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Character Evidence - Footprints in the Civil Snow

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CHARACTER EVIDENCE — FOOTPRINTS IN THE CIVIL SNOW

I. INTRODUCTION

Rule 404(a) of the North Dakota Rules of Evidence[1] exemplifies the traditional prohibition against introducing

1. *See* N.D.R. EVID. 404(a). Rule 404(a) provides:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion,

character evidence to prove that a party acted in conformity with his character on a specified occasion.[2] The subsections to rule 404(a) list three broad exceptions to the general rule.[3] In particular instances, the subsection authorizes the introduction of evidence to prove the character of the accused, the character of the victim, and the character of a witness.[4] The courts that follow the traditional position apply the exceptions to rule 404(a) only in criminal cases.[5] The courts adopting the traditional position absolutely prohibit character evidence in civil trials, but allow a criminal defendant to freely introduce evidence of his character.[6] However, a currently developing body of law permits character evidence in particular civil cases.[7]

A survey of North Dakota Supreme Court cases reveals that the court has not yet subscribed to either the traditional or minority position. This Note urges the North Dakota Supreme Court to adopt the minority rule and allow the admission of character evidence in civil trials.

This Note analyzes the foundations of the developing law that allows the introduction of character evidence in civil cases. Section II explores the traditional rationale for prohibiting character evidence in civil cases. Section II also analyzes the circumstances in which the traditional rule permits the use of character evidence to show a party's propensity to act in a certain manner. Section III examines the two theories underlying the minority position, which, in civil trials, allows the introduction of character evidence to demonstrate propensity.

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except:

(1) Character of Accused. Except as otherwise provided by statute, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the 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 victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

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

Id.

2. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[03] (1986) (orthodox position rejects character evidence in a civil case).

3. *See* N.D.R. EVID. 404(a). For the text of rule 404(a), see *supra* note 1.

4. *See* N.D.R. EVID. 404(a). For the text of rule 404(a), see *supra* note 1.

5. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 189 (3d ed. 1984). McCormick notes that "[t]he prevailing pattern now is to exclude all forms of character evidence in civil cases." *Id.*

6. IA J. WIGMORE, EVIDENCE, § 56 (Tillers rev. ed. 1983). Once the accused has offered evidence of his good character to show the improbability that he committed the crime, the prosecution may then rebut by introducing evidence of the accused's bad character. FED. R. EVID. 404(a)(1).

7. C. MCCORMICK, EVIDENCE § 159 (1954). McCormick observes that "[a] growing minority . . . have followed the appealing criminal analogy by permitting the party to introduce evidence of his good reputation for the trait involved in the charge." *Id.*

Three qualifications must be stated at the outset. First, this Note does not deal with the use of character evidence to impeach the credibility of a witness.[8] Second, when a North Dakota statute is modeled after a federal statute, the North Dakota Supreme Court often refers to interpretations of the federal statute to guide its interpretation of the North Dakota statute.[9] Therefore, since rule 404 of the North Dakota Rules of Evidence is not materially different from rule 404 of the Federal Rules of Evidence, this Note will also examine interpretations of the federal rule. Third, this Note does not concern the use of character evidence in negligence actions to demonstrate care or the propensity for accidents.[10] The North Dakota Supreme Court definitively prohibited this latter use of character evidence in *Thornburg v. Perleberg*.[11]

II. THE TRADITIONAL RULE

Character evidence was first allowed as evidence in 1805 in the

8. *See generally* FED. R. EVID. 608. Rule 608, in pertinent part, provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

9. *See, e.g.*, State v. Boushee, 284 N.W.2d 423, 433-34 (N.D. 1979) (looking to federal interpretation of rule 609 of the Federal Rules of Evidence when interpreting the North Dakota version). North Dakota's version of rule 404 differs from the federal rule only in that the North Dakota version adds the phrase "[e]xcept as otherwise provided by statute," to the beginning of the first subsection. *Compare* FED. R. EVID. 404 *with* N.D.R. EVID. 404. Twelve states have adopted rule 404 of the Federal Rules of Evidence verbatim: Arizona (*see* ARIZ. R. EVID. 404); Arkansas (*see* ARK. R. EVID. 404); Colorado (*see* COLO. R. EVID. 404); Delaware (*see* DEL. R. EVID. 404); Hawaii (*see* HAWAII REV. STAT. § 33-626-404 (1984)); Idaho (*see* IDAHO R. EVID. 404); New Mexico (*see* N.M.R. EVID. 404); South Dakota (*see* S.D. CODIFIED LAWS ANN. § 19-12-4 (1969)); Utah (*see* UTAH R. EVID. 404); Vermont (*see* VT. R. EVID. 404); Washington (*see* WASH. R. EVID. 404); Wyoming (*see* WYO. R. EVID. 404).

Fifteen states have adopted rule 404 with minor wording variations that do not significantly change its meaning: Alaska (*see* ALASKA R. EVID. 404); Florida (*see* FLA. STAT. § 90.404 (1985)); Iowa (*see* IOWA R. EVID. 404); Maine (*see* ME. R. EVID. 404); Michigan (*see* MICH. R. EVID. 404); Minnesota (*see* MINN. R. EVID. 404); Montana (*see* MONT. CODE ANN. § 26-404 (1981)); Nebraska (*see* NEB. R. EVID. 404); Nevada (*see* NEV. REV. STAT. § 48-045 (1981)); North Dakota (*see* N.D.R. EVID. 404); Ohio (*see* OHIO R. EVID. 404); Oklahoma (*see* OKLA. STAT. ANN. § 2404 (West 1984)); Oregon (*see* OR. REV. STAT. § 40.170 (1983)); Texas (*see* TEX. R. EVID. 404); Wisconsin (*see* WIS. STAT. ANN. § 904.04 (West 1975)). The remaining twenty-three states have not adopted a rule of evidence similar to federal rule 404.

10. *See* C. MCCORMICK, *supra* note 5, § 189. McCormick has noted "that because a small number of drivers with identifiable characteristics account for the bulk of the accidents, they must drive improperly as a routine matter, and this provides a better than usual basis for inferring that the accident in issue resulted from such negligent driving." *Id.*

11. 158 N.W.2d 188 (N.D. 1968). In *Thornburg* the court held that "evidence of reputation for care or lack of care or of proneness to accident is inadmissible on the issue of negligence." Thornburg v. Perleberge, 158 N.W.2d 188, 191 (N.D. 1968); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[03] (character of peacefulness is more inconsistent with deliberate conduct, such as running down a man, than is carefulness of running one down negligently).

civil case of *Ruan v. Perry*. [12] In *Ruan* a Danish shipowner alleged that an American naval officer fraudulently colluded with the captain of a French ship resulting in the capture of the Dane's merchant ship.[13] The New York Supreme Court allowed the naval officer to rebut the allegation with evidence of his good character.[14] Thirty years later, in *Gough v. St. John*, [15] the same court overruled *Ruan* and held that evidence of the defendant's good character for honesty in business transactions was inadmissible in a case for fraudulent misrepresentation.[16] The decision in *Gough* thus established what has since become the traditional rule: character evidence is allowed in criminal, but not civil trials.[17] Eleven states subscribe to the traditional rule.[18]

A. TENETS OF THE TRADITIONAL RULE

Traditionally, courts have refused to admit character evidence

12. 3 Cai. R. 120 (N.Y. Sup. Ct. 1805), *rev'd*, Gough v. St. John, 16 Wend. 645 (N.Y. Sup. Ct. 1835).

13. Ruan v. Perry, 3 Cai. R. 120, 121 (N.Y. Sup. Ct. 1805), *rev'd*, Gough v. St. John, 16 Wend. 645 (N.Y. Sup. Ct. 1835). In *Ruan* an American naval officer ordered the plaintiff's ship to stop. *Id.* at 121. This resulted in its capture by a French ship. *Id.* Immediately after the capture the American naval officer had supper with the captain of the French ship. *Id.*

14. *See id.* The court in *Ruan* reasoned that since "imputation of gross fraud was attempted to be proved by mere circumstances . . . evidence of general character [was] certainly admissible." *Id.* at 122.

15. 16 Wend. 645 (N.Y. Sup. Ct. 1835).

16. Gough v. St. John, 16 Wend. 645, 653 (N.Y. Sup. Ct. 1835). The court in *Gough* asserted that "[character] evidence is, in general, confined to criminal prosecutions . . . . The case of *Ruan v. Perry* is to the contrary; but that is virtually exploded." *Id.*

17. *Id.*; *see also* C. MCCORMICK, *supra* note 5, § 189. McCormick notes that "[t]he rule against using character evidence solely to prove conduct on a particular occasion has long been applied in civil cases." *Id.*

18. The eleven states that allow the admission of character evidence only in criminal trials are: Alabama (*see* Bill Steber Chevrolet-Oldsmobile v. Morgen, 429 So. 2d 1013, 1014 (Ala. 1983) (evidence that plaintiff read "get rich quick" literature not admissible in action for breach of employment contract)); Arizona (*see* Blankinship v. Duarte, 137 Ariz. 217, ____, 669 P.2d 994, 998 (Ct. App. 1983) (evidence that defendant was peaceful man not admissible in civil assault and battery case)); Connecticut (*see* Bosworth v. Bosworth, 131 Conn. 389, ____, 40 A.2d 186, 187 (1944) (evidence of defendant's cruelty not allowed in divorce case)); Kentucky (*see* Ellis v. Ellis, 612 S.W.2d 747, 748 (Ky. Ct. App. 1980) (defendant not allowed to introduce evidence of good character for truth and fair dealing in intentional trespass case), *cert. denied*, 452 U.S. 940 (1981)); Missouri (*see* Farley v. Johnny Londoff Chevrolet, Inc., 673 S.W.2d 800, 803 (Mo. Ct. App. 1984) (plaintiff not allowed to mention defendant's criminal record during civil trial)); Montana (*see* Lindberg v. Leatham Bros. Inc., 693 P.2d 1234, 1242 (Mont. 1985) (evidence of defendant's chronic tardiness not allowed in wrongful death action)); North Carolina (*see* Holiday v. Cutchin, 311 N.C. 277, ____, 316 S.E.2d 55, 57 (1984) (defendants not allowed to testify they had never been sued)); Oklahoma (*see* Baker v. First Nat'l Bank, 176 Okla. 70, ____, 54 P.2d 355, 358 (1936) (evidence of defendant's reputation for being a law abiding citizen not admissible in action for replevin)); Pennsylvania (*see* Greenberg v. Aetna Ins. Co., 427 Pa. 494, ____, 235 A.2d 582, 584 (1967) (evidence of plaintiff's heroic war record not admissible in insurance claims case in which insurance company claimed plaintiff participated in arson)); Washington (*see* Himango v. Prime Time Broadcasting, Inc., 37 Wash. App. 259, ____, 680 P.2d 432, 437 (Ct. App. 1984) (evidence of plaintiff's extramarital sexual activity not allowed in defamation suit)); Wisconsin (*see* Eisenberg v. Continental Casualty Co., 48 Wis. 2d 637, 647, 180 N.W.2d 726, 731 (1970) (evidence of plaintiff's honest reputation not allowed in fraud case)).

in civil suits based on the rationale that it distracts the jury from the main issue at trial[19] and lacks probative value.[20] The traditional position also relies, in part, on the linguistic argument that the words "prosecution" and "accused" in rule 404(a) refer only to criminal trials.[21]

Proponents of the traditional rule maintain that character evidence shifts the jury's focus away from the issue in the complaint to the quality of the parties' character.[22] This permits a jury to reason that, because the defendant has committed sufficient wrongs in the past, he should be punished, whether or not he committed the current wrong.[23] To preserve the impartial nature of a trial, the trier of fact must resolve the conflict at issue rather than punish or reward a party's character.[24]

The distraction, prejudice, and time consumption that accompany the introduction of character evidence create an administrative inconvenience for courts.[25] Courts tolerate this inconvenience in criminal trials because they must afford the accused every possible chance to defend himself.[26] The possibility that the defendant will lose his liberty ameliorates the inconvenience caused by the use of character evidence.[27] However,

19. 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[03], at 404-20; *see also* FED. R. EVID. 403 (relevant evidence may be excluded if it confuses issues or misleads jury).

20. *See* J. WIGMORE, *supra* note 6, § 64 (character evidence usually of no probative value).

21. *See, e.g.*, Blankinship v. Duarte, 137 Ariz. 217, 669 P.2d 994 (Ct. App. 1983). In *Blankinship* the court reasoned that "[a]s can be seen from the language itself, [rule 404(a)] only applies in criminal cases." *Id.* at ____, 669 P.2d at 998; *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404[03] (rule 404 prohibits character evidence in civil cases because the terms "accused" and "prosecutor" are used). For the text of rule 404(a) of the North Dakota Rules of Evidence, see *supra* note 1.

22. *See* Stow v. Converse, 3 Conn. 325, 345 (1820). In *Stow* the Connecticut Supreme Court held that evidence of a party's honesty was inadmissible to prove the issue of whether he had impartially collected taxes. *See id.* The court was concerned that "[i]nstead of meeting a charge of misconduct by testimony of not having misconducted . . . he who could throng the court with witnesses to establish his reputation in general, would shelter himself from the wrongs he had perpetrated." *Id.* at 345-46.

23. *See, e.g.*, Ellis v. Ellis, 612 S.W.2d 747, 748 (Ky. Ct. App. 1981). In *Ellis* the court held that evidence of the defendant's honesty was inadmissible on the issue of intentional trespass. *Id.* The court maintained that the rule prohibiting character evidence in civil trials derives "from the concept of fundamental fairness and impartiality." *Id.* The court concluded that character evidence transforms "an impartial judicial proceeding into a swearing contest." *Id.*

24. *See* FED. R. EVID. 404, advisory committee note. The advisory committee notes state that admitting character evidence "subtly permits the trier of fact to reward the good man and to punish the bad man." *Id.; see also* Creech v. Creech, 222 N.C. 656, 24 S.E.2d 642 (1943). The court in *Creech* maintained that admitting character evidence in civil cases "might move the jury to follow the principles of poetic justice rather than the rules of law." *Id.* at 664, 24 S.E.2d at 648.

25. *E.g.*, Hancock v. Hullett, 82 So. 522 (Ala. 1919). The court in *Hancock* stated that admitting character evidence in civil trials "would make trials intolerably tedious, and greatly increase the expense and delay of litigation." *Id.* at 524; *see also* C. MCCORMICK, *supra* note 5, § 188 (character evidence causes distraction, prejudice, and delays).

26. *See* Hein v. Holdridge, 78 Minn. 468, 81 N.W. 522 (1900). In *Hein* the court noted that character evidence is permitted in criminal trials because of the serious consequences to the defendant. *Id.* at 472-73, 81 N.W.at 523.

27. *See* Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982). The rule permitting character evidence in criminal trials "allow[s]

proponents of the traditional position do not consider the risk exposure of a civil defendant sufficient to justify the inconveniences associated with the use of character evidence.[28]

A second premise of the traditional rule is that character evidence lacks probative value in civil cases.[29] A person's character consists of the mental characteristics and habitual ethical traits he possesses, such as honesty, impulsiveness or greediness.[30] Proponents of the traditional rule reason that character evidence is only probative in cases involving a moral quality and that only criminal cases contain a sufficient moral component to justify admitting character evidence.[31] Proponents of the traditional rule rely on the assumption that the conduct typically at issue in a criminal case deviates from "normal" behavior more than the conduct typically at issue in a civil case.[32] Assuming a person's mental characteristics control the amount that their behavior deviates from societal norms, character evidence is probative of conduct involved in a criminal case.[33] Conversely, proponents of the traditional rule reason that, in civil cases, in which there is typically a smaller deviation from normal behavior, the probative value of character evidence falls below the threshold of relevancy set by rule 401 of the rules of evidence.[34]

B. EXCEPTIONS TO THE TRADITIONAL RULE

There are two exceptions to the operation of the traditional prohibition. First, evidence of a character trait that constitutes the main issue in a case escapes the prohibition of rule 404.[35] Second, rule 404(b) specifically authorizes the use of character evidence in

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the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the fact-finder just what sort of person he really is." *Id.* at 855.

28. C. MCCORMICK, *supra* note 5, § 192, at 571. Character evidence is not allowed in civil cases because "the consequences of civil judgment are less severe than those flowing from a criminal conviction." *Id.*

29. J. WIGMORE, *supra* note 6, § 64.

30. *See* People v. Coleman, 19 Mich. App. 250, ____, 172 N.W.2d 512, 515 (1969) (character is the complex of mental, moral, and ethical traits marking a person).

31. J. WIGMORE, *supra* note 6, § 64. Wigmore notes that torts involving violence or fraud may contain a moral quality. *Id.* However, the law does not recognize any moral quality present. *Id.* Wigmore makes the following assertion: "[w]here the issue is whether a contract was made or broken, whether money was paid or property improved by mistake, whether goods were illegally converted or a libel published, there is no moral quality in the act alleged . . . ." *Id.*

32. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 142 (1977) (discussing Wigmore's view that character evidence has no probative value).

33. *See id.*

34. *Id.* Rule 401 provides that relevant evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.D.R. EVID. 401.

35. *See* C. MCCORMICK, *supra* note 5, § 187 (when character is put in issue by the pleadings character evidence is admissible).

three particular situations.[36]

1. *Character in Issue*

In some situations, character evidence is necessary to determine the parties' rights and liabilities under the substantive law.[37] "Character in issue" refers to character traits that constitute an element of a claim or defense.[38] For example, the competency of a driver, an issue of character, is the central issue in an action for negligently entrusting a motor vehicle to an incompetent driver.[39] Thus, whether the driver truly possesses the character trait determines the outcome of the case.[40] Under rule 404(a), evidence of character can be admitted if character is in issue.[41] However, even when character is in issue, state court opinions occasionally prohibit the admission of evidence of good character until evidence to the contrary is introduced.[42] This position presumes that character is good in the absence of evidence that it is bad.[43]

2. *Rule 404(b) Exceptions*

Although character evidence is not admissible to show that a

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36. *See* N.D.R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id.

37. J. WEINSTEIN & M. BERGER, *supra* note 2, ¶ 404 [02].

38. FED. R. EVID. 404, advisory committee note. "Character in issue" refers to cases in which "[c]haracter may itself be an element of a crime, claim, or defense." *Id.* Character has been held "in issue" in a variety of situations. *See, e.g.*, Hirst v. Gertzen, 676 F.2d 1252, 1262 (9th Cir. 1982) (failure to supervise employee with dangerous character traits); Smith v. Executive Club, Ltd., 458 A.2d 32, 40 (D.C. App. 1983) (damages for emotional distress in a false arrest claim); Allen v. Toledo, 109 Cal. App. 3d 415, ____, 167 Cal. Rptr. 270, 273 (1980) (allowing unfit person to drive a motor vehicle); Reynolds v. Jobes, 565 S.W.2d 690, 694 (Mo. 1978) (malicious prosecution); Cooper v. Eastern Airlines, Inc., 90 Misc. 2d 52, ____, 393 N.Y.S.2d 306, 308 (1977) (fraud).

39. *Cf.* FED. R. EVID. 404, advisory committee note. An illustration of character in issue is "the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction." *Id.*

40. *See id.*

41. FED. R. EVID. 404, advisory committee note. The advisory committee stated that since there is no problem with the general relevancy of character that is in issue, the prohibition contained in rule 404 should not apply. *See id.*

42. *See, e.g.*, Hepps v. Philadelphia Newspapers, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd. on other grounds*, 106 S. Ct. 1558 (1986). In *Hepps* the court determined that character evidence is inadmissible in civil cases "unless directly in issue, and even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary." *Id.* at ____, 485 A.2d at 379 n.1.

43. *See id.*

person acted in conformity with his character, rule 404(b) provides that character evidence as indicated by prior bad acts is admissible for a limited number of purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[44] Since rule 404(b) contains no language specifically limiting character evidence to criminal cases, the exceptions apply to both criminal and civil cases.[45] Moreover, the words "such as" suggest that rule 404(b) does not limit the admissibility of character evidence to prove only those enumerated issues, but may allow evidence of character for additional purposes.[46]

In *State v. Stevens*[47] the North Dakota Supreme Court discussed the requirements for the admission of character evidence under rule 404(b).[48] The defendant in *Stevens* appealed from his manslaughter conviction for the death of the son of the woman with whom he lived.[49] At trial the prosecution entered evidence under rule 404(b) of the child's nine previous injuries.[50] The prosecution argued that the evidence of previous injuries should be admitted to contradict the defense that the fatal injury was caused accidentally and to prove the identity of the person causing the fatal injury.[51] On appeal the court concluded that the prejudicial effect of the evidence of prior injuries outweighed its probative value and that it

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44. *See* N.D. R. EVID. 404(b). For the text of rule 404(b), see *supra* note 36. The exceptions listed in rule 404(b) are invoked in a variety of situations. *See, e.g.*, Lataille v. Ponte, 754 F.2d 33, 35 (1st Cir. 1985) (evidence that the plaintiff was placed in solitary confinement was not relevant to his knowledge that guards were not harrassing him); Warner v. Transamerica Ins. Co., 739 F.2d 1347, 1350 (8th Cir. 1984) (evidence that plaintiff's house burned prior to time his sporting goods store burned inadmissible to show intent); Kerr v. First Commodities Corp., 735 F.2d 281, 286 (8th Cir. 1984) (prior consent decree concerning unfair trading practices allowed to show absence of mistake and intent to commit fraud); Aetna Casualty & Sur. Co. v. Guynes, 713 F.2d 1187, 1193 (5th Cir. 1983) (insured's wife's alleged involvement in separate insurance fraud inadmissible to show intent to commit arson); Carson v. Polley, 689 F.2d 562, 572 (5th Cir. 1982) (performance evaluation stating arresting officer had hot temper admissible to show intent to harm plaintiff); Doe v. New York City Dept. of Social Services, 649 F.2d 134, 147 (2d Cir. 1981) (foster father's molestation of plaintiff's sister relevant to social worker's knowledge that plaintiff was at risk), *cert. denied*, 464 U.S. 864 (1983); Hammann v. Hartford Accident and Indem. Co., 620 F.2d 588, 589 (6th Cir. 1980) (evidence that farmer previously burned six other buildings was admissible to show intent); Carter v. Hewitt, 617 F.2d 961, 967 (3d Cir. 1980) (letter detailing prisoner's plan to file false complaint not admissible to show plan).

45. *See* N.D.R. EVID. 404(b); Fischer v. Knapp, 332 N.W.2d 76, 85 (N.D. 1983) (rule 404(b) applies to both criminal and civil cases); Ginter v. Northwestern Mut. Life Ins., 576 F. Supp. 627, 630 (E.D. Ky. 1984) (rule 404(b) applies to civil cases); *see also* Dahlen v. Landis, 314 N.W.2d 63 (N.D. 1981) (North Dakota Supreme Court applied rule 404(b) in civil case without discussing its applicability).

46. Uviller, *supra* note 27, at 878.

47. 238 N.W.2d 251 (N.D. 1975).

48. State v. Stevens, 238 N.W.2d 251, 257 (N.D. 1975).

49. *Id.* at 253-54.

50. *Id.* at 257.

51. *Id.*

should not have been admitted at trial.[52] The court stated that "the mere invocation of [a rule 404(b) exception] does not end inquiry . . . . It only begins it."[53] The court in *Stevens* concluded that a stricter showing of relevance is required to invoke the "identity" exception than is required to invoke the other rule 404(b) exceptions.[54] The court also concluded that the current act in issue must be proven before the trier of fact may consider character evidence offered under rule 404(b).[55] This requirement presumably ensures that a party will not use character evidence admitted under rule 404(b) for the impermissible purpose of proving that a person acted in conformity with his character. Because rule 404(b) is a "specialized rule of relevancy,"[56] the court's application of rule 404(b) did not involve mere "pigeonholing" the bad act into permissible categories, but rather involved a discretionary balancing.[57] Specifically, the court noted that the dangers of prejudice must be balanced against the danger of sacrificing too much relevant evidence.[58]

In *Lamar v. Steele*[59] the United States Court of Appeals for the Fifth Circuit concluded that evidence indicating that a prison guard

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52. *Id.* at 258. The court concluded that evidence of prior injuries had too great a tendency to stir the passions of a jury to be admitted into evidence. *Id.* The court also reasoned that the previous injuries, offered to prove the identity of the person causing the death, did not meet the high degree of proof required by the identity exception. *Id.*

53. *Id.* at 257.

54. *Id.* (citing C. MCCORMICK, MCCORMICK ON EVIDENCE § 190 (2d ed. 1972)).

55. *Id.* The court quoted from North Dakota Jury Instruction 1316 concerning evidence offered under rule 404(b): "Evidence of other acts of a like nature cannot be considered for any purpose, unless you first find that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the defendant committed the particular act charged in the Information." *Id.*

56. Fischer v. Knapp, 332 N.W.2d 76, 82-83 (N.D. 1983). In *Fischer* the court advanced the following analysis of rule 404(b):

> Rule 404(b) is a specialized rule of relevancy. Accordingly, as with any determination pursuant to Rule 401, counsel must be prepared to 1) identify the consequential fact to which the proffered evidence of other crimes, wrongs or acts is directed, 2) prove the other crimes, wrongs or acts and 3) articulate precisely the evidential hypothesis by which the consequential fact may be inferred from the proffered evidence. Evidence which passes muster up to this point must, in addition, satisfy the balancing test imposed by Rule 403 which requires the probative value of the other crimes evidence to outweigh the harmful consequences that might flow from its admission.

Id. at 82-83 (quoting State v. Forsland, 326 N.W.2d 688 (N.D. 1983)).

57. *See Stevens*, 238 N.W.2d at 258.

58. *Id.* (quoting C. MCCORMICK, MCCORMICK ON EVIDENCE, § 190 (2d ed. 1972)). In *Stevens* the court stated that the "problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules." *Id.* at 257; *see* N.D.R. EVID. 403. Rule 403 provides: 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. *Id.*

59. 693 F.2d 559 (5th Cir. 1982).

supplied an inmate with a knife and asked him to kill a second inmate was admissible to prove the guard's plan to kill a third inmate in a similar manner.[60] *Lamar* was a civil rights case in which an inmate alleged that he was denied access to the courts because a guard attempted to have him killed if he did not stop filing lawsuits on behalf of the other prisoners.[61] At trial the plaintiff entered testimony that the same guard had attempted to have another prisoner, who was also filing lawsuits, killed.[62] The court reasoned that evidence offered to prove a "plan" must be sufficiently similar to the act at issue to ensure that the same person thought of both actions; the more idiosyncratic the plan and the act, the greater the probative value of the character evidence.[63] The court concluded that evidence of the guard's prior attempt to have a lawsuit filing prisoner killed was admissible under the rule 404(b) "plan" exception because that alleged incident was the mirror image of the current charge.[64]

Thus, character evidence is admissible under the traditional rule if it comprises the central issue in a case, or fits within one of the specific rule 404(b) exceptions.[65] By using these exceptions, a court may admit a small amount of character evidence even under the traditional rule.[66] This limited use of character evidence under the traditional rule causes sufficient problems that some courts are reluctant to expand the admissibility of character evidence.[67]

C. CHARACTER EVIDENCE AND PSYCHOLOGICAL EVALUATION

Proponents of the traditional rule speculate that admitting character evidence in civil cases would cause an undesirable expansion of opinion evidence based on psychological evaluations.[68] Since psychology is the study of mental processes,[69] a

60. Lamar v. Steele, 693 F.2d 559, 561 (5th Cir. 1982).

61. *Id.* at 560-61. The plaintiff was active as a prison "writ writer," an inmate who assists other inmates in preparing petitions for habeas corpus and filing class action suits challenging prison practices and conditions. *Id.*

62. *Id.* at 561.

63. *Id.* The court stated that "the conduct tendered must be sufficiently similar to the act under inquiry to minimize any doubt that the two are products of the same mind." *Id.*

64. *Id.* The court also reasoned that evidence of a guard's prior attempt to have a writ writing prisoner killed was admissible under the notice exception of rule 404(b) because it gave the prisoners notice of the guard's intent to purge all writ writing inmates from the prison. *Id.*

65. *See* FED. R. EVID. 404, advisory committee note; N.D.R. EVID. 404(b).

66. FED. R. EVID. 404, advisory committee note.

67. *See id.* (admissibility of character evidence should not be expanded because it would increase the use of psychiatric testimony).

68. *See id.* Concepts of character extend into the areas of psychiatric evaluation and psychological testing. *Id.*

69. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 574 (23d ed. 1982). Psychology is defined as "the science dealing with the mind and mental processes, especially in relation to human and animal behavior." *Id.*

psychological examination can reveal a great deal about a party's character.[70] However, the advisory committee of the Proposed Rules of Federal Evidence reasoned that the Supreme Court's decision in *Schlagenhauf v. Holder* [71] precluded expanding the role of psychological evaluations.[72]

In *Schlagenhauf* injured bus passengers sought to force the defendant bus driver to submit to a mental and physical examination.[73] The Court held that, due to the intrusive nature of examinations, the mental or physical condition for which an examination is sought must be genuinely in controversy.[74] The Court reversed the examination order because the driver's health was not sufficiently in controversy.[75] The Court concluded that the "in controversy" requirement is not satisfied by mere conclusory allegations in the pleadings nor by mere relevance to the case.[76] This strict "in controversy" requirement apparently renders psychological evaluations unavailable as character evidence to show that a person acted in conformity with his character because such evidence is, by definition, not "in controversy."[77]

The traditional prohibition against the use of character evidence in civil trials rests on the premise that character evidence is not probative and, therefore, not relevant.[78] However, rule

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70. *See* R. SIMONS & H. PARDES, UNDERSTANDING HUMAN BEHAVIOR IN HEATLH AND ILLNESS, 486 (2d ed. 1984). A psychological examination reveals a person's predictable patterns of behavior, his responses to stress and the techniques by which he tries to achieve his potential. *Id.*

71. 379 U.S. 104 (1964).

72. FED. R. EVID. 404, advisory committee note. The committee rejected the admission of character evidence in civil cases because it "would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder . . . ." *Id.*

73. Schlagenhauf v. Holder, 379 U.S. 104, 107 (1964).

74. *Id.* at 118; *see* FED. R. CIV. P. 35(a). Rule 35(a) provides:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Id.

75. *Schlagenhauf*, 379 U.S. at 121.

76. *Id.* at 118. The Court concluded that rule 35 of the Federal Rules of Civil Procedure requires the trial judge to decide whether the party requesting a mental examination "has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause' . . . ." *Id.* at 118-19.

77. *Cf.* FED. R. EVID. 404, advisory committee note. Rule 404 pertains to character evidence used to suggest that a person acted consistently with his character on a specified occasion. *Id.* It does not cover character evidence offered when the character of a party is the central issue in a case. *Id.* Thus, rule 404 does not cover character that is in controversy. *Id.*

78. *Cf.* FED. R. EVID. 404, advisory committee note. The advisory committee reasoned that the rule allowing character evidence in criminal trials is "so deeply imbedded in our jurisprudence as

404(a) of the North Dakota Rules of Evidence provides that character evidence is admissible in some limited situations.[79] These exceptions establish that character evidence is not necessarily irrelevant to the determination of how an individual acted in a given situation.[80] Proponents of the traditional rule alternatively argue that, even if character evidence is relevant, it is too distracting and inconvenient to justify admitting it in civil trials.[81] While courts following the traditional rule arbitrarily prohibit character evidence in all civil cases,[82] courts following the minority position carve out areas of civil law in which character evidence is permitted.

III. THE MINORITY RULE

A. CIVIL CASES INVOLVING CRIMINAL CONDUCT

In *Crumpton v. Confederation Life Insurance Co.*[83] the United States Court of Appeals for the Fifth Circuit reasoned that if character evidence is admissible in a criminal trial, it should also be admissible in a civil trial involving an essentially criminal issue.[84] In *Crumpton* a woman shot and killed the insured as he walked toward her after allegedly raping her one week earlier.[85] The insurance company denied coverage under the insured's life insurance policy.[86] The insurer argued that the insured's death was not accidental because he had committed a violent act and should have known that he would be in danger if he approached the victim again.[87] The life insurance policy beneficiary sought to introduce evidence of the insured's good character to prove that he had not

to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." *Id.*

79. N.D. R. EVID. 404(a)(1)-(3). The subsections to rule 404(a) create broad exceptions to the prohibition of character evidence when the character of the accused, the character of the witness, or the character of the victim is involved. *Id.*

80. Falknor, *Extrinsic Policies Affecting Admissibility,* 10 RUTGERS L. REV. 574, 583 (1956). Professor Falknor states that "the orthodox doctrine . . . making admissible evidence of good character in behalf of the criminal accused and evidence of bad character in behalf of the prosecution in rebuttal, establishes the relevancy — the necessary rational probative 'tendency' — of evidence of this sort." *Id.*

81. *See* FED. R. EVID. 404, advisory committee note.

82. For a list of cases that prohibit character evidence in all civil cases, see *supra* note 18.

83. 672 F.2d 1248 (5th Cir. 1982).

84. Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253 (5th Cir. 1982). The court concluded that the facts in *Crumpton* placed the case "very close to one of a criminal nature." *Id.* The court emphasized that, had it been a criminal case against Crumpton, evidence of his character would have been admissible. *Id.*

85. *Id.* at 1250. In *Crumpton* a woman was allegedly raped and beaten in her home. *Id.* The assailant threatened to kill the woman's children if she told anyone about the rape. *Id.* One week later she took a gun and went out to her garage where the alleged assailant saw her and walked toward her. *Id.* The woman pulled out the gun and shot him without a verbal warning. *Id.*

86. *Id.* at 1250-51.

87. *Id.* at 1251. The insured's insurance policy defined accidental death as "death resulting

committed the rape and had no reason to expect that the alleged victim would shoot him.[88]

The court determined that evidence of the insured's nonviolent character was admissible.[89] The court concluded that the insured's character was placed in issue by the insurance company's argument that he should have anticipated bodily injury because he had committed a violent criminal act.[90] However, the court stated that, even if the character evidence had not fallen within the "character in issue" exception, it still would have been admitted.[91]

The court recognized that the advisory committee of the Proposed Federal Rules of Evidence rejected the use of character evidence in civil proceedings.[92] However, the court reasoned that the committee report was not determinative because the tenor of the case was criminal.[93] Although *Crumpton* was a civil case, it focused on the same elements as a criminal rape trial.[94] The court reasoned that evidence of Crumpton's character would have been admissible in a criminal rape trial under rule 404(a)(1), which allows the accused to enter evidence of his good character.[95] Therefore, the court concluded that evidence of Crumpton's good character was admissible in the civil action.[96] The court added, however, that the proffered character evidence must be "relevant, probative and not unduly prejudicial."[97] The test formulated by the court was used in addition to, not in place of, the normal relevancy requirement of rule 401.[98]

The court in *Crumpton* relied on the case of *Hackbart v. Cincinnati Bengals, Inc.*[99] to support the proposition that character

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from . . . accidental bodily injury visible on the surface of the body or disclosed by an autopsy." *Id.* at 1250.

88. *Id.* at 1251-52. Five witnesses testified that the insured was not violent, did not use profanity, did not make obscene gestures or indecent proposals to women, and did not drink. *Id.* at 1251.

89. *Id.* at 1253.

90. *Id.* at 1252.

91. *Id.* at 1253.

92. *Id.; see* FED. R. EVID. 404, advisory committee note.

93. *Crumpton,* 672 F.2d at 1254 n.7. The court asserted that the case, "while actually civil, in character is akin to a criminal case." *Id.*

94. *Id.* at 1253. The court noted that the "focus of the civil suit . . . was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape." *Id.*

95. *Id.; see* N.D.R. EVID. 404(a)(1). For the text of rule 404(a)(1), see *supra* note 1.

96. *Crumpton,* 672 F.2d at 1253. The court concluded that the district court had committed no abuse of discretion in admitting evidence of Crumpton's good character. *Id.*

97. *Id.* at 1254 n.7; *see* N.D.R. EVID. 403. For the text of rule 403, see *supra* note 58.

98. *See Crumpton,* 672 F.2d at 1254 n.7; N.D.R. EVID. 401. Rule 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

99. 601 F.2d 516 (10th Cir. 1979), *cert. denied,* 444 U.S. 931 (1979).

evidence should be admitted to prove that a person acted in conformity with their character.[100] In *Hackbart* a professional football player was injured by an intentional blow from an opposing player during a football game.[101] At trial the defendant introduced films designed to show that the plaintiff was an exceptionally violent football player.[102] On appeal the United States Court of Appeals for the Tenth Circuit determined that the evidence was irrelevant and should not have been admitted.[103] The court in *Crumpton* noted that the decision in *Hackbart* quoted rule 404 but decided that case on the grounds of general relevancy.[104] Regarding *Hackbart,* the court in *Crumpton* stated, "[w]e interpret the Court's failure to discuss whether [rule 404 of the Federal Rules of Evidence] is applicable to civil suits as impliedly approving its use . . . to [sic] civil suits."[105]

Thus, according to the *Crumpton* decision, the requirements for the admission of character evidence in a civil case are: (1) the evidence is offered in a civil case that is criminal in nature;[106] (2) the evidence passes the relevance test of rule 401;[107] and, (3) the probative value of the character evidence outweighs its prejudicial effects.[108]

Although the *Crumpton* rationale allows the admission of character evidence in civil cases focusing on any type of criminal conduct, several states restrict the admission of character evidence in the civil context to the narrower area of civil assault and battery cases.[109] Twenty-five states have case law that supports the admission of character evidence in civil assault and battery trials.[110]

100. *See Crumpton,* 672 F.2d at 1253 n.6.

101. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 518 (10th Cir. 1979), *cert. denied,* 444 U.S. 931 (1979). After an interception, while the plaintiff was still kneeling on the ground, the defendant stepped forward and struck the plaintiff on the back of the head. *Id.* at 519.

102. *Id.* at 525. In addition to film of the actual accident giving rise to the lawsuit, the defendant introduced films of acts of violence between other players. *Id.*

103. *Id.* at 526.

104. *See Crumpton,* 672 F.2d at 1253 n.6.

105. *Id.*

106. *See id.* at 1254. Civil character evidence should be admitted in civil cases "where the focus is on essentially criminal aspects." *Id.* at n.7.

107. *See id.; see also* N.D.R. EVID. 401. For the pertinent text of rule 401, see *supra* note 98.

108. *See Crumpton,* 672 F.2d at 1254 n.7; *see also* N.D. R. EVID. 403. For the text of rule 403, see *supra* note 58.

109. *See, e.g.,* Feliciano v. City of Honolulu, 62 Haw. 88, 611 P.2d 989 (1980) (evidence of plaintiff's violent character admitted to prove self defense in a civil assault case).

110. Eighteen states allow character evidence in civil assault and battery trials on the issue of whether the defendant acted in self defense: Alabama (*see* Butler v. Hughes, 265 Ala. 532, ____, 88 So. 2d 195, 198 (1956)); Georgia (*see* Swinney v. Wright, 35 Ga. App. 45, ____, 132 S.E. 228, 230 (Ct. App. 1926)); Hawaii (*see* Feliciano v. City of Honolulu, 62 Haw. 88, ____, 611 P.2d 989, 991 (1980)); Iowa (*see* Halley v. Tichenor, 120 Iowa 164, 166, 94 N.W. 472, 473 (1903)); Louisiana (*see* Rodrigue v. Matherne, 416 So. 2d 577, 583 (La. Ct. App. 1982)); Maryland (*see* Bugg v. Brown, 251 Md. 99, ____, 246 A.2d 235, 239-40 (1968)); Massachusetts (*see* Brennan v. Bongiorno, 304 Mass. 476, ____, 23 N.E.2d 1007, 1007 (1939)); Michigan (*see* Culley v. Walkeen, 80 Mich. 443, 446, 45

Two states have adopted evidentiary rules that expressly permit the introduction of character evidence in assault trials.[111]

In civil assault and battery trials, character evidence is admissible in two situations.[112] First, when a defendant pleads self defense in a civil assault case, the defendant may enter evidence of the plaintiff's violent character if that character was known to the defendant at the time of the incident.[113] The defendant's prior knowledge of the plaintiff's violent character demonstrates whether the defendant reasonably apprehended the need to defend himself.[114]

In *Feliciano v. City of Honolulu*[115] two brothers alleged that a police officer assaulted them in their home.[116] At trial the police officer introduced evidence of the brothers' violent reputations.[117] On appeal the court in *Feliciano* concluded that the character evidence was admissible to show that the police officer reasonably believed there was a need to defend himself.[118]

N.W. 368, 369 (1890)); Missouri (*see* Davenport v. Silvey, 265 Mo. 543, 555, 178 S.W. 168, 171 (1915)); Nebraska (*see* Golder v. Lund, 50 Neb. 867, 872, 70 N.W. 379, 381 (1897)); New York (*see* Silliman v. Sampson, 42 App. Div. 623, ____, 59 N.Y.S. 923, 925 (1899)); North Carolina (*see* Strickland v. Jackson, 23 N.C. App. 603, ____, 209 S.E.2d 859, 862 (1974)); Oregon (*see* Brooks v. Bergholm, 256 Or. 1, ____, 470 P.2d 154, 157 (1970)); Rhode Island (*see* Martin v. Estrella, 107 R.I. 247, ____, 266 A.2d 41, 47 (1970)); South Dakota (*see* Christensen v. Holm, 33 S.D. 174, 177, 144 N.W. 919, 920 (1914)); Texas (*see* Hall v. Hayter, ____ Tex. Civ. App. ____, ____, 209 S.W. 436, 437 (1919)); Vermont (*see* Russ v. Good, 90 Vt. 236, ____, 97 A. 987, 988 (1916)); Wisconsin (*see* Lowe v. Ringe, 123 Wis. 107, 114, 101 N.W. 381, 383 (1904)).

Seven states allow character evidence in civil assault and battery trials on the issue of which party was the first aggressor: Arkansas (*see* Bookout v. Hanshaw, 235 Ark. 924, ____, 363 S.W.2d 125, 128 (1962)); Delaware (*see* Dingle v. Hickman, 32 Del. 49, ____, 119 A. 311, 312 (1922)); Florida (*see* Pino v. Koelber, 389 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 1980)); Kansas (*see* Carrick v. McFadden, 216 Kan. 683, 687, 533 P.2d 1249, 1252-53 (1975)); Kentucky (*see* Marshall v. Glover, 190 Ky. 113, ____, 226 S.W. 398, 400 (1920)); Minnesota (*see* Campbell v. Aarstad, 124 Minn. 284, 287, 144 N.W. 956, 957 (1914)); Oklahoma (*see* Oller v. Hicks, 441 P.2d 356, 362-63 (Okla. 1967)).

111. *See* IOWA R. EVID. 404(a)(2)(B). Rule 404(a) of the Iowa Rules of Evidence, in pertinent part, provides: "Evidence of character for violence of the victim of assaultive conduct offered on the issue of self defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same." *Id.; see also* ORE. REV. STAT. § 40.170(2)(d) (1983). Section 40.170 of the Oregon Revised Statutes allows the admissibility of "[e]vidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense." *Id.*

112. For a list of cases admitting character evidence in civil assault and battery trials, see *supra* note 110.

113. *See, e.g.*, Martin v. Estrella, 107 R.I. 247, ____, 266 A.2d 41, 47 (1970) (defendant's knowledge of plaintiff's violent character established by evidence of plaintiff's previous assault of defendant's father).

114. *Cf.* Feliciano v. City of Honolulu, 62 Haw. 88, ____, 611 P.2d 989, 992 (1980) (evidence probative of reasonableness of fear of bodily harm).

115. 62 Haw. 88, 611 P.2d 989 (1980).

116. Feliciano v. City of Honolulu, 62 Haw. 88, ____, 611 P.2d 989, 990-91 (1980). The brothers contended that the police officer maced them and beat them with his flashlight without reason. *Id.*

117. *Id.* The defendant testified that the plaintiffs were "beat characters," characters on the officer's patrol beat that are regularly involved in violence or criminal activity. *Id.*

118. *Id.* at ____, 611 A.2d at 991-92.

Second, character evidence is admissible in civil assault and battery cases when the evidence concerning which party committed the first act of violence conflicts.[119] In this situation, evidence of both parties' predisposition for violence is admissible, regardless of whether the other party previously knew about it.[120] In *Carrick v. McFadden* [121] a trespassing incident turned into a brawl, and both parties charged the other party with starting the incident.[122] The court determined that evidence of the parties' character for violence was admissible to prove which party was the first aggressor.[123] The court concluded that character evidence is admissible in this situation even if the parties were not aware of each other's reputation for violence.[124]

In summary, under the first theory of the minority position, character evidence is admissible in civil cases involving conduct that is essentially criminal in nature.[125] Proponents of this theory reason that it is inconsistent to permit character evidence in a criminal trial but not in a civil trial concerning exactly the same conduct.[126] The following section discusses the second theory of the minority position. This theory authorizes the introduction of character evidence in a civil trial if the evidence fits within the rationale that authorizes the introduction of character evidence in a criminal trial.

B. CIVIL APPLICATIONS OF THE RATIONALE ALLOWING CHARACTER EVIDENCE IN CRIMINAL TRIALS

The second rationale for admitting character evidence in civil trials is premised on the rationale for admitting character evidence in criminal trials.[127] This approach considers the defendant's risk of loss in a civil trial,[128] and also fills the void created when character

119. *See, e.g.*, Carrick v. McFadden, 216 Kan. 683, 687, 533 P.2d 1249, 1253 (1975).

120. *Id.* at 686, 533 P.2d at 1251-52. Evidence of a party's reputation or character for violence is admissible when there is a dispute concerning who was the first aggressor, regardless of "whether the defendant has pleaded self-defense, and even if the defendant did not know of such character or reputation." *Id.* (quoting Annotation, *Admissibility of Evidence of Character or Reputation of Party in Civil Action for Assault*, 154 A.L.R. 121, 134 (1945)).

121. 216 Kan. 683, 533 P.2d 1249 (1975).

122. Carrick v. McFadden, 216 Kan. 683, 684-85, 687, 533 P.2d 1249, 1250-51, 1253 (1975).

123. *Id.* at 687, 533 P.2d at 1253.

124. *Id.*

125. Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1254 (5th Cir. 1982). For a discussion of *Crumpton*, see *supra* notes 83-108 and accompanying text.

126. *See Crumpton*, 672 F.2d at 1254 (court should admit character evidence in civil trial because it would be admitted in a criminal case concerning the same conduct).

127. *See* Hein v. Holdridge, 78 Minn. 468, 472-73, 81 N.W.522, 523 (1900) (character evidence admissible to defend suit for seduction).

128. *See generally* Falknor, *supra* note 80, at 582 (discussing various consequences of loss in a civil trial).

evidence is the only evidence available in a civil trial.[129]

1. *Risk of Civil Loss Equal to Criminal Loss*

The minority rule admits character evidence in civil trials in which the defendant risks losing as much as the accused in a criminal trial.[130] In *Hein v. Holdridge* [131] the plaintiff alleged that the defendant seduced the plaintiff's daughter.[132] The Minnesota Supreme Court concluded that evidence of the defendant's chastity was admissible to counter the seduction charge.[133] The court reasoned that character evidence should be admitted when the same factors justifying its admission in criminal cases are present in a civil case.[134] Courts admit character evidence in criminal cases because the accused faces a potential loss of liberty or even life.[135] However, the court in *Hein* reasoned that a civil defendant often stands to lose as much or more than a criminal defendant, since he risks "his fortune, his honor, [and] his family."[136] A civil defendant also risks being penalized with exemplary damages.[137]

The court in *Hein* determined that the civil/criminal distinction is not an effective means of determining when character

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129. *Cf. In re* Ferrill, 97 N.M. 383, ____, 640 P.2d 489, 497 (Ct. App. 1981) (character evidence allowed when no other evidence available to defend claim).

130. *See, e.g.*, Hein v. Holdridge, 78 Minn. 468, 472-73, 81 N.W.522, 523 (1900).

131. 78 Minn. 468, 81 N.W. 522 (1900).

132. Hein v. Holdridge, 78 Minn. 468, 470, 81 N.W. 522, 522 (1900).

133. *Id.* at 474, 81 N.W. at 523. The concurring justice in *Hein* argued that character evidence should be admitted "whenever the charge made in a civil action imputes any kind of moral turpitude to a defendant, such as fraud or falsehood or kindred delinquencies." *Id.* at 474, 81 N.W. at 523 (Collins, J., concurring).

134. *Id.* at 472-74, 81 N.W. at 523. The court employed the following language to explain why it did not follow the general rule excluding character evidence in civil trials:

> Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character, or, in other words, that such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases.

Id. at 472, 81 N.W. at 523.

135. *See id.* at 472-73, 81 N.W. at 523.

136. *Id.; see also* Falknor, *supra* note 80, at 582. Professor Falknor states that a civil defendant risks "not only his money or property but, when charged with criminal or immoral acts, his honor and reputation as well." *Id.*

137. *See* N.D. CENT. CODE § 32-03-07 (1978). Section 32-03-07 provides as follows:

> In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

Id.

evidence should be admitted.[138] The court noted the irony in the failure to distinguish between the grave consequences faced by an accused in a felony case and the minor consequences faced by an accused in a misdemeanor case.[139] For example, a civil defendant in a million dollar negligence suit may not introduce character evidence because it might confuse the issue; yet a criminal defendant charged with simple assault, who faces a fine of perhaps one hundred dollars, is free to admit evidence of his good character.[140]

The continued use of character evidence in criminal trials demonstrates the relevance of such evidence to the determination of how a person acted on a given occasion.[141] Assuming that character evidence is relevant, the remaining justification for the traditional rule centers around the inconvenience and distraction caused by character evidence.[142] Prohibiting character evidence in civil trials because of these factors duplicates the function of rule 403 of the North Dakota Rules of Evidence.[143] Rule 403 allows a judge to weigh the probative value of evidence against its tendency to confuse the issues, waste time, and cause unfair prejudice.[144] The traditional rule preempts a judge's opportunity to weigh evidence under rule 403.[145]

2. *Character Evidence Admitted in Civil Cases when no Other Evidence Is Available*

The traditional rule allows a criminal defendant to introduce evidence of his good character because he often has very little other

138. *Hein*, 78 Minn. at 472, 81 N.W. at 523.

139. *Id.* at 472-73, 81 N.W. at 523.

140. *See id.* at 473, 81 N.W. at 523. The court in *Hein* offered the following example of the irony of the civil/criminal distinction:

> Ought a defendant in such a [civil] case to be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the state charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? The question has been answered in the negative by this court.

Id.

141. Falknor, *supra* note 80, at 583.

142. *Id.* Professor Falknor includes the following as "counter- factors" to relevant evidence: "prejudice, distraction from the issues, time consumption, and hazard of surprise." *Id.* at 582.

143. *See* N.D. R. EVID. 403. For the text of rule 403, see *supra* note 58.

144. *See id.*

145. Falknor, *supra* note 80, at 584. In the absence of the traditional rule, character evidence still may be excluded under rule 403 "but if so it will not be because there is an inflexible exclusionary rule, but because, in the context, the judge, . . . balancing probative worth against the enumerated dangers, is persuaded that one or more of the latter should control." *Id.*

evidence available.[146] This reasoning has spilled over into some areas of the civil law. For example, some courts admit evidence of the good character of the beneficiary of a will when the will is challenged on the grounds of undue influence.[147] If the testator is dead, the beneficiary has virtually no way to prove, except by evidence of his good character, that he did not unduly influence the testator.[148] Thus civil cases in which character evidence is the only available evidence fall precisely within the rationale for admitting character evidence in criminal cases.[149]

To summarize, the minority rule, which admits character evidence in civil trials, is based on two theories. The first theory admits character evidence in civil trials that resemble criminal trials, such as a civil trial for assault.[150] The second theory admits character evidence in civil trials in which a defendant has no other available evidence, or risks a large loss of money or reputation.[151] Determining the admissibility of character evidence by an independent logical analysis under the minority theory is more precise and therefore, more just than a system that depends upon the broad classifications of "civil" and "criminal."

IV. CONCLUSION

The traditional rule, which excludes character evidence in civil trials, lives on, even in the absence of a sound reason for allowing such evidence in criminal but not civil trials.[152] The distinction originated as an expedient technique for identifying cases in which

146. Uviller, *supra* note 27, at 855.

147. *See, e.g.*, Bryan v. Norton, 245 Ga. 347, ____, 265 S.E.2d 282, 284 (1980) (testimony by members of propounder's church concerning his character admissible to counter undue influence claim); *In re* Ferrill, 97 N.M. 383, ____, 640 P.2d 489, 497 (Ct. App. 1981) (opinion of propounder's employer concerning propounder's character admissible to prove undue influence); *In re* Olsson's Estate, 344 S.W.2d 171, 174 (Tex. Civ. App. 1961) (character evidence admissible even when tendency to exert undue influence is not an element of undue influence claim); Perry v. Vaught, 624 P.2d 776, 784 (Wyo. 1981) (evidence of propounder's character admissible to prove undue influence in farm land transfer).

Courts also admit character evidence in civil sexual assault cases because, due to the surreptitious nature of a sexual assault, often the only evidence with which an innocent person may defend themself is with evidence of their prior good character. *See, e.g.*, Hein v. Holdridge, 78 Minn. 468, 472-73, 81 N.W. 522, 523 (1900). For a duscussion of *Hein*, see *supra* notes 131-40 and accompanying text.

148. *See In re* Ferrill, 97 N.M. 383, ____, 640 P.2d 489, 497 (Ct. App. 1981) (character evidence admitted when there was no other evidence available to defend a claim).

149. *See* Uviller, *supra* note 27, at 855.

150. *See, e.g.*, Carrick v. McFadden, 216 Kan. 683, 687, 533 P.2d 1249, 1253 (1975) (character evidence admissible in civil trial to determine which party was first aggressor). For a discussion of this aspect of the minority rule, see *supra* notes 83-126 and accompanying text.

151. *See, e.g.*, Hein v. Holdridge, 78 Minn. 468, 472-73, 81 N.W. 522, 523 (1900) (allowing character evidence in civil case due to grave consequences of loss). For a discussion of this aspect of the minority rule, see *supra* notes 127-45 and accompanying text.

152. *See supra* notes 19-34 and accompanying text.

the defendant was substantially at risk of incurring a significant loss.[153] The traditional rule only marginally serves this purpose because it ignores civil cases in which a defendant faces severe penalties.[154] The traditional rule also seeks to minimize the inconvenience and distraction caused by character evidence.[155] However, modern rules of evidence allow a judge to exclude relevant evidence if necessary to expedite a trial.[156]

The traditional rule excludes too much relevant evidence. The minority position is more precise than the traditional rule because it is based on logical analysis rather than on mere reference to civil and criminal labels. The minority position makes it possible for more relevant evidence to reach the trier of fact in a civil trial. The more relevant evidence to which the trier of fact has access, the more just will be its determination. If the judge finds that the distraction or inconvenience of proffered character evidence outweighs its probative value, he may exclude it under rule 403 of the North Dakota Rules of Evidence. The traditional rule, which forces the judge to exclude all character evidence because it is sometimes distracting, unnecessarily duplicates the function of rule 403. North Dakota courts should adopt the minority rule and allow the admission of character evidence in civil trials when the defendant is in danger of suffering a significant loss, or when the distraction caused by character evidence is minor in comparison to its probative value.

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153. *See supra* notes 22-28 and accompanying text.
154. *See supra* notes 134-42 and accompanying text.
155. *See supra* notes 19-38 and accompanying text.
156. *See supra* notes 143-45 and accompanying text.