasures of life.”²¹⁷ The American scientific societies modeled themselves after their British counterparts and dedicated themselves to the scientific method.²¹⁸ The language of the Declaration of Independence emphasizes the extent to which the notions of individual use of reason had permeated American thought.²¹⁹

After the War of Independence, American commitment to scientific inquiry redoubled.²²⁰ Many Americans emphasized the connection between freedom from England and intellectual freedom:

[The] introduction and progress of freedom have generally attended the introduction and progress of letters and science. In despotick governments the people are mostly illiterate, rude, and uncivilized; but in states where civil liberty hath been cherished, the human mind hath generally proceeded in improvement, – learning and knowledge have prevailed, and the arts and sciences have flourished.²²¹

213. TREVELYAN, *supra* note 175, at 347.

214. DANIELS, *supra* note 193, at 47.

215. *Id.* at 50.

216. *Id.* at 66-68, 106-07 (discussing the various efforts to establish scientific societies in America prior to the Revolution, particular the American Philosophical Society).

217. *Id.* at 106.

218. *Id.* at 107.

219. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also*, SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 120 (1994). This is also an example of the extent to which the ideals of the Enlightenment were incorporated into America. *See infra* notes 222-34 and accompanying text.

220. DANIELS, *supra* note 193, at 126-27.

221. *Id.* at 128 (quoting John Gardiner).

3. Enlightenment Philosophy

The Age of Enlightenment is generally considered to have started in the late seventeenth century and run into the middle of the nineteenth century. Some historians mark the beginning of the Enlightenment with Isaac Newton publishing the *Principia Mathematica* in 1687,²²² others with the adoption of the Bill of Rights following the Glorious Revolution of 1688 in England.²²³ A detailed discussion of the complexities of the Enlightenment is beyond the scope of this article.²²⁴ However, there are several ideas which run consistently through much of Enlightenment thought and which found prominence in colonial and revolutionary America.

Enlightenment thinkers believed in the existence of an objective truth or reality.²²⁵ They asserted the preeminence of the rational mind²²⁶ and committed themselves to the discovery of the objective truth through the rigorous use of the rational mind, including the scientific method of observation and attention to cause and effect.²²⁷ The belief in a discoverable objective reality, coupled with the breakdown of the status society,²²⁸ led to the notion that people should be judged by their actions and not their position held as an accident of birth.

In addition, the Enlightenment was characterized by optimism about human nature and its possibilities.²²⁹ Enlightenment thinkers viewed people as essentially good and able to use their reason to advance themselves and society toward greater equality and liberty.²³⁰ This optimism is evident in the commitment to the use of reason and the individual's ability to discern that

222. GAY, *supra* note 198, at 12.

223. ROY PORTER, *THE CREATION OF THE MODERN WORLD: THE UNTOLD STORY OF THE BRITISH ENLIGHTENMENT* 27 (2000).

224. Much has been written about the history of the Enlightenment. Indeed, it is facetious to suggest that there is one thing called the Enlightenment. The ideas proposed are varied and often contradictory.

225. Cammack, *supra* note 205, at 411-12.

226. The Enlightenment advanced the idea that the individual could make their own inquiries about the nature of the world, independent of religious or state constraints or constructs. See John Jackson and Sean Doran, *Evidence, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 172 (Dennis Patterson ed., 1996).

227. STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 2 (1991).

The theoretical discourses of modernity from Descartes through the Enlightenment and its progeny championed reason as the source of progress in knowledge and society, as well as the privileged locus of truth and the foundation of systematic knowledge. Reason was deemed competent to discover adequate theoretical and practical norms upon which systems of thought and action could be built and society could be restructured.

Id.

228. See *infra* notes 250-61 and accompanying text.

229. 2 ENCYCLOPEDIA, *supra* note 195, at 521.

230. See *id.* at 519.

objective truth. In fact, the Enlightenment has been described as a “metaphysics of the ‘sound common sense.’”²³¹

According to Enlightenment thinkers, the ability of every human being to fully employ his or her reason had been constrained by the forces of church, state, social and economic class, superstition, ignorance, and prejudice.²³² One of the objectives of the Enlightenment was to clear these obstacles from the individual’s path toward realization of each person’s full potential, primarily through education.²³³ Importantly, the Enlightenment viewed progress of both the individual and society as virtually unlimited.²³⁴

4. The Rejection of Virtue Ethics

Prior to the Reformation in Europe, the concept of morality – deeming an action to be appropriate or inappropriate²³⁵ – derived primarily from the Greek notion of virtue.²³⁶ Aristotle defined virtue as “state involving rational choice, consisting in a mean relative to us and determined by reason – the reason, that is, by reference to which the practically wise person would determine it.”²³⁷ Virtue included the concept of an individual’s character, but it also embraced an individual’s role in a hierarchical social structure.²³⁸ To be virtuous was to perform a particular and specific function within society: a king had certain virtues – for instance, an ability to command – that were contingent on his place in society.²³⁹ A person’s character, therefore, was a function of his or her allotted role in society, be it king, soldier, or wife, and not of their decisions or actions. Greek society was rigidly hierarchical.²⁴⁰ An individual’s role in Greek society was permanently established by his or her nature at birth. The social setting into which one was born determined one’s social function, one’s position in relation to superior and inferior persons, and one’s obligations and duties to superiors.²⁴¹

231. 2 WILHELM WINDELBAND, A HISTORY OF PHILOSOPHY: RENAISSANCE, ENLIGHTENMENT, AND MODERN 438 (1958).

232. 2 ENCYCLOPEDIA, *supra* note 195, at 520.

233. *Id.* at 521.

234. *Id.*

235. I use the terms appropriate and inappropriate to avoid the difficulties of the term “good” and “bad.” Also, appropriate and inappropriate allow for comparison of pre-Reformation morality based on virtue ethics and post-Reformation morality based on individual psychology.

236. ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY 8 (2d ed. 1998).

237. ARISTOTLE, NICOMACHEAN ETHICS, Book II, ch. 6 (Roger Crisp ed., Cambridge Univ. Press 2000).

238. MACINTYRE, *supra* note 236, at 8.

239. *Id.*

240. See *infra* text accompanying notes 250-62 (discussing the transformation of American society from hierarchical monarchism to republicanism and democracy).

241. See MACINTYRE, *supra* note 236, at 8, 156.

The Greek notion of virtue survived the rise of Christianity; indeed, it was incorporated into Christianity primarily through the theology of Aquinas.²⁴² Western Europe, therefore:

[I]nherited from the Greeks and from Christianity a moral vocabulary in which to judge an action good was to judge it to be the action of a good man, and to judge a man good was to judge him as manifesting dispositions (virtues) which enabled him to play a certain kind of role in a certain kind of social life.²⁴³

The seventeenth and eighteenth centuries brought a radical transformation in the understanding of virtue, morality, and character.²⁴⁴ With the advent of the Reformation and capitalism, the relationship of the individual to society experienced significant changes.²⁴⁵ Reformation thought insisted on personal judgment and individual responsibility regarding one's relationship to God, as opposed to strict obedience to ecclesiastical authority.²⁴⁶ As a consequence of greater individualism, people sought a morality, not based on the dictates of Christianity but based on reason and experience.²⁴⁷

In addition to changes in the relationship of the individual to the church, society itself underwent significant structural changes. Rigid social hierarchy began to break down, and with it the traditional ties of duty and obligation were "fatally loosened."²⁴⁸ Individuals experienced greater personal autonomy. This transformation led to:

[A] move from the well-defined simplicities of the morality of role fulfillment, where we judge a man *as farmer, as king, as father*, to the point at which evaluation has become detached, both in the vocabulary and in practice, from roles, and we ask not what it is to be good at or for this or that role or skill, but just what it is to be "a good man"; not what it is to do one's duty as clergyman or landowner, but as "a man."²⁴⁹

As a result of these changes, individuals felt freer to determine for themselves the appropriateness or inappropriateness of a particular action. This determination rested more on resonance with personal experience and individual reason than on religious doctrine. The resulting rejection of a virtue-based objective value system generated a pluralism of moral belief and the inability of individuals to agree as to which settled dispositions should be considered "virtuous." Moreover, with the focus turned to individual

242. *Id.* at 117.

243. *Id.* at 166.

244. *Id.* at 156.

245. *Id.* at 167.

246. HENRY SIDGWICK, *OUTLINES OF THE HISTORY OF ETHICS FOR ENGLISH READERS* 153-54 (1949).

247. *Id.* at 157.

248. MACINTYRE, *supra* note 236, at 156. This transformation is more fully explored *infra* at notes 250-62 and accompanying text.

249. MACINTYRE, *supra* note 236, at 94 (emphasis in original).

autonomy, not surprisingly the focus of morality turned to action rather than disposition.

5. The Breakdown of Social Stratification

The period of time between 1660 and the creation of the American republic saw a dramatic change in the nature of English and American societies: the transition from monarchy to democracy.²⁵⁰ This transition completely changed the relationships of individuals to each other and to the state.

The Restoration of the Stuarts in 1660 was a restoration of the monarchy in England. In addition, it was an extension of the traditional social hierarchy.²⁵¹ English monarchical society was rigidly hierarchical.²⁵² There were no modern conceptions of the separation between society and state, or public and private.²⁵³ The divine right of kings established a direct link from God to the king.²⁵⁴ The king was the head of the state, the church, and the society, and all owed allegiance to the king.²⁵⁵ As David Hume wrote, monarchy was “a long train of dependence from the prince to the peasant.”²⁵⁶ Inherent within hierarchy is inequality.²⁵⁷

As has already been discussed, one of the consequences of the Reformation was that the need for an intermediary between the individual and God was challenged. After the Reformation, individuals were free to make

250. Contrary to popular belief, the breakdown in social hierarchy took place primarily without industrialization, particularly in America. WOOD, *supra* note 52, at 7.

251. TREVELYAN, *supra* note 175, at 332-33.

252. See DAVIES, *supra* note 174, at 264-72 (discussing the hierarchy of royalty, nobility, country gentry, landlords, and tenants that existed in England prior to the restoration of Charles II). Davies explains how the concept of “paternal rule” was commonplace and founded on dependence of tenants. *Id.* at 266. See 1 BLACKSTONE, *supra* note 16, at *396-407. Blackstone details the division of the society into nobility and commonality. *Id.* at 396. He further graphically represents this division with a “Table of Precedence,” which goes from the king’s children to laborers. *Id.* at 405-06.

253. WOOD, *supra* note 52, at 81.

254. ROSS HARRISON, HOBBS, LOCKE, AND CONFUSION’S MASTERPIECE: AN EXAMINATION OF SEVENTEENTH-CENTURY POLITICAL PHILOSOPHY 2-4 (2003). Harrison cites to speeches of James I from 1610, in which he stated that “Kings are justly called gods, for that they exercise a manner or resemblance of divine power upon earth.” *Id.* at 2. Blackstone disputed that there was a divine right of kings. He felt that the rights of the kings were inherited. See 1 BLACKSTONE, *supra* note 16, at *191.

255. 1 BLACKSTONE, *supra* note 16, at *366-67. “Allegiance is the tie, or ligament, which binds the subject to the king, in return for that protection which the king affords the subject” *Id.* See also WOOD, *supra* note 52, at 11-12 (discussing that the king was the head of the nation and that to be a subject was to be “personally subordinated to a paternal dominion”).

256. David Hume, *The Rise and Progress of the Arts and Sciences*, in DAVID HUME’S POLITICAL ESSAYS 120 (Charles W. Hendel ed. 1953).

257. WOOD, *supra* note 52, at 19.

their own relationship to God. This not only affected the role of the church in society, it also affected the position of the monarchy. The impact on the monarchy was furthered by those same efforts which gave birth to liberalism, namely the recognition of religious toleration, freedom of conscience, freedom of speech, and the separation of church and state.²⁵⁸

Among the monarchies of Europe, the English possessed by far the most republican constitution Already by the beginning of the [eighteenth] century the English monarchy had lost much of its sacred aura. The man-made dynastic alterations of 1688 and 1714 and the rationalizing of religion inevitably weakened the sense of hereditary mystique, and the restrictions Parliament placed on the crown's prerogatives and finances diminished the king's ability to act independently.²⁵⁹

The gradual replacement of monarchy with republicanism:

challenged the primary assumptions and practices of monarchy – its hierarchy, its inequality, its devotion to kinship, its patriarchy, its patronage, and its dependency. It offered new conceptions of the individual, the family, the state, and the individual's relationship to the family, the state, and other individuals. Indeed, republicanism offered nothing less than new ways of organizing society. It defied and dissolved the older monarchical connections and presented people with alternative kinds of attachments, new sorts of social relationships. It transformed monarchical culture and prepared the way for the revolutionary upheavals at the end of the eighteenth century.²⁶⁰

This transition from hierarchy to a more egalitarian society was most dramatic in America. Colonial society was largely hierarchical.²⁶¹ During the American Revolution, republican ideals had permeated American society and the Revolution contributed to the replacement of hierarchy with egalitarianism, inherited status with ability, and stratification with an ideal of upward mobility and individual self-fulfillment.²⁶²

D. *Manifestations of These Intellectual Developments within the Rule*

The birth of liberalism, the Enlightenment, the rise of modern science, the rejection of virtue ethics, and the breakdown of social stratification all occurred during the hundred years from 1660 to 1776. In light of this history, it is not surprising that this same time period witnessed dramatic shifts in the nature of criminal trials, changed conceptions about the role of juries, and the establishment of the character evidence rule. Although a discussion of these

258. See *supra* text accompanying notes 171-92.

259. WOOD, *supra* note 52, at 98.

260. *Id.* at 96-97.

261. Lerner, *supra* note 51, at 127 (discussing the particular impact of this hierarchical structure on women and their resulting position of inferiority and subordination).

262. *Id.*

broader social and intellectual changes is missing from the cases establishing the character evidence rule, it is possible to observe aspects of all five of the major developments in the rule itself, particularly as the rule is established in America.

The philosophies of the Enlightenment played a significant role in the creation of the American republic and informed much of the ideology surrounding the American Revolution.²⁶³ The character evidence rule embodies Enlightenment philosophy's emphasis on objective truth and its corresponding rejection of a person's private character as an important aspect of legal decision-making.²⁶⁴ The scientific movement's emphasis on observable action²⁶⁵ and the Reformation's emphasis on the ability of the individual to independently determine the significance of an action²⁶⁶ are also reflected in the rule. Finally, the character evidence rule reflects important concepts of liberalism.

Manifestations of Enlightenment thought can be found throughout the political and intellectual history of Europe and the United States. Those ideals, however, found particularly fertile soil in the United States. Indeed, Enlightenment ideas fostered significant aspects of the American Revolution.²⁶⁷ For example, the rejection of the importance of private character as evidenced by social position and social stratification was central to the American Revolution and the radical nature of the American experiment.²⁶⁸ At the same time, the Enlightenment emphasized scientific observation of the objective world.²⁶⁹ Here are the early seeds of the emerging conception of a separation between public action and private character.

Significantly, these concepts found their way into the American jury trial and were important in transforming the trial from an exploration of the character of the parties to an objective search for the truth regarding the parties' actions.²⁷⁰ In fact, it was the legal system's adoption of the Enlightenment's focus on the objective that led to the modern conception of a trial.²⁷¹ Prior to the Enlightenment, jury trials consisted primarily of the

263. COLIN BONWICK, *THE AMERICAN REVOLUTION* 51-52 (1991).

264. Leonard, *supra* note 141, at 1194-96.

265. Cammack, *supra* note 205, at 412-13.

266. See SIDGWICK, *supra* note 246, at 154.

267. BONWICK, *supra* note 263, at 51-52.

268. WOOD, *supra* note 52, at 3-8.

269. Cammack, *supra* note 205, at 411-12.

270. Leonard, *supra* note 141, at 1194-96.

271. See *id.* at 1195-96.

It was the embrace of the Enlightenment idea that the private and public lives of people should be separated, and that in their public existence, people should be judged not according to who they are but by their deeds The increasingly anonymous and complex social and economic lives of the growing urban classes therefore mandated a different conception of personal responsibility. Because the absence of information made

production of witnesses to swear to the character of the parties. The trial was not about the facts of the dispute; rather, it focused on demonstration of good character of the parties.²⁷² The pre-Reformation conception of trials was, of course, consistent with pre-Reformation virtue ethics.

The modern trial mimics several of the Enlightenment's central tenets. First, the trial can be seen as a rational search for the truth based upon the observation of objective facts.²⁷³ In addition, the trial reflects an Enlightenment optimism in the ability of the jury to achieve that truth.²⁷⁴ The significant aspect of this is that certain types of proof were deemed appropriate for sound and just decision-making, and others were not.²⁷⁵ Thus, the rules of evidence developed to protect the process of the trial from being subverted by inappropriate methods of proof.²⁷⁶ The preclusion of hearsay and methods of authentication of documents are two such examples. The trial, as guided by the developing rules of evidence, sought to focus on the objective truth discernible through "scientific" methods.²⁷⁷

The ban on character evidence, with its corresponding shift from the subjective to the objective, was one of the most significant rules of evidence in the development of the modern, "enlightened" trial.²⁷⁸ Precluding the very evidence that formed the basis of verdicts prior to the Enlightenment reflects the impact of the rejection of virtue ethics and the completeness of the adoption of these ideas in the common law, both British and American.

It is not surprising that during this period, juries underwent a profound change. Prior to the 1660s, jurors could be required to return verdicts for the Crown.²⁷⁹ In fact, the Star Chamber was often used to prosecute and punish jurors who failed to return verdicts favorable to the Crown.²⁸⁰ Because the

it no longer possible for people to judge each other by their inner moral characters, proof had to be made by resort to external signs.

Id. at 1196. See also Cammack, *supra* note 205, at 410-15.

272. Leonard, *supra* note 141, at 1194.

273. Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 129 (1996).

274. See WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURES IN AMERICAN DEMOCRACY 131-32 (2002) (quoting Enlightenment philosopher David Hume that the jury is "an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice, that was ever devised by the wit of man").

275. Hunter, *supra* note 273, at 129.

276. *Id.* "[T]he rules of evidence clearly embody Enlightenment epistemology. They privilege fact over value, reason over emotion, presence over absence, physical over psychological, perception over intuition." *Id.* For a general discussion of the development of the rules of evidence, see LANGBEIN, *supra* note 156, at 178-251.

277. Leonard, *supra* note 141, at 1195.

278. *Id.* See also 1 WIGMORE, *supra* note 128, § 194, at 415-16.

279. CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 22 (1998).

280. *Id.* at 21.

Crown was the agent of God, the juror simply followed the word of God, in a similar fashion to the way that knowledge in general was conveyed and understood. After the Reformation and the rise of modern science and secular knowledge, individuals no longer needed intermediaries to understand or interpret information. Individuals were able to use their own experience and intelligence to determine their relationship to God, to the world, and to knowledge. Not surprisingly, these changes were reflected in the way juries functioned. In 1670, the courts officially recognized the right of jurors to act independently and to use their own judgment and intelligence in reaching a verdict.²⁸¹ In *Bushell's Case*, the court eloquently expressed the extent to which the impact of the Reformation and the scientific movement had influenced jury trials:

To what end must [jurors] undergo the heavy punishment of the villainous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge? A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning.²⁸²

At the same time that jurors were free to act with independent judgment, the character evidence rule developed to keep a particular type of evidence from jurors. While at first glance contradictory, this development is consistent with the liberal principles being developed during the end of the seventeenth and the beginning of the eighteenth centuries.

Liberalism, particularly in America, came to be synonymous with personal autonomy and procedural fairness.²⁸³ Personal autonomy is consistent with the concept of individual freedom in the exercise of rights guaranteed to the individual by the state.²⁸⁴ It is possible to view personal autonomy as a private realm shielded from intrusion by the state within which the individual is free to make choices about how to live. Procedural fairness, on the other hand, is more focused on the interaction of the individual with the state; in other words, with the public actions of the individual in relation to the shared rules of cooperation enforced by the state.²⁸⁵ Liberalism's concern with both personal autonomy and procedural fairness can also be expressed as the creation of a public-private dichotomy.²⁸⁶

281. *Bushell's Case*, 6 Howell's State Trials 999 (1670). For an account of *Bushell's Case* and the growth of juror independence, see DWYER, *supra* note 274, at 43-59.

282. *Bushell's Case*, 6 Howell's State Trials at 1012.

283. Goldfarb, *supra* note 67, at 34-35.

284. *Id.* at 34.

285. McClain, *supra* note 189, at 1205.

286. While the concept of privacy implicit in such a public-private dichotomy did not fully develop until later in the nineteenth century, it is possible to see the seeds of this public-private dichotomy even at the birth of liberalism. For this reason, I have elected to articulate the division

With regard to procedural fairness, the resolution of public disputes is of primary concern.²⁸⁷ A public dispute is one involving the individual and the government or a breach of the social order. The resolution of public disputes is critical to regulating interactions between individuals and in preserving the realms of personal autonomy. It is due to the unique nature of American liberal society that nearly all disputes of public importance are resolved in court, usually by means of a trial. The trial is one of the main vehicles by which liberalism is manifest in the legal arena; it is the means by which American society determines *mens rea* and the objective failure to live up to the requirements of social cooperation. Consistent with the definition of liberalism discussed above, the trial must not advance a particular conception of the good; rather, the trial must be a forum for formal decision-making regulated by rules that ensure the neutrality of the forum in its determination of the facts.

To ensure the neutrality of the forum, the rules must preserve two separate aspects of neutrality. First, the rules must protect the procedural neutrality of the forum by eliminating improper advantage based on influence, status, or standing. Second, the rules must ensure the evidentiary neutrality of the forum. This second aspect is primarily achieved through the exercise of the rules of evidence that regulate the types of evidence deemed appropriate for substantive decision making. The rules of evidence, therefore, are essential to the public aspect of liberalism: they regulate a formal and reasonable decision making process which seeks, so far as possible, a substantively just result.

As a subset of the evidence rules, the character evidence rule advances the liberal conception of procedural fairness through the preservation of evidentiary neutrality. However, it also embodies an additional component of liberalism. The rule mimics the public-private dichotomy inherent in

at this point as a public-private dichotomy. In addition, it is important to recognize that the public-private dichotomy inherent in liberalism is related to, but distinct from, the public-private dichotomy discussed earlier in connection with the legal system's reflection of the societal privacy discourse in the mid-nineteenth century. See *supra* notes 47-59 and accompanying text. Liberalism distinguishes between spheres of public concern – our actions that affect others – and spheres of private action – those actions over which we should have autonomous control and in which our liberty is guaranteed. In the privacy discourse, the private sphere is more limited than that in liberalism generally. In the privacy discourse, the private sphere relates to that portion of our autonomy specifically connected to family life. It is important to keep these concepts clear, therefore, I have attempted to be specific with regard to the context in which the term “public-private dichotomy” has been used. At the same time, because domestic violence overlaps both concepts of privacy, it is useful to make the connection between liberalism's public-private dichotomy and the privacy discourse's public-private dichotomy.

287. See MACINTYRE, *supra* note 236, at 157. “Disputes between men have no impartial arbiter to decide them, and every dispute will therefore tend toward a state of war between the parties. All these considerations make desirable the handing over of authority to a civil power in who trust can be reposed.” *Id.*

liberalism; it reflects the liberal belief that what is done in the private realm of personal autonomy is not relevant to the public sphere. The rule not only regulates formal decision-making, it reinforces the essence of liberalism: freedom of individual choice to be the sort of person one wants to be, limited by the objective terms of cooperation.

The notion that people should be judged by their public actions and not their private character is quintessentially American, quintessentially Enlightenment, and quintessentially American liberalism:

The trial can and should be a model for formal decision making. The types of evidence we find acceptable in that setting should represent our highest, not our lowest, instincts about how we ought to behave. If we believe that we should avoid making decisions based on character, then the trial process should reinforce that belief through regulation of character evidence.²⁸⁸

The trial reflects liberalism's belief that a fair set of procedures will result in a fair determination: justice. Excluding character evidence reflects the notion that character evidence will pervert the procedures in the trial. It also reflects a belief that the private realm is not relevant to the resolution of public disputes. Under this theory, the character evidence rule is critical to creating and preserving a fair procedure for formal decision making.

E. A New Rule Is Consistent with Intellectual Foundations of Rule

In the domestic violence context, the character evidence rule, however, violates its intellectual foundations, and therefore, the rule's legitimate purposes. The rule rejects Enlightenment and scientific principles and violates the essence of liberalism by advancing a particular conception of the good. An examination of these violations compels a new rule true to the principles underlying the original rule.

1. Traditional Policy Arguments Are Unpersuasive

The traditional policy arguments in favor of the character evidence rule are not persuasive in the context of a modern domestic violence trial.²⁸⁹ The

288. Leonard, *supra* note 141, at 1192-93.

289. It is interesting to compare the domestic violence context with the sexual assault context. Congress rejected the traditional policy arguments when it enacted rules admitting prior misconduct in sexual assault and child molestation cases. See FED. R. EVID. 413-15. There is much scholarly work which supports the rejection of the traditional policy arguments in the sexual assault and child molestation contexts. See, e.g., David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994) (rejecting unfair surprise); De Sanctis, *supra* note 8, at 387 (rejecting confusion of the issues); Fingar, *supra* note 141, at 537-38 (rejecting undue prejudice); Karp, *supra* note 141, at 21-22. In addition, several scholars also argue that the federal rules admitting character evidence in sexual assault and child molestation cases have procedural benefits. See *id.* at 21. See also De Sanctis, *supra* note 8, at 393 (asserting that the bright line rules presented by FED. R. EVID. 413-14 save preparation time

concern over *unfair surprise* has largely been addressed by procedural rules requiring notice of the charges and pre-trial recitation of all prior bad act evidence.²⁹⁰ The claim that a person will have to defend against his whole life is exaggerated. The defendant is aware of his past and aware that the only relevant portion of his past is that which relates to violence against women. Because the prosecution is limited in its knowledge of the defendant's private life, its main source of information comes from prior police reports and from the victim. Prior police reports are readily accessible to both the prosecution and the defense. The victim is generally subjected to a grueling interview with the defense prior to trial, during which the defense is free to investigate prior instances of violence of which the victim knows. In addition, the prosecution is under a continuing duty to provide pre-trial discovery and therefore must inform the defense of any acts of misconduct which the prosecution intends to present.²⁹¹ Finally, the question of whether a prior bad act is admissible can be established pre-trial. The concept of unfair surprise does not exist in the typical domestic violence trial today.

The concerns over *undue prejudice* and *confusion of the issues* are also largely addressed by the availability of pre-trial determinations and the interaction of FRE 404 and FRE 403.²⁹² Prior to any character evidence getting before a jury, the judge has to determine that the probative value of the evidence substantially outweighs the prejudice to the defendant. During the pre-trial hearing, all of the character evidence is discussed, and the parties argue its relevance, prejudicial nature, and probative value. In addition, restrictions on the evidence that will be admitted are fully argued and established long before the jury sees or hears the evidence.

While a pre-trial hearing and a judicial determination go a long way to undermining the assertion of undue prejudice and confusion of the issues, there is no question that juries may misuse evidence. There is also no question that a jury feels more comfortable and confident in its decision of guilt when they are aware of a past history of violence. Of course, the converse is also true.

by attorneys for both the prosecution and the defense, as well as saving judges countless hours in determining whether prior acts meet sufficient tests to allow admission under exceptions to the common law character evidence rule); Fingar, *supra* note 141, at 542. It can be argued that the rationale for a rule change in the domestic violence context is even greater than in the sexual assault context because of the repetitive nature of domestic violence within a single relationship.

290. FED. R. EVID. 404(b) (requiring "reasonable notice in advance of trial"); FED. R. CRIM. P. 12(b)(3)(c) (requiring pre-trial motion to suppress evidence); FED. R. CRIM. P. 26.2 (requiring production of witness statements for pre-trial motion to suppress). In addition, this concern has been rejected in the sexual assault context. *See supra* note 289.

291. FED. R. CRIM. P. 16(c) (prosecution's continuing duty to disclose).

292. FED. R. EVID. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Without a past history, juries are apt to discount the allegations and consider the victim not credible. Without a past history, juries will only see the bad acts of the victim in isolation. Given this fact, it seems disingenuous to act as if the trial is not about character. What the trial is not about is the character of the defendant.²⁹³

2. The Current Rule Never Contemplated Domestic Violence

As detailed above, the character evidence ban was well established in the American common law before the American Revolution. Domestic violence has been expressly or tacitly sanctioned since the formation of the United States. The character evidence rule, therefore, was established at a time when the legal position of women was subordinate to men, and it was legal for a husband to beat his wife.

Overlapping the history of the character evidence rule with the history of domestic violence highlights several significant issues and calls into question the continued validity of the character evidence rule in the domestic violence context. The character evidence rule developed to deal with specific sets of problems relating to character and the effort to achieve fair trials and just verdicts. Because domestic violence was not a crime, the unique issues surrounding domestic violence were not considered in the set of problems that the character evidence rule was developed to address.²⁹⁴ The character evidence rule should, therefore, reflect changed understandings.²⁹⁵

3. The Current Rule Violates Liberal Theory

The character evidence rule embodies liberalism's concern with the preservation of personal autonomy and the neutrality of formal decision-making. In the domestic violence context, however, the character evidence ban subverts its liberal principles and distorts the neutral process into one that advances a particular conception of the good or comprehensive doctrine.²⁹⁶

293. Alaska, Colorado, Minnesota, and California have adopted evidence rules which admit prior acts of domestic violence in the current prosecution. See ALASKA R. EVID. 404(b)(4) (2001); COLO. REV. STAT. ANN. § 18-6-801.5(2) (2000); MINN. STAT. ANN. § 634.20 (2001); and CAL. EVID. CODE § 1109(a)(1) (1999). As with the changes in the federal sexual assault arena, no scholarly work identifies great injustices that have resulted from these changes.

294. Seymore, *supra* note 23, at 1035.

295. In light of the history of domestic violence, commentators' reliance on the longevity of the character evidence rule as support for the rule's continued existence is questionable. See generally Leonard *supra* note 141.

296. I borrow the term "comprehensive doctrine" from John Rawls. Rawls defines a doctrine as "comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole." RAWLS, *supra* note 187, at 13, 175.

In a non-domestic violence case, the character evidence rule can be supported by arguments not derived from a comprehensive doctrine. The rule applies equally to all and advances the belief that character evidence is not relevant to a determination of our public actions.²⁹⁷ When accused of a crime, being judged by our actions and not by our character does not seem to foster a particular conception of the good or a religious viewpoint.²⁹⁸ Rather, the rule assists in the discovery of truth by preserving a fair and neutral dispute resolution forum, primarily through the regulation of evidence deemed to be prejudicial to the issues. In the non-domestic violence context, the character evidence rule furthers its liberal principles.

In the specific context of domestic violence, however, the arguments in favor of the rule are made from a comprehensive doctrine that promotes the subordinate position of women. This violates a central tenet of liberalism that the state cannot encourage a comprehensive doctrine or a particular conception of the good. The character evidence rule profoundly disadvantages women. Women comprise the overwhelming majority of domestic violence victims.²⁹⁹ For these women, the rule prevents discussion of their realities and allows male defendants to hide behind half-truths of good character. Male defendants are allowed to define the relationship and – through the character evidence rule – are permitted to employ and profit from societal stereotypes about women in general and domestic violence victims in particular. This distorts the trial and subverts liberalism's goal of preserving evidentiary neutrality.

The character evidence rule also plays a significant role in preserving the private sphere which perpetuates the subordinate legal and cultural status of women. As discussed earlier, the private sphere has been primary in perpetuating male domestic violence against women. This is state sanctioned violation of women's personal autonomy. Whether supported by secular or religious beliefs, the comprehensive doctrine of patriarchy underlies the character evidence rule.³⁰⁰

When the rule was originally adopted, the subordinate status of women meant that the underpinnings of the rule were ones that a person could

297. According to Rawls, justice can only be achieved when state policies – i.e. judicial decisions – are not based on a comprehensive religious or philosophical doctrines. *Id.* at 223.

298. It is interesting to note that Leonard, *supra* note 141, makes several arguments for the continued existence of the character evidence rules, in the general context, expressly relying on comprehensive doctrines. He states that the rule embodies the Jewish principle of *loshan hora* (literally, evil tongue). *Id.* at 1188, 1190-91. Later, Leonard discusses the Protestant basis for the rule. *Id.* at 1196-99. These arguments would violate liberalism's prohibition against comprehensive doctrines.

299. Rice, *supra* note 4, at 939-40.

300. For a general discussion of patriarchy and liberalism, see Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 389-92 (2003); Schneider, *Equal Rights*, *supra* note 2, at 628. For a general discussion of patriarchy and its historical roots, see GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986).

reasonably expect others to embrace.³⁰¹ That is no longer the case. It is inconceivable that a person could reasonably expect others to embrace a rule that treats women as subordinate, that hides the true nature of domestic violence, that so disproportionately advantages men, that perpetuates violence against women, and that allows juries to base their decisions on biases, falsehoods, and stereotypes. It is not reasonable to assume that others would accept these arguments in favor of the continued existence of the character evidence rules in the domestic violence context.³⁰²

4. The Current Rule Violates Enlightenment and Scientific Principles

In the domestic violence context, the current rule violates the principles of the Enlightenment and the scientific movement. As discussed above, the Enlightenment and the scientific movement constituted rejections of virtue ethics and religious superstition. Rather than focusing on the character of individuals as birthrights and authorized epistemologies, the Enlightenment and the scientific movement emphasized individual reason and freedom of conscience: individuals can employ their own reason to discern the objective truth about an action.³⁰³

The character evidence rule represents an acceptance of the Enlightenment insight that a person's private character is irrelevant in assessing a person's public actions. This public-private dichotomy was critical to the establishment of the modern jury trial and American rejection of a status-based society. Many people would view these developments as significant advances in the history of humanity, especially as they paved the way for democratic governance with all the accompanying principles of liberalism: liberty; equality; privacy; and freedom of religion, thought, and speech.³⁰⁴ These changes reflected the Enlightenment belief in the essential goodness of persons and of the need for increased equality between persons.

The character evidence rule also reflects an acceptance of objective evidence of actions. It incorporates a fundamental insight of the scientific movement that the meaning of an action is contingent upon understanding the context surrounding the action. Observation, experience, and experiment are all geared toward placing an action in context. After the rise of modern science and the Enlightenment, an individual did not need to rely on a higher power to determine the importance of an action.

301. See RAWLS, *supra* note 187, at 243. Rawls defines a legitimate governmental policy as one that "all might reasonably be expected to endorse." *Id.*

302. *Id.* at 226. "There is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as that person's, or that association's, comprehensive doctrine directs. When equally represented, no citizen could grant to another person or association that political power." *Id.*

303. Jackson & Doran, *supra* note 226, at 172.

304. Goldfarb, *supra* note 67, at 39.

In the non-domestic violence context, the character evidence rule's extension of the public-private dichotomy furthers greater equality and egalitarianism. The rule reduces aspects of social status or advantage from influencing the jury's determination. The rule advances the notion that all are equal regardless of birth or social status. It also furthers scientific principles in that the rule removes from the jury's consideration evidence not connected to the act or its context. In this way, the character evidence rule advances its underlying principles.

In the domestic violence context, however, the rule violates its underlying principles and fails to serve its objective evidence role. First, the character evidence rule systematically misrepresents the equal importance of the interests of one group (women) over another (men). Rather than advancing Enlightenment principles of egalitarianism, the rule perpetuates the subordinate position of women. The character evidence rule perpetuates the public-private dichotomy, preserves a private realm of violence against women, and shields that private violence from public scrutiny. In the domestic violence context, therefore, the character evidence rule works to perpetuate greater subjugation rather than less.

Second, the character evidence rule isolates an act of domestic violence from the context of the violent relationship. This is contrary to current understanding of battering relationships as a pattern of behavior and not a series of isolated incidents. As discussed earlier, viewing an act separated from its context changes the meaning of the act for both the victim and the jury. Denying a juror's ability to place the violent act into its proper and full context prevents the juror from employing the scientific principles that formed the character evidence rule. Essentially, the juror is prevented from using her own reason and experience to make an objective assessment of the defendant's action. The use of the character evidence rule, therefore, violates this understanding of the scientific movement.

The character evidence rule runs counter to a second aspect of the underlying scientific principles that helped to form the rule: discovery builds bridges to further discovery. In the past fifty years, much has been discovered about psychology and behavioral traits which pertain to batterers.³⁰⁵ The

305. See Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 533 (1991).

"[T]he view that character evidence in general is not probative of conduct can no longer draw support from the psychology materials. Where the prior behavior or a character trait is described with sufficient particularity and where it occurred in an analogous context, it may be highly probative of the conduct in question. At the same time, the psychological literature does not indicate that character evidence is unduly prejudicial. Although misuse of character evidence admitted for limited purposes is probably inevitable, the notion that jurors overvalue the probativeness of character or make errors because of their inability to

character evidence rule bars the use of this evidence in the domestic violence context, preventing the jury from benefiting from these scientific advancements.

It is important to recognize that the rejection of the character evidence rule in the domestic violence context does not equate with a return to a focus on character. The defendant's prior acts of domestic violence are not character, they are context. Consistent with modern conceptions of battering relationships, the prior acts are simply part of the pattern, not isolated incidents. The jury will have to assess the entire pattern, not simply the isolated charged incident. The function of the jury will still be the assessment of objective actions. The focus of the trial remains on the objective actions of the defendant, not on whether the defendant is a good person or a bad person. Jurors have the ability to determine objective actions even when confronted with evidence of prior misconduct. As has been discussed, juries have historically been presented with evidence of the domestic violence victim's "character." The addition of admission of prior acts of the defendant may add to the jury's task but not substantially alter it.

IV. CONCLUSION

The legal system should be wary of changes to established principles that have stood the test of time. The character evidence rule has existed for centuries, and the general purpose of the rule remains valid. A call to alter the character evidence rule should be cautiously and carefully considered.

In general, the character evidence rule promotes neutral dispute resolution, encourages greater egalitarianism, rejects the importance of social status, and fosters adherence to scientific principles. In the domestic violence context, however, the rule fails to achieve these aspirations. Rather, the rule violates important aspects of its intellectual foundation: liberalism, the Enlightenment, and the scientific movement. In the domestic violence context, the character evidence rule subjugates women, promotes societal stereotypes of women, perpetuates domestic violence against women, and sanctions that same violence. Until the character evidence rule is changed in domestic violence prosecutions, the law will continue to tacitly condone domestic violence.

make accurate assessments of character gains little reinforcement from contemporary work in the social sciences."

Id.

NOTES

