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# "He Looks Guilty": Reforming Good Character Evidence to Undercut The Presumption of Guilt.

Josephine Ross

*Boston College Law School*, [josephine.ross@bc.edu](mailto:josephine.ross@bc.edu)

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“HE LOOKS GUILTY”: REFORMING GOOD CHARACTER  
EVIDENCE TO UNDERCUT THE PRESUMPTION OF GUILT

*Josephine Ross*\*

The man before them was noble in appearance, and the shadows played across the planes of his face in a way that made their angles harden; his aspect connoted dignity. And there was nothing akin to softness in him anywhere, no part of him that was vulnerable. He was, they decided, not like them at all . . . .

The jurors' thoughts portrayed in *Snow Falling on Cedars* after the accused, Kabuo Miyamoto, testifies.<sup>1</sup>

INTRODUCTION

How do juries decide the guilt or innocence of the accused? In cases where identification is at issue, the physical evidence is not conclusive, or where credibility is central to determining guilt, juries often look at the character of the accused to help piece together what happened. This is an article about good character evidence. It is also an article about how the perceived character of an accused affects the outcome of jury trials.

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\* Long-term visitor to Boston College Law School. I have worked in the criminal trial courts of Massachusetts for seventeen years, first as a public defender, then as a clinical professor. Many of the insights in this article come from discussing trial strategy with other defense attorneys, watching trials, and trying my own cases. I wish to acknowledge the helpful suggestions on this article from Professors Phyllis Goldfarb, Mike Cassidy, Andrew Leipold, and Anthony Farley. I also wish to thank my valuable research assistant, Sarah Forman '05.

1. DAVID GUTERSON, SNOW FALLING ON CEDARS 309-10 (1994).

The concept of good character evidence is based on the premise that someone who has led a morally sound and lawful existence is less likely to have committed a crime than someone with a history of bad actions and an immoral or amoral approach to the world. Certainly we use good character information in everyday life to infer a lack of propensity. Imagine you play Monopoly with a youngster who never cheats, and one day he short-changes you. Because his prior conduct proves to you that he does not have the propensity to cheat, you will conclude he made a mathematical error. Similarly, if your neighbor of five years was home the day your house is burglarized, you will not suspect your neighbor even though she had the opportunity to commit the crime, unless there is something negative about your neighbor's character to make you suspicious. If you think someone has good character, you give her the benefit of the doubt. Juries are supposed to give all criminal defendants the benefit of the doubt, what the law refers to as the presumption of innocence. It is by no means assured that every juror will give a defendant the presumption of innocence despite a judge's instructions. Hence, one way to think about good character evidence is that it gives factual support to the legal presumption of innocence, rendering it more likely that jurors will give the defendant the benefit of the doubt as the law requires.<sup>2</sup>

Only certain evidence that informs juries and judges about character is actually called "character evidence."<sup>3</sup> This article will review the category called "character evidence" and inquire into what the law permits into jury trials and what the law excludes. It asks other questions as well, such as: what role does the character of the accused play in criminal trials; do juries make decisions about a defendant's character based on factors other than what the law classifies as "character evidence;" does the lack of character evidence contribute to the stereotyping of defendants?

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2. Conversely, the rule against bad character evidence is recognized as a derivative to the presumption of innocence, or "concomitant of the presumption of innocence." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

3. This article will also discuss evidence that does not fall under the definition of "character evidence" that has been introduced for some purpose such as background or motive, which reflects on the defendant's character in the eyes of the jury. *See infra* Section II.

Many scholars have commented on the government's use of bad character evidence; some encourage its expansion, while others condemn its proliferation.<sup>4</sup> A number of these authors discuss good character; few have concentrated on positive character evidence in their scholarly inquiry.<sup>5</sup> In contrast, this article centers its discussion on men and women charged with crimes who would benefit if they were allowed to bring in witnesses to discuss their life.<sup>6</sup>

In addition, this article is making a second claim, namely that jury trials are all about character. It would be a mistake to think of character evidence in trials only in terms of the rules called character evidence. Juries are making character judgments, and prosecutors are disparaging the character of the defendants in every trial. From the opening statement where the prosecutor sets forth his accusation, to the closing argument where the prosecutor tries to make the criminal charge stick, the accused is being labeled a criminal. The

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4. For writing that opposes the expansion of bad character evidence, see, e.g., Robert D. Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 *DRAKE L. REV.* 1 (1999); Russell L. Jones, "If It Ain't Broke, Don't Fix It!": *An Unnecessary Tampering With A Well Established Rule: Louisiana Code of Evidence Admits Criminal Propensity Evidence*, 48 *LOY. L. REV.* 17 (2002); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 *IND. L.J.* 1161 (1998); Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters"*, 49 *HASTINGS L.J.* 871 (1998); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 *HASTINGS L.J.* 663 (1998); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1544-45 (1999). For a further list of scholarship critical of the expansion of bad character evidence, see Leonard *supra* at 1215 n.7.

Some writing that supports expansion of bad character evidence: Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 *NW. U. L. REV.* 1582, 1618 (1994); Thomas J. Leach, "Propensity" Evidence and FRE 404: *A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 *TENN. L. REV.* 825, 827 (2001); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 *BYU L. REV.* 1547, 1620; Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 *REV. LITIG.* 181 (1998); Roger C. Park, *Character at the Crossroads*, 49 *HASTINGS L.J.* 717, 756 (1998); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 *MD. L. REV.* 1, 120 (1993) [hereinafter *Taslitz, Myself Alone*]; H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 *U. PA. L. REV.* 845, 891 (1982); Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character Evidence*, 45 *CLEV. ST. L. REV.* 345, 378-92 (1997) (urging more good character evidence since "personality" or character tend to be stable across situations). Reed also suggests that more psychological exploration of prisoners, which he calls "deviant populations," may help predict criminality. *Id.* at 378-82.

5. See, e.g., Leach, *supra* note 4, at 860; Méndez, *supra* note 4, at 886; Melilli, *supra* note 4, at 1625; Park, *supra* note 4, at 745-46; Uviller, *supra* note 4, at 854-56 (arguing that in practice the rules are asymmetrical in favor of the defendant).

6. This article will not consider how character is used for and against witnesses and victims; that will be left for another day.

laws of libel and slander teach us that asserting criminality is libel or slander *per se*.<sup>7</sup> While there is a huge range in style and aggressiveness on the part of prosecutors, the force of the accusation itself can counteract the presumption of innocence. Despite the judge's caution to the jury that the defendant is presumed to be innocent, there is always a danger that the jury will assume that the state would not have brought an indictment or complaint unless the defendant was probably guilty. The danger of a lack of presumed innocence is magnified when the defendant is poor or a member of an unpopular minority. Good character evidence should be understood as a defensive tool, designed to off-set the damage caused by the indictment and opening statement.

Section I discusses literature which aids us in thinking about how character is known in life and literature and how different that process is within trials. Trials generally offer jurors only short-cuts to character, such as a person's job, age, race and marital status.

Section II shatters the myth that criminal defendants have the upper hand where character evidence is concerned. Part A looks at how weak and restricted good character evidence currently is, while Part B sets forth the tools possessed by the prosecution once a defendant introduces good character. Part C looks at the burgeoning use of prior bad acts in criminal cases, and discusses how prior bad acts operate to convince jurors of a defendant's bad character.

Section III examines the way in which character affects trials from beginning to end. Part A argues that good character evidence must be understood as part of a general attempt by defense attorneys to convince juries to see their clients as humans as opposed to "the other." Part B considers laws on libel and slander to help the reader understand the force of the accusation itself in criminal trials. Good character evidence must be understood as a defensive attempt to off-set this type of character assassination. Part C considers how cultural bias serves to enhance the force of the accusation against members of unpopular groups. I argue that good character evidence possesses the potential in some cases to correct stereotyping and bias, and encourages jurors to actually grant the legally promised "presumption of innocence."

Section IV addresses the question of symmetry. If symmetry is the goal, then it would be easy to forgo all good character evidence and ask the government to relinquish evidence of other bad acts by the accused. However, the rules were intended to be asymmetrical in favor of the accused. Allowing

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7. Assuming the assertion of criminality is false. *See infra* Section IV Part B.

more good character evidence should not encourage more bad character evidence under the name of equality, for the benefits and concern regarding these two types of evidence are very different.

In the conclusion, I argue that since good character evidence is an important safeguard, the rules should be improved to allow for better communication to juries concerning the good character of the accused.

#### I. CHARACTER PORTRAYED IN TWO LITERARY WORKS WHERE THE PROTAGONIST IS ON TRIAL

[Our lawyer] often seemed to relish the fact that we had so much property, the one thing that should prove to the judge the quality of our citizenship. He used the words synonymously: upstanding, moral, hardworking, four hundred acres, sixty head of cattle.<sup>8</sup>

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8. JANE HAMILTON, *A MAP OF THE WORLD* 239 (1994).

In *Map of the World*, a novel by Jane Hamilton, the protagonist is charged with sexually molesting a boy.<sup>9</sup> As she heads for trial by jury, conviction seems likely, for the force of the accusation itself will cause the jury to view her as someone capable of such an act. We know this hero Alice well, having spent many pages listening to her thoughts and observing her actions. As readers, we know she is incapable of such an act, that her character alone should bring back a verdict of not guilty, but how will a jury know her, know her integrity, her moral consideration of others that would prove her unlikely to commit a criminal offense?

Instead of evidence about Alice's integrity, the jury is given the superficial emblems that substitute for character evidence in courtrooms across America. Alice has a good defense lawyer who understands appearances. Her lawyer lines up the appearances in her favor, the devoted husband in the front row dressed in his best suit, Alice in a nice middle class dress, and their four hundred acres. The hero in *Map of the World* was fortunate to have the indicia of good character; she was a married white woman with two children and a working husband standing by her.<sup>10</sup>

The novel is accurate in its portrayal of how a jury would be shown character under the present jury system. One of the facts, or one could say defects, of the American jury system is that jurors measure the character of witnesses and defendants by shortcuts, such as whether the person has a job, and the kind of a job they hold. These shortcuts are intrinsically interconnected with biases, including that of class, race, gender, sexual orientation, and immigration status.<sup>11</sup> For example, the type of job a witness has is intrinsically connected with class. Joblessness is also connected to class

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9. *Id.*

10. The protagonist in *Map of the World*, Alice, is fortunate she has the material trappings of credibility as measured by jurors. Knowing that appearances serve as a substitute for any real discussion of character during a trial, Alice's attorney is devastated when her husband sells the land before the trial. It will effect whether the jury sees her as someone capable of such an act, or someone unlikely to commit such an act. *Id.* at 239.

11. Attractiveness is also a superficial aspect of the defendant that potentially effects the likelihood of jurors to convict. See MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 155 (1978).

and to gender, for a mother on welfare will be viewed by a jury very differently than a middle class woman without a job, and both will be viewed differently than a man without a job.

Most of the time these biases are so ingrained as to be invisible to lawyers as well as to the jury. For example, one year as I was critiquing closing arguments by defense attorneys in a refresher course, I noticed that most of the lawyers started their arguments by pointing out that their female client was married. It was a drunk driving case, and they used defendant's marital status as a shortcut to bring out many aspects of their argument: that she was not a big drinker, that she did not usually drive if she did drink, and that she was scared at being pulled over and ordered to walk a straight line. To these lawyers, the fact that she was married helped prove these facts. Had it been a class at the law school, I would have asked them if their closings reflected their own opinion about married women, their view of how juries decide guilt, or both. I also would have inquired if they thought the fact that she was Latina enhanced the value of her marital status. But, I was asked to teach effectiveness, not theory. Lawyers do not have to be conscious of the assumptions they make in order to be effective. Collectively, these lawyers had accumulated a great deal of knowledge about how juries decide cases.<sup>12</sup>

Hamilton's novel is about character. It is about how rare it is for people to really know each other, or even for a husband and wife to understand each other. The one good friend who really knows and understands the protagonist, explains her to the protagonist's husband. Thus, he finally begins to understand the protagonist the way the reader does. In contrast, the jury does not understand her, and is not really given an opportunity. Appearances substitute for character at the trial. The good friend who translates Alice's character to the husband does not do so for the jury, for the attorney has no intention of explaining the real Alice to the jury. Moreover, to really understand the protagonist, one would need to understand her grief over the death of a child who was in her care. In the context of the trial, this is a prior bad act, and one that the attorney successfully fights to prevent the government from bringing before the jury.

One of the key pieces of the prosecution's evidence is Alice's statement to the police, "I hurt everyone." Readers of *Map of the World* understand the

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12. Using marital status as a shortcut may also be connected to class, culture or sexual orientation of the defendant. See *infra* Section II Part C.



statement “I hurt everyone” because they know that Alice was suffering from depression caused by guilt over the drowning death of a child in her care. At trial, her lawyer does not want her to explain that because it brings out her previous bad behavior. Thus, in a scene that highlights the tension between truth and trial even for innocent defendants, he cautions her to omit any mention of the drowned child. At trial, when asked about her statement, she disappoints her lawyer by explaining her guilt over the death of her friend’s child. Although she was supposed to stick to a courtroom version of truth, her own sense of truth, the fuller version, prevents her from doing so. Hamilton is right that the structure of a trial does not generally serve to bring out truth the way we think of it in novels. It does not bring out truth of character. Because jurors are given so little real information about the defendant’s character, it is a small wonder that they grasp short-cuts in assessing the character of the accused.

*Snow Falling on Cedars*<sup>13</sup> provides a neat contrast to *Map of the World*. Published within one year of each other, both novels revolve around jury trials that flesh out the dynamics of community and status. In *Snow Falling on Cedars*, Kabuo Miyamoto is a Japanese-American fisherman charged with murder in the Pacific Northwest during the 1950’s. As the quote at the beginning of this article indicates, the jurors make determinations about the character of the accused in order to aid their determination of guilt or innocence. They try to decide if he is the type of person capable of killing a man, the type of person likely to kill someone. The inquiry is superficial and relies on stereotypes. To the extent a jury relies on racial stereotypes, their deliberations would be considered improper in the highly unlikely event that these thoughts became part of the record of the case.<sup>14</sup> However, courts rarely review jurors’ thought processes.

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13. GUTERSON, *supra* note 1.

14. See the Worcester, Massachusetts trial of Benjamin La Guer, who was convicted of rape by an

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all-white jury. Later, a juror revealed that the deliberations were tainted by racism. One juror claimed another juror referred to La Guer as “a spic.” William F. Doherty, *Convicted Rapist Files Lawsuit Seeking Hearing, Alleging Racial Bias*, BOSTON GLOBE, July 17, 1999, at B8. Reminiscent of *Snow Falling on Cedars*, one juror allegedly remarked: “The goddamn spic is guilty just sitting there; look at him. Why bother having the trial.” *Commonwealth v. Laguer*, 630 N.E.2d 618, 619 (Mass. App. Ct. 1994). However, in 1994, the state appeals court rejected his arguments that he be granted a new trial because of racial bias. *Id.* at 621.

After years of petitioning the state to conduct DNA testing, results from tests done in 2002 did not exonerate La Guer, but rather pointed strongly towards his guilt. Doug Hanchett, *DNA Boomerangs on Con—Test Upholds Rape Conviction*, BOSTON HERALD, Mar. 24, 2002, at 2.

Even though Kabuo has a devoted wife, and both he and his wife testify, they are both perceived as aliens. In addition to being married, he also was a veteran of World War II in the United States Army. Not only does this not sway the jury in his favor, it works against him, for the jury takes his prowess as a soldier in the United States Army as proof that he could and would kill.<sup>15</sup> The defense lawyer's closing argument to forgo prejudice is not enough, especially as it is offset by the prosecution's description of the defendant as a cunning schemer, a narrative that fit comfortably into existing stereotypes of that period. The novel rings true and presents a realistic jumping-off point for our inquiry into the nature of race in determining character in criminal trials.

Were we to transport *Snow Falling on Cedars* into a contemporary trial, it is unlikely the attorney could do anything more for his client than caution against prejudice in his closing argument. As seen in the evidence section below,<sup>16</sup> under current law, Kabuo's history as a survivor of an internment camp during World War II might be allowed in to explain why he killed, but not to create a full picture of a man claiming innocence. That would be considered irrelevant and a ploy to create sympathy.

Should there be a narrative of innocence that the defense could give to the jury that would educate them about Kabuo's life, character and background?<sup>17</sup> Is there character evidence that would aid the jury in realizing that he was not a likely murderer?

I have taken two narratives of innocence from literature. The contrast between the narratives that readers have available to learn the truth, and the narratives that juries have available to determine truth, should make us question the limitations on character evidence in jury trials. Literature teaches us that character and conduct are interrelated and complex, and that more information is needed to understand character than simple recitation of what a person was allegedly seen doing at a certain time. "Juries are supposed to evaluate facts as we evaluate literature," Professor Katherine Baker recently wrote.<sup>18</sup> "They are supposed to determine truth based on the complexities of

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15. GUTERSON, *supra* at note 1, at 285.

16. *See infra* Section II.

17. The jury learns that the defendant failed to inform the police that he was with the deceased sailor the night he was found dead, evidence that put Miyamoto's character for truthfulness in a bad light. Unlike the jury, the reader learns that Miyamoto followed a code of honor and honesty. GUTERSON, *supra* note 1. As Guterson states: "The heart of *any* other, because it had a will, would remain forever mysterious." *Id.* at 345.

18. Katherine Baker, *A Wigmorean Defense of Feminist Method*, 49 HASTINGS L.J. 861, 862 (1998).

the characters in front of them, not on a set of universal truths or types that might be true on average.”<sup>19</sup>

## II. THE MYTH OF ASYMMETRY BETWEEN GOOD AND BAD CHARACTER EVIDENCE

[I]t is not probable that in a single moment a person, who during his past life, had conducted himself in the way Mr. Jones has would enter into that corrupt agreement.

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19. *Id.* at 862.

—Opening statement of English defense barrister in Jones' Trial.<sup>20</sup>

To those who do not practice criminal law, the rules of evidence appear asymmetrical when it comes to character evidence. In theory, every state and federal court allows an accused person to introduce evidence of good character in their defense.<sup>21</sup> Defense lawyers may call witnesses to the stand who can attest to the defendant's honesty, integrity, or other positive personality traits. Good character evidence may be put on regardless of whether the accused takes the stand on her own behalf. This right to prove good character is "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions."<sup>22</sup> It joins the presumption of innocence, proof beyond a reasonable doubt, and the right to confront one's accusers, as one of the hallmarks of a system designed to protect the accused.<sup>23</sup>

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20. *The King v. Jones*, 31 How. St. Tr. 251, 310 (1809).

21. *See* FED. R. EVID. 404(a)(1). Many states have adopted rules similar to the federal rules, and some states follow common law that also permits good character evidence. *See infra* note 46.

22. *See* FED. R. EVID. 404(a)(1) advisory committee's notes.

23. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 4.12 (1999). *See also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 101 (2d ed. 1994).

The black letter law also appears to prohibit the government from introducing bad character evidence against the accused, while allowing the defense to introduce good moral character in favor of the accused. Rule 404(a) states that “[e]vidence 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 to rebut character evidence offered by the accused.<sup>24</sup> Thus it appears that the defense chooses whether character evidence will be part of the trial and it appears that the government may not bring up propensity or bad character unless the defense raises good character. Rule 404(b) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith” although it may be “admissible for other purposes . . . .”<sup>25</sup> To read the rules of evidence, one would think that character evidence is an area where the defendant is given all the advantages, coddled some would say, while the government is hamstrung from presenting damaging evidence. This configuration is misleading.

In the practice of criminal law, good character evidence and bad character evidence remain asymmetrical, but reality reverses the asymmetry. Trial by trial, there is a great deal more evidence of bad character than good character introduced into criminal prosecutions. There are three primary factors that account for this uneven pattern, two of which involve evidentiary rules. First, the right of good character evidence is a mirage.<sup>26</sup> Second, a good deal of evidence is now paraded before juries which the jury is likely to use as proof of bad character even though ostensibly it was admitted for reasons other than proof of bad moral character.<sup>27</sup> Third, many defendants have checkered pasts or criminal records, even if they did not commit the crime charged. This third factor may be inherent in our criminal justice system, but it exacerbates the evidentiary imbalance of the first and second factors which will be set forward below.

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24. See FED. R. EVID. 404(a) & 404(a)(1). Note a change to the federal rules allows prosecutors to bring in evidence of a negative character trait once defense opens the door by bringing in similar evidence of a negative trait against the complaining witness. FED. R. EVID. 404(a)(1).

25. See FED. R. EVID. 404(b). Note that in 1994, Congress amended the Federal Rules of Evidence to specifically allow bad character evidence in cases alleging sexual assault and child molestation. FED. R. EVID. 413-415. For a discussion on how the new rules embrace propensity theory for the first time, see James J. Duane, *The New Federal Rules of Evidence of Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 105 (1994).

26. See *infra* Section III Parts A, B.

27. See *infra* Section III Part C.

*A. The Hollow Right of Good Character Evidence*

Everyone who spoke on my behalf was asked by the magistrate's clerk if he knew that I was homosexual and replied that he did. This question was in each case followed by the words, uttered in a voice hoarse with incredulity, "and yet you describe him as respectable?" All said, "Yes."

—Quentin Crisp, a flamboyant gay writer, charged with soliciting sex in England during World War II, tells how his character witnesses helped win him an acquittal.<sup>28</sup>

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28. QUENTIN CRISP, *THE NAKED CIVIL SERVANT* 162-64 (1968).

I am a clinical professor in a criminal defense clinic. Every year as I prepare my students for jury trials, I discuss character evidence with them to see if it could be useful in their cases. Initially, those representing likable clients with no criminal records are enthusiastic. However, this enthusiasm fades when they do the research and confirm their understanding of the law with me. In Massachusetts, character evidence is limited to evidence of the client's reputation. In other words, a character witness may say something of this sort: "I know four people that know the accused. I know she has a good reputation because we talked about her when she was arrested and everyone was surprised because she wasn't the type of person to do something violent."<sup>29</sup> In jurisdictions like Massachusetts, witnesses cannot testify to their own opinion of the client's good moral character, nor to specific events that would lead a jury to know her good character.<sup>30</sup> Students do not envision this evidence helping their client, or at least not enough to be worth the energy to find witnesses for that testimony when there is so much else to do to prepare for trial. They are discouraged even before they learn about the dangers of cross-examination once defense counsel presents good character witnesses. I tell them their attitude is similar to that of many lawyers.<sup>31</sup>

The first difficulty in presenting good character evidence is the manner in which evidence may be presented to the jury. The rules choose among three types of evidence from which to prove character: (1) testimony about the defendant's conduct that reflects character; (2) a witness's opinion based on observations of the defendant and his conduct; and (3) the reputation of the defendant. In other areas of evidence, the rules encourage witnesses to retell their direct observations and specific facts they observed. In a few instances, a witness may give his opinion. Rarely do we see reputation admitted into trial under other areas of evidence. Character evidence rules are counter-intuitive.

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29. For a slightly different method of introducing reputation, see EDWARD J. IMWINKELREID, *EVIDENTIARY FOUNDATIONS* 145-47 (3d ed. 1995).

30. Massachusetts law is contrary to Federal Rule 404. See cases cited *infra* note 46.

31. This is but one of many instances where students in the defense clinic learn that the notion of the defendants' rights as taught in regular law school classes is inaccurate. The obfuscation in the character evidence area creates the impression among the bar that defendants have all these rights, without actually giving real defendants at trial any advantages.



The third type of evidence is always allowed; the second type is sometimes allowed; and the first type, almost never.

In eleven jurisdictions, character witnesses may testify only to the defendant's reputation, not to their own opinion about her good character.<sup>32</sup> Reputation evidence is weak hearsay; the witness is only allowed to testify to what he heard others say about the accused. If it is a battery case and the defendant is arguing that he never hit the alleged victim, the witnesses cannot say they believe the defendant to be peaceful. They can only say they heard other people say she was peaceful. This is obviously the weakest kind of evidence and it is also the most difficult to obtain. First of all, people do not generally stand around gossiping about someone's good qualities, and even when they do, they are likely to forget precisely what was said. Second, the law requires that it be a community reputation, so the trial judge may exclude the defense witnesses if he determines that the reputation is limited to too small a group.<sup>33</sup> Many people do not have a reputation in the large community in which they live or work. Consider a woman who stayed home with children for years and is just heading back to work. Good character evidence is an impossibility for her. Good character witnesses are also out of reach for those who are self-employed or work for small companies, unless they happen to be one of the handful of people actively involved in the neighborhood in which they live.<sup>34</sup>

It is no revelation that reputation is weaker than opinion evidence, and that both are weaker than evidence of conduct. The courts are well aware of the weak state of this defense right. As one court put it, "it is an evidentiary anomaly that—in proving general moral character, the law prefers hearsay, rumor, and gossip, to personal knowledge of the witness."<sup>35</sup> McCormick notes: "As one moves from the specific to the general in this fashion, the pungency and persuasiveness of the evidence declines, but so does its tendency to arouse undue prejudice, to confuse and distract, and to raise time-consuming side issues."<sup>36</sup> The limitations on the type of good character evidence

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32. See *infra* note 46.

33. See *Commonwealth v. LaPierre*, 408 N.E.2d 883 (Mass. App. Ct. 1980) (holding trial judge justified in prohibiting opinion of three fellow workers because it was too small a group to constitute a reputation).

34. The court listened in amusement when one of my clients referred to himself as a prominent figure because he had been involved in planning First Night Worcester Activities. But when I consider all my clients, he had more "community" ties than most.

35. *Simpkins v. State*, 256 S.E.2d 65 (Ga. Ct. App. 1979).

36. CHARLES TILFORD MCCORMICK, *MCCORMICK ON EVIDENCE* 788 (John William Strong ed., 4th ed. 1992).

presented is partially explained as the protection of judicial resources, containing the length of trials.<sup>37</sup> Judicial resources are a real concern when considering whether to allow actual instances of good conduct. However, since reputation evidence is only marginally quicker to put on than opinion evidence, it follows that some rule-makers are not bothered by the weakness of reputation evidence. In fact, the weakness of the evidence may serve a purpose, the purpose of discouraging lawyers from exercising this “deeply imbedded right.” How else to explain the continuation of a mistake, decades after it was uncovered by Henry Wigmore?<sup>38</sup>

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37. The issue of scarce judicial resources will be discussed more fully. *See infra* Section IV.

38. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1981 (2d ed. 1923).

In 1809, an English judge was irritated with a defense barrister, and probably misspoke in limiting the testimony of the fourth character witness for the defense. This oral reasoning changed the course of evidence. Lord Ellenborough, C.J. interrupted the fourth character witness and stated: “[I]t is reputation; it is not what a person knows.”<sup>39</sup> This statement was then seized upon by English treatise writers as a refinement of existing evidence law.<sup>40</sup> Although records from the nineteenth century case indicate Lord Ellenborough did say what he was reputed to have said, a reading of the case itself indicates that he did not intend to limit character evidence to reputation alone, but just to avoid specific incidences. The defendant Jones was charged with graft while holding office as a commissary general of the West Indies. His barrister called six character witnesses to testify to “what his general conduct and character has been,”<sup>41</sup> as he explained in his opening. Lord Ellenborough, C.J. did not object to the defense’s description of what these witnesses would say. Nor did Lord Ellenborough object when the first witnesses spoke of their opinion of the defendant’s character, except when the character witnesses strayed into issues such as whether he reduced the expense of the army.<sup>42</sup> Moreover, the previous year the same judge, Lord Ellenborough, questioned a defense witness as follows: “From your knowledge of Mr. Davison’s character and conduct, do you think him capable of committing a fraud?”<sup>43</sup> Clearly Massachusetts law and the other states that follow the reputation-only rule have built their jurisprudence upon a misunderstanding.<sup>44</sup>

Wigmore urged that the mistake be remedied. He referred to reputation evidence as “the second-hand, irresponsible product of multiplied guesses and gossip which we term ‘reputation.’”<sup>45</sup> Eventually, with dissension, the federal rules were changed to permit opinion evidence in addition to reputation. Although many states have adopted Federal Rule of Evidence 404(a)(1), which

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39. *The King v. Jones*, 31 How. St. Tr. 251, 310 (K.B. 1809). In the middle of the seventeenth century, England gave defendants the right to put on witnesses to prove their innocence, and by the end of the seventeenth century, this included character witnesses. Reed, *supra* note 4, at 382.

40. See WIGMORE, *supra* note 38 (Chadbourne Rev. 1978). The treatise writers in turn influenced the appeals court in *R. v. Rowton, Leigh & Co.* 520, 10 COX CRIM. CAS. 25 (1865). The original federal rules excluded opinion, but the rules were later changed to conform with early English law.

41. *Jones*, 31 How. St. Tr. at 308.

42. “What was his general character for integrity is the question,” Lord Ellenborough informed counsel for the accused during the first character witness’s testimony, rather than whether his department was conducted in the best possible manner. *Id.* at 309.

43. *The King v. Davison*, 31 How. St. Tr. 100, 189 (K.B. 1809).

44. WIGMORE, *supra* note 38. “The isolated phrase . . . in Jones’ Trial . . . being misunderstood, has proven a great stumbling block . . . .”

45. MCCORMICK, *supra* note 36, at 789 & n.10(b) (quoting Wigmore).

allows opinion evidence as well as reputation, the mistake is still law in eleven states.<sup>46</sup>

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46. Of the eleven states that prohibit opinion evidence, five states have codified the exclusion of opinion evidence. FLA. STAT. ANN. § 90.405 (West 1995); LA. CODE OF EVID. ANN., art. 405 (West 1995); ME. R. EVID. 405; VT. R. EVID. 405; WASH. R. EVID. 405. Six others bar it through case law. *E.g.*, Powell v. Georgia, 29 S.E. 309 (Ga. 1897); Taylor v. Georgia, 336 S.E.2d 832 (Ga. Ct. App. 1985); Hirschman v. Illinois, 100 Ill. 568 (1882); Illinois v. Williams, 649 N.E.2d 397 (Ill. 1995); Massachusetts v. Belton, 225 N.E.2d 53 (Mass. 1967); Missouri v. Wellman, 161 S.W. 795 (Mo. 1913); Missouri v. Brown, 718 S.W.2d 493, 494 (Mo. 1986); New York v. Van Gaashek, 82 N.E. 718 (N.Y. 1907), *overruled by* New York v. Barber, 541 N.E.2d 394, 395 (N.Y. 1989); Harrison v. Virginia, 79 Va. 374 (1884); Hoke v. Virginia, 377 S.E.2d 595 (Va. 1989). For a commentary on the Illinois rule, see Marc R. Kadish & Jason J. Elmore, *Illinois' Grotesquely Outdated Ban of Opinion Evidence in Criminal Cases*, 86 ILL. B.J. 268 (1998).

The Federal Rules of Evidence no longer limit testimony about character to reputation alone, allowing the witness to give their opinion of the accused's character if pertinent. FED. R. EVID. 405. The most recent state to adopt language similar to the Federal Rules was Delaware, which amended the Delaware Uniform Rules of Evidence in 2001 to include opinion evidence as a method of proving character. *See* DEL. UNIF. R. EVID. 405(a).

Although there was historical precedent to do so, the federal rules still do not permit the strongest kind of evidence, namely testimony on direct examination as to particular acts.<sup>47</sup> Specific examples of good character are prohibited. If a man accused of stealing once returned a wallet he found with the money still in it to a stranger, this fact is never set before the jury. Instead, the jury may only hear the opinions of witnesses as to the defendant's character (in this case, an opinion about his honesty), and in eleven jurisdictions, not even that. There was a time in England when defendants were entitled to present evidence of their good deeds, but this was eliminated in the nineteenth century.<sup>48</sup> Powerful, convincing evidence is now left out, and only a shadow of the accused's good character remains.

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47. See FED. R. EVID. 405.

48. WIGMORE, *supra* note 38, § 1981(c). Professor Reed writes that in the good character area, a "jury should know what the basis for the [witness's] opinion is in order to evaluate that opinion." Reed, *supra* note 4, at 390-91. He points out that experts are allowed to explain the basis of their expert opinion under Rules 703 and 705 of the Federal Rules. *Id.* at 390.

The right to introduce reputation and opinion evidence of good character is also circumscribed by many courts. As gatekeepers, judges sometimes exclude reputation evidence because of insufficient foundation or because the time period of that reputation is deemed too early or too late to be relevant.<sup>49</sup> Even where foundational requirements are met, judges may still prevent character witnesses from taking the stand by ruling that the preferred evidence is irrelevant to the particular charge. Good character has been sub-divided into character traits such as peacefulness, honesty or sobriety, with certain character traits relevant only to certain crimes.<sup>50</sup> Although whether the defendant is law abiding would seem to be part of every case, courts have ruled that general good character is irrelevant to the charge.<sup>51</sup> For example,

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49. *Lutz v. Colorado*, 293 P.2d 646, 649 (Colo. 1956) (holding four or five years before event and several years after event deemed too remote); *Smith v. Alabama*, 72 So. 316, 318 (Ala. 1916) (holding reputation between arrest and trial irrelevant).

50. Rule 404 of the Federal Rules of Evidence speaks of a “pertinent trait of character.” *See Illinois v. Kendall*, 192 N.E.2d 378, 382 (Ill. 1934) (holding reputation for truth and veracity has no bearing on whether defendant committed a violent crime); *Oregon v. VanNatta*, 945 P.2d 1062, 1063 (Or. App. 1997) (holding evidence of a submissive personality deemed irrelevant to a duress defense).

51. *See Gillespie*, 4 City H. Rec. 154 (N.Y. Gen. Sess. 1819) (holding defendant’s good character ruled inadmissible because the offense of assault and battery does not necessarily involve “moral turpitude”).

one court held that good moral behavior is too broad to be relevant to a child molestation charge,<sup>52</sup> while another court ruled that reputation in the business community is irrelevant to a charge of possession with intent to distribute.<sup>53</sup> In one instance, a court held that good moral character was not relevant to the issue of whether the defendant was guilty of draft evasion.<sup>54</sup>

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Ironically, in immigration law the concept of a conviction for a crime of moral turpitude has been expanding at such a rate that the INS took the position in two cases that shoplifting was a crime of moral turpitude. *See Da Rosa Silva v. INS*, 263 F. Supp. 2d 1005 (E.D. Pa. 2003); *United States v. Samaei*, 260 F. Supp. 2d 1223, 1227 (M.D. Fla. 2003).

52. *Washington v. Griswold*, 991 P.2d 657 (Wash. Ct. App. 2000) (holding good moral behavior is irrelevant in child molestation charge because it is too broad). The defendant should have offered a reputation for "good sexual moral reputation." *See also North Carolina v. Waggoner*, 506 S.E.2d 738, 743 (N.C. Ct. App. 1998) (holding expert testimony concerning defendant's general psychiatric/psychological profile was properly excluded as irrelevant to issue of whether the accused committed a sexual offense); *North Carolina v. Mustafa*, 437 S.E.2d 906, 909 (N.C. Ct. App. 1994) (holding honorable discharge from the military properly excluded because good military record is irrelevant to the issue of defendant's guilt or innocence of rape). *But see United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000) (holding exclusion of good character was harmless error in case of travel with intent to engage in sexual act with minor).

53. *Haralson v. Georgia*, 479 S.E.2d 115, 121 (Ga. Ct. App. 1996).

54. *Springer v. United States*, 148 F.2d 411, 415 (9th Cir. 1945). *See also Harris v. United States*, 412 F.2d 384, 388 (9th Cir. 1969).

Where the crime charged does not specifically involve dishonesty, such as a violent crime or drug distribution, courts may prohibit a defendant from presenting his reputation for honesty.<sup>55</sup> Even where a defendant takes the stand, courts have been known to preclude testimony about the defendant's honesty, ruling it irrelevant because the prosecutor never impeached the integrity of the defendant on cross-examination.<sup>56</sup> One court held this evidence to be irrelevant while simultaneously observing that the trial's "central issue was which of the two witnesses, defendant or the child, was telling the truth."<sup>57</sup> Doesn't a prosecutor's closing argument disputing the defendant's testimony imply that the accused lied? Doesn't accusing someone of a crime imply an accusation that the person possesses the character to commit that crime?<sup>58</sup>

All the limitations on the form of good character evidence fit poorly with the notion that good character evidence is a fundamental right.

### *B. The Penalty for Good Character Evidence*

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55. *Mack v. Lynaugh*, 754 F. Supp. 1116, 1125 (W.D. Tex. 1990) (holding that truthfulness was not at issue where the defendant was charged with aggravated robbery with a deadly weapon); *State v. Weaverling*, 523 S.E.2d 787, 793 (S.C. Ct. App. 1999) (stating defendant was not entitled to offer character evidence of his truthfulness where his credibility had not been attacked and where truthfulness is not pertinent to a sex charge).

56. *United States v. Jackson*, 588 F.2d 1046, 1055 (5th Cir. 1979) (ruling that the trait of truthfulness was not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin. The court refused to allow evidence of truthfulness after the defendant took the stand).

We find no evidence of an attack upon Jackson's character for truthfulness. During the cross-examination the government attorney questioned Jackson closely about his version of the facts and pointed out conflicts between that testimony and the testimony of other witnesses. However, "(t)he mere fact that a witness is contradicted by other evidence in the case does not constitute an attack upon his reputation for truth and veracity." *Id.* (quoting *Kauz v. United States*, 188 F.2d 9, 10 (5th Cir. 1951)); *United States v. Dring*, 930 F.2d 687, 689 (9th Cir. 1991); *Homan v. United States*, 279 F.2d 767, 772 (8th Cir. 1960). *Cf.* *United States v. Smith*, 46 F.3d 1223, 1233 (1st Cir. 1995) (holding trial judge erred in excluding character witnesses to show truthfulness but objection not preserved).

57. *Oregon v. Adonri*, 923 P.2d 658, 660 (Or. Ct. App. 1996). The appeals court there held that defendant should have been prevented from introducing testimony that he was a truthful person because it was not relevant to the charge of sexual misconduct towards a minor. This was the ruling even though the defendant had taken the stand in his own defense (and therefore arguably put his credibility into issue). Ironically, the court went on at length to explain that credibility was at issue in the case. *See generally id.*

58. *See infra* Section IV Parts A, B. This is quite a separate inquiry from impeachment with criminal convictions allowed under the Federal Rules of Evidence. *See* FED. R. EVID. 609.



[Character evidence] seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.

—An opinion by Judge Learned Hand.<sup>59</sup>

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59. *Michelson v. United States*, 335 U.S. 469, 474 n.5 (1948) (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, J.)).

Once the defendant is said to have “opened the door” by introducing a defendant’s good character, the prosecutor can rebut with bad character evidence. In contrast to the short affirmance of good character or reputation for good character generally allowed on direct, cross-examination of the character witness can be devastating.<sup>60</sup> The prosecutor is not limited to opinion and reputation but may bring up specific instances of bad conduct during cross-examination.<sup>61</sup> Nor is the prosecutor limited to convictions. As long as the prosecutor has a good faith basis for believing the alleged bad fact, he may question the witness about whether the witness has heard this alleged fact. Although the prosecutor cannot prove the bad acts by extrinsic evidence and must rely on the answers given on the witness stand, the cross-examination may still do more than neutralize a witness.

For example, a character witness may be asked on cross-examination whether he has heard that the accused was arrested for an unrelated crime two years ago. If the witness says yes, then the jury will hold it against the defendant that she was arrested. If the witness says no, the jury will still probably hold it against the defendant that she was arrested despite general instructions that a lawyer’s questions are not evidence.<sup>62</sup> This question is considered permissible under the “opened door policy” even where an arrest did not lead to conviction, potentially even where it was a false arrest.<sup>63</sup>

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60. However, the rules generally do not permit a prosecutor to prove bad character through independent witnesses. FED. R. EVID. 404. Rather, most often, the government must rely on cross-examining defense witnesses to bring out the damaging particulars. FED. R. EVID. 405.

61. See FED. R. EVID. 405 advisory committee’s notes (stating the proposition that evidence in the form of “specific instances of conduct” possess “the greatest capacity to arouse prejudice”).

62. A judge should instruct the jury that it is the answers the witness gives that matter and that the questions themselves are not evidence. Nevertheless, where jurors think well of the prosecuting attorney who poses the question, jurors would be unlikely to think the prosecutor made up the prior arrest. More likely, they would think the witness did not know of the arrest or is pretending not to know. This is one of many instances where lawyers generally believe it difficult or impossible for jurors to follow instructions.

63. See, e.g., *United States v. Morla-Trinidad* 100 F. 3d 1, 4-6 (1st Cir. 1996).

Allowing prior arrests to be discussed in court is particularly troubling because it undercuts the presumption of innocence in the present trial. If a jury is allowed to draw a negative inference from a defendant's prior arrest, how will the same jury refrain from drawing a negative inference from the current arrest as the presumption of innocence requires? We can confidently predict that jurors will not be able to follow the judge's instructions that the current arrest is not evidence of guilt, but merely "the method by which the case came to trial."<sup>64</sup> Another troubling aspect of allowing prior arrests into evidence is that this practice will impact non-white defendants more than Caucasians, particularly young men.<sup>65</sup> Prior arrests are generally not admissible evidence in any context other than rebutting good character.<sup>66</sup> Even if a defendant is impeached with his criminal record when he takes the stand, he may only be impeached with an actual conviction, not solely with an arrest.<sup>67</sup> Cross-examination on arrests is a costly tax on a defendant who brings in evidence of her good character.

Nor is impeachment limited to arrests. The inadmissibility of the question "when did you stop beating your wife?" is legendary, yet the law permits prosecutors to ask "did you know he beats his wife?" and "have you heard he beats his wife?"

The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue.<sup>68</sup>

This was how the Supreme Court justified allowing the government to cross-examine a defense witness about specific instances of bad conduct. This is "[t]he price a defendant must pay for attempting to prove his good name . . . ."<sup>69</sup> Clearly it is a high price indeed.

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64. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

65. For example, black men comprise 35% of arrests for drug possession, and 53% are convicted of drug possession, although they constitute only 13% of all drug users. See Am. Civil Liberties Union, *Drugs & Race*, at <http://archive.aclu.org/issues/drugpolicy/DrugsRace.html> (last visited Nov. 25, 2003). See also Floyd D. Weatherspoon, *Devastating Impact of the Justice System on the Status of African-American Males*, 23 CAP. U. L. REV. 23 (1994) (detailing the disproportionate investigation, arrest, charging and sentencing of African-American males).

66. It is hornbook law that evidence of an arrest is not admissible. MUELLER & KIRKPATRICK, EVIDENCE, *supra* note 23, § 4.15. But see *United States v. Gonzales*, 328 F.3d 755, 759 (5th Cir. 2003) (holding officer's testimony about his knowledge of defendant's prior arrests was admissible because it was intrinsic to the story of the crime and how defendant ended up being arrested for the charged offense).

67. FED. R. EVID. 609.

68. *Michelson v. United States*, 335 U.S. 469, 479 (1948).

69. *Id.*

To understand how these rules manipulate the view of an accused's character, consider a scenario where former President George Washington was charged with a crime of dishonesty when he was a young man. His defense lawyer would be able to find many character witnesses, but they would only be permitted to attest to his general reputation for honesty and to his reputation as a law-abiding citizen. The prosecution could cross-examine in the following manner: "Were you aware that the defendant [George Washington] committed a destruction of property, violently hacking a tree with an ax, just for fun—yes or no?"<sup>70</sup> No evidence would be allowed to paint this event as proof of the man's honesty by exploring defendant's forthright admission to his father. That would be considered extraneous information barred by the rules. If George Washington's reputation would have such a rough road, what chance have regular criminal defendants?

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70. In jurisdictions that allow opinion testimony, the question would be: "Would your opinion of Mr. Washington change if you were informed he committed a destruction of property, violently hacking a tree with an ax just for fun—yes or no?"

In the one case where the Supreme Court considered evidence of good character, they refused to ameliorate the rule allowing wide cross-examination by prosecutors once defendants opened the door with good character. The justices appear irked at the idea that the defense can use propensity but not the prosecution.<sup>71</sup> The attitude of the majority in *Michelson* can best be paraphrased as “we don’t like good character evidence and if the price is high enough, they won’t put it on.” A far cry from good character evidence being “so deeply imbedded in our jurisprudence as to assume almost constitutional proportions.”<sup>72</sup> It is a tax upon the defendant who would try to take advantage of this right to present good character.<sup>73</sup> This philosophy works; defense lawyers shy away from putting on character evidence, a thanks-but-no-thanks attitude towards this “right.”

Jim McClosky of Centurion Ministries has freed thirty prisoners by proving their innocence.<sup>74</sup> I asked him to think about the cases he has worked on where he was sure of the client’s innocence. In all his years of trying to free the wrongly convicted, he only handled one case where a defense lawyer put on witnesses that testified to the defendant’s good character. In that case, despite eleven witnesses testifying to the defendant’s good character, the defendant was still convicted.

In England today, police vouch for criminal defendants with no record of convictions. One English barrister cross-examines the police in this manner: “I put it to you. The defendant has good moral character. Isn’t that so?”<sup>75</sup> “That’s right,” the police officer answers. What is meant is that the accused has no prior convictions. The barrister is confident that the officer will answer

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71. See *Michelson*, 335 U.S. at 476.

72. See FED. R. EVID. 404(a) advisory committee’s notes.

73. It is similar to the tax that judges routinely employ in allowing criminal convictions against a defendant if he testifies, a tax the rules allow. See FED. R. EVID. 609.

74. This was culled from a conversation with Jim McCloskey on June 12, 2003. The ministry has been active for over twenty years. Centurion Ministries, *C.M. Staff*, at <http://www.centurionministries.org/aboutus.html> (last visited Nov. 25, 2003).

75. This interchange was supplied by a barrister who has practiced criminal law in London for over ten years.

in the affirmative where there is no record of convictions. In contrast, no American trial lawyer would ask a police officer about the defendant's character. A friend of mine who has been practicing criminal law for fourteen years informed me she had never put on good character evidence. "I am afraid they would just make it up," she said, referring to what the police would tell the prosecutor about her client so that he could cross-examine the character witnesses.

The penalty against the introduction of good character must be eliminated or at least reduced. Like England, a person should be able to tell the jury that he has no criminal convictions without fear that allegations will be manufactured against him. At the very least, bad accusations must be vetted first to make sure there is a strong possibility of their truth and then to assure that there is more proof than just an arrest.<sup>76</sup> I propose an even simpler rule. The prosecution may introduce criminal records of convictions if good character testimony is submitted, as long as a judge finds that it tends to disprove the testimony of good character witnesses. Or, if the matter was adjudicated in civil court, such as a settlement for sexual harassment claims, that would also be permitted. All other bad character rebuttal should be off limits.<sup>77</sup> Prosecutors would still be able to cross-examine the character witness to show bias or lack of knowledge, just as they would any other witness.

### *C. Bad Character as the Elephant in the Room*

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76. One possible way to make the process fairer is to limit the prosecution rebuttal to the type of evidence introduced. Thus, if opinion evidence is introduced by defense, then prosecution may not offer specific acts. If reputation is offered by the defense, prosecution may bring in witnesses who heard a different reputation. The only problem with this is that it would open up the discovery process so that prosecutors might try to find people who hold the defendant in ill-repute. Such evidence also opens the door to witnesses testifying negatively to curry favor and informants testifying falsely.

77. A defendant could use the motion in limine process to determine if criminal convictions would be introduced as a tax upon his good character witnesses just as currently, motions in limine help defendants find out if criminal convictions will be introduced against them if they take the stand in their own defense. More complicated is the question of non-criminal behavior of the defendant. As my colleague Mike Cassidy asked, what about allowing in impeachment with non-criminal conduct? Once the accused introduces specific instances of good conduct, should not the prosecution be able to introduce specific instances of non-criminal behavior tending to show bad character through cross-examination of defense witnesses? This alternative proposal would be for criminal allegations to be off-limits if they do not result in convictions, but leave the door open for bad conduct that is not criminal. This avoids many of the problems discussed above, but not all of them. A sexual harassment allegation could be wrong and quite damaging to the juror's view of the defendant, but the mechanism for proving or disproving the allegation takes time. It is likely to turn into a trial-within-a-trial. A better use of judicial resources would be to exclude everything that hasn't been adjudicated or settled through the courts.

The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.

—Justice Robert Jackson, U.S. Supreme Court<sup>78</sup>

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78. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

“It is fundamental to American jurisprudence that ‘a defendant must be tried for what he did, not for who he is.’”<sup>79</sup> This philosophy requires courts to bar evidence designed to show that the accused is a bad person or has the propensity to commit the crime charged. For nearly three centuries of Anglo-American history, propensity evidence was barred, at least in theory.<sup>80</sup>

In fact, the prosecution has a decided advantage in the war to control images of the defendant’s character, for jury trials are now filled with evidence of defendants’ uncharged misconduct. Non-prosecuted bad acts, while not admissible as “bad character” or “propensity to commit the crime charged,” are often admitted under other evidentiary rules.<sup>81</sup> There are several exceptions to the general rule banning prior bad acts, and these exceptions have been expanding, the exceptions starting to swallow the rule itself.<sup>82</sup> In the federal context, these exceptions are referred to as 404(b) evidence. Bad acts are admitted to show intent, malice, or motive, and sometimes just to provide “context.”<sup>83</sup>

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79. *United States v. Fosky*, 636 F.2d 517, 523 (D.C. Cir. 1980) (citing to *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)).

80. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 58.2 (Tillers rev. 1983).

81. Federal Rules of Evidence 404(b) allows “other crimes, wrongs, or acts” to show proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” FED. R. EVID. 404(b).

82. Brauser, *supra* note 4, at 1583; Melilli, *supra* note 4, at 1548; Park, *supra* note 4, at 755.

83. Rule 404(b) of the Federal Rules of Evidence allows “other crimes, wrongs, or acts” to show proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *See, e.g.*, *United States v. Serang*, 156 F.3d 910 (9th Cir. 1998) (allowing evidence that a defendant previously arranged a sham marriage between his aunt and his alleged co-conspirator in order to give the jury “context” from which to infer that the co-conspirator must have been devoted to the defendant, and therefore would be willing to engage in arson with him).



In the past decades, federal courts have affirmed trial courts' decisions to permit evidence of bad acts in thousands of cases.<sup>84</sup> Here are some examples. In trying a man for allegedly assaulting two passengers in a car, a federal district court allowed evidence that two years earlier, the defendant had assaulted his girlfriend (who was not an alleged victim in the case) with a knife.<sup>85</sup> In trying a police officer for use of excessive force during a drug investigation, prosecutors were allowed to introduce evidence that one year before, when working as a bouncer in a club, the defendant "pulled a chair out from under an exotic dancer," threw her into a wall and choked her.<sup>86</sup> A man

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84. A Westlaw check found hundreds of federal cases from August 7, 2002 to August 7, 2003 where bad act evidence was challenged. *See* Leach, *supra* note 4, at 825.

85. *United States v. Haukaas*, 172 F.3d 542 (8th Cir. 1999) (allowing evidence of the prior assault to prove intent to harm, to rebut self-defense).

86. *United States v. Brown*, 250 F.3d 580, 584-85 (7th Cir. 2001) (introducing character evidence to prove intent). The Court justified the evidence by noting that both involved "people who failed to respect his authority." *Id.* at 585. The similarity is that the dancer complained to the bouncer after he pulled the chair out from under her while in the current charge the man thought that defendant was not a police officer

charged with arson was shown to have committed another arson six weeks before, and the jury also learned that at another time he had stolen property and used the proceeds to purchase illegal drugs.<sup>87</sup>

In a kidnapping case, it was shown that the defendant had sexually assaulted a woman in an unrelated episode eleven days before.<sup>88</sup> In a murder trial, a judge allowed evidence that the defendant purportedly ordered the murder of someone else at an earlier time.<sup>89</sup> In a bank robbery prosecution, the

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so he refused to open the door to his truck when ordered to do so.

87. *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998) (allowing a prior arson because it was relevant to government's claim that defendants went to the construction site on the night of a fatal fire to steal equipment to sell in order to buy drugs); *see also Serang*, 156 F.3d 910 (9th Cir. 1998).

88. *United States v. Metre*, 150 F.3d 339 (4th Cir. 1998) (holding that evidence of an earlier abduction and rape was sufficiently similar to the charged crime to be probative of defendant's specific intent to sexually assault victim of charged crime). Where the charge was violent interference with the enjoyment of a public facility based on race, a witness was allowed to testify that the defendant refused to accompany some friends on an outing because they were going with a woman of "mixed race." *United States v. Woodlee*, 136 F.3d 1399 (10th Cir. 1998). There was also a well-publicized trial of two white men in Texas who dragged a man to his death, where the tattoos on their arms which indicated racism and violence were projected onto a screen and discussed by an expert. *See CNN, Racism to be Key Issue in Third Dragging Death Trial*, at <http://www.cnn.com/US/9910/26/dragging.death.01/> (last visited Nov. 25, 2003).

89. *United States v. LeBaron*, 156 F.3d 621 (5th Cir. 1998) (including a limiting instruction that the jury not consider the first murder as proof of the defendant's propensity to kill again, only to prove his intent and motive to murder again).

defendant's girlfriend—who was not involved in the robbery—was permitted to testify that she was afraid of him.<sup>90</sup>

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90. *United States v. Harris*, 165 F.3d 1062 (6th Cir. 1999) (considering evidence as relevant background information). *See also* *United States v. Zamora*, 222 F.3d 756 (10th Cir. 2000) (detailing bank robbery prosecution where government may show defendant robbed a restaurant afterwards because second robbery “shared sufficient similarities, such as intent to obtain money to support heroin addiction”).

Drug distribution and conspiracy trials often include evidence of other drug purchases,<sup>91</sup> and other bad acts, such as gun sales.<sup>92</sup> Domestic violence trials also have included prior bad acts, for example, previous restraining order violations and the accused's unfavorable impression of women.<sup>93</sup> A defendant's prior violent acts against a victim are now allowed in homicide prosecutions.<sup>94</sup> Again, the theory is that these bad acts are not being offered to prove propensity or bad character, but for some other reason, such as identity, motive, intent, or modus operandi.

There is one final safeguard to protect the notion that "a defendant must be tried for what he did, not for who he is." If the prejudicial aspect of a piece of evidence substantially outweighs the probative value, trial judges are supposed to exclude it.<sup>95</sup> However, in all the cases described above, the evidence was not considered too prejudicial, even on appeal. Apparently, many courts are not strictly applying the balancing rule to prevent bad character and propensity from being injected into the trial.

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91. *United States v. Best*, 250 F.3d 1084 (7th Cir. 2001) (noting charge of possession of narcotics with intent to distribute, where the prosecutor was entitled to introduce conviction two years earlier of possession of drugs); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (discussing how drugs found in other state after conspiracy allegedly concluded); *United States v. Brisk*, 171 F.3d 514 (7th Cir. 1998) (noting drugs found prior to conspiracy).

92. One conspiracy case for drug and weapons possession allowed in evidence of uncharged murders. *United States v. Baptiste*, 264 F. 3d 578, 590 (5th Cir. 2001) (discussing how it was "necessary for the jury to understand the brutal nature of the conspiracy"). In a drug case, the court allowed in evidence that the accused sexually assaulted someone who allegedly helped him sell the drugs. *United States v. Johnson*, 169 F.3d 1092, 1096-97 (8th Cir. 1999) (discussing how rape was admissible to show means used to obtain payment for drug debt in furtherance of conspiracy). See also *United States v. Gibson*, 170 F.3d 673, 679 (7th Cir. 1999) (allowing incriminating statements defendant made to the FBI concerning illegal sale of weapon and defendant's prior drug dealing activities).

93. *United States v. Von Foelkel*, 136 F.3d 339 (2d Cir. 1998) (discussing how prosecutor also introduced the defendant's belief that he was above the law to show propensity to lie).

94. See FED. R. EVID. 413 (allowing evidence of similar crimes in sexual assault cases). See, e.g., *United States v. Frank*, 11 F. Supp. 2d 314 (S.D.N.Y. 1998).

95. Rule 403 of the Federal Rules of Evidence establishes a balancing test to exclude evidence that is more prejudicial than probative. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. *But see* *United States v. Claxton*, 276 F.3d 420, 423 (8th Cir. 2002) (noting how rules allow evidence of other crimes unless "it tends to prove only criminal disposition"); *United States v. Fallen*, 256 F. 3d 1082, 1091 (11th Cir. 2001) (holding "Rule 403 is an extraordinary remedy, however, 'which should be used only sparingly since it permits the trial court to exclude concededly probative evidence. The balance under the Rule, therefore, should be struck in favor of admissibility.'"). Russell Jones writes "it is a well accepted principle that the standard used to assess evidence under rule 403 will admit evidence more often than it will exclude it." Jones, *supra* note 4, at 20 (citing GLEN WEISSEBERGER, WEISSEBERGER'S FEDERAL EVIDENCE 403.2 (3d ed. 1997)).

State courts all have analogous rules to Federal Rule of Evidence 404(b), allowing exceptions to the ban against propensity evidence.<sup>96</sup> Some states have also expanded the amount of bad act evidence introduced.<sup>97</sup>

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96. For example, in the O.J. Simpson homicide trial, prior bad acts were allowed in against the victim. *See, e.g.*, *Nebraska v. Jones*, 577 N.W.2d 302, 307-08 (Neb. Ct. App. 1998) (describing how defendant was charged with sexually assaulting two children, and how prosecutor was allowed to show another sexual assault on an unrelated child for purpose of proving motive, opportunity, plan, knowledge, or identity); *State v. Fritsch*, 511 S.E.2d 325 (N.C. Ct. App. 1999) (admitting evidence showing knowledge of degree of care expected towards a child in mother's prosecution for child abuse and involuntary manslaughter), *rev'd on other grounds*, 526 S.E.2d 451 (N.C. 2000).

97. *See, e.g.*, Tom R. Mason, *Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts*, 71 MISS. L.J. 835, 880-81 (2002) (detailing Mississippi law which is more restrictive vis-à-vis bad act evidence). Nevertheless, he writes that "courts have been creative in finding other unlisted purposes [for] justifying evidence" of other bad acts. *Id.*

Although they are not introduced to show that the accused is a bad person or has the propensity to commit the crime charged, once the bad acts are introduced the prosecution may find a way to use them in closing argument to create a picture of the defendant as someone capable of committing the crime.<sup>98</sup>

Courts have long held the view that evidence introduced under the 404(b) exceptions do not constitute propensity or bad character evidence. While recognizing the danger that jurors might use bad act evidence the wrong way, courts tend to assume that curative instructions will cure the problem. There are two myths operating here: first, that jury instructions will cure the tendency of juries to use previous criminal behavior as propensity evidence; second, that the “other” reason the prior bad acts were admitted is unrelated to propensity or bad character evidence.

Professor Andrew Morris persuasively exploded the second myth, proving that evidence admitted to show “intent” or “identity” relies on a propensity inference in order to establish relevance.<sup>99</sup> For this “other purpose” reasoning to work, one must assume a continuity of the defendant’s bad character. Consider a drug case where defendant is found with drugs concealed in his car’s gas tank, and the court admits a prior conviction for smuggling drugs in a vehicle.<sup>100</sup> The evidence in that case was allowed in order to show knowledge, intent, and plan. In other words, the jury is expected to infer that since he behaved badly once before in smuggling drugs, it is reasonable to conclude he will behave badly again. The “bad act evidence supports the finding of intent only if one assumes that the character traits that can be inferred from the uncharged misconduct evidence are continuing.”<sup>101</sup> It is targeted propensity

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98. Samuel Gross, *Make Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 848-52 (1998).

99. Morris, *supra* note 4, at 187 (noting “[w]ithout exception, all federal circuits (and all states) accept this division of the evidentiary field into air-tight propensity and non-propensity categories”). For a list of scholars who accepted the logic that Rule 404 bans propensity reasoning, *see id.* at 184 n.13.

100. *United States v. Saucedo-Munoz*, 307 F.3d 344, 349-50 (5th Cir. 2002).

101. Morris, *supra* note 4, at 198-201. “This is so because the bad act evidence supports the finding

rather than general bad character evidence, but because it is targeted, it is often more damaging than general bad character testimony. As judges allow in growing quantities of evidence under 404(b), the ban against bad character is further undermined.

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of intent only if one assumes that the character traits that can be inferred from the uncharged misconduct evidence are continuing.” *Id.* at 201.

Judges often instruct juries that prior and subsequent bad acts are admitted for a limited purpose and not to show propensity or bad character. Thus, in the drug case described above involving the prior conviction for smuggling drugs, the judge “properly instructed the jury that it was to consider Saucedo-Munoz’s prior offense only so far as it demonstrated the requisite intent.”<sup>102</sup> According to the appeals court: “This mitigated any danger that the jury considered the evidence improperly as proof of bad character.”<sup>103</sup> These type of instructions are impossible to follow because, as Professor Morris explains, the prior offense only demonstrates the requisite intent if one assumes that the defendant has the continuing bad character to repeat the wrong deed. No wonder jury instructions attempting to limit 404(b) evidence are so ineffectual; most contain an inherent contradiction.

Some evidence does not fit Professor Morris’s bad character theory. After all, Professor Morris’s thesis involved intent and identity evidence; he did not consider motive and other 404(b) exceptions. But in those cases where evidence truly fits a non-propensity purpose, it is still difficult for the jury to disregard the bad character aspect of the bad act evidence. For example, in a recent well-publicized Massachusetts murder trial of a Wellesley doctor accused of killing his wife, the prosecution introduced evidence that the doctor often cruised the Internet for pornography and sex.<sup>104</sup> This dirt was allowed

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102. *Saucedo-Munoz*, 307 F.3d at 350.

103. *Id.*

104. MacDaniel, *Greineder Guilty of Murder: Doctor Gets Life Term, No Parole*, BOSTON GLOBE, June 30, 2001, at A1. Dr. Dirk Greineder had all the superficial trappings of good character, including a house in Wellesley and a teaching position at Harvard Medical School. *Id.* You could even say he had good character witnesses since his three grown children testified in his favor. “Attorneys agreed that Greineder’s best case was made by the testimony and courtroom presence of his three grown children, all well-educated and convinced of their father’s innocence.” Erica Noonan, *In the End, DNA Evidence Outweighed Defense*, BOSTON GLOBE, June 30, 2001, at B6. His conviction for first-degree murder of his wife may be understood as one where the prosecution was able to off-set the good character testimony with bad character evidence. *Id.*



into evidence to show motive, for allegedly his wife had just found out about his secret. This is a classic example of motive evidence, relevant because it helps to explain why and when the defendant may have decided to kill, but regardless of jury instructions to the contrary, the evidence doubles as character assassination. The jury learned that the day after the murder, Dr. Greineder attempted to hire a prostitute. It would take an unusual juror not to view this piece of evidence as reflecting negatively on the doctor's character.

There is general skepticism among defense attorneys and scholars that juries can disregard the bad character aspect of bad acts, once bad acts of the defendant are introduced against the accused for any reason, regardless of whether a judge gives limiting instructions.<sup>105</sup> Judge Learned Hand described limiting instructions as “the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.”<sup>106</sup> Telling jurors to disregard what they have heard during a trial has been likened to telling them to ignore the white elephant in the corner of the room. It is even harder for jurors to follow instructions such as the one in Saucedo-Munoz's case,<sup>107</sup> where the jury is told that the defendant's prior transportation of drugs may be used to determine if, in the current case, defendant knew the drugs were in his car and intended to smuggle them, but not to prove that he had the propensity to smuggle drugs. Imagine a jury instructed that they may consider former physical abuse as proof of the defendant's general pattern of behavior but not to show his propensity to beat his wife. It is like telling a jury they can examine the elephant in the room, and consider its weight, but they may not

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105. One study noted that “ninety-eight percent of lawyers believed jurors are not able to follow instructions to consider prior conviction evidence only for impeachment purposes.” Dodson, *supra* note 4, at 43. The article details studies that prove that jurors convict more often when given a defendant's prior convictions and do not follow limiting instructions. *Id.* See also Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 173-87 (1989); Melilli, *supra* note 4, at 1549.

Judge Frank wrote that limiting instructions “are like exorcising phrases intended to drive out evil spirits.” JEROME FRANK, *LAW AND THE MODERN MIND* 184 (1930). Another commentator wrote that by using limiting instructions, the courts are sometimes treating juries “as a group of low-grade morons” and at other times as people “endowed with a superhuman ability to control their emotions and intellects.” EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 105 (1956). Some label limiting instructions as useless because “it is impossible for the juror to so order his mind as to enable him to fractionate evidence into competent and incompetent segments, using only the former in his decisionmaking process.” Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 267 (1966) (citing numerous judicial opinions).

106. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), *cert. denied*, 285 U.S. 556 (1932).

107. *United States v. Saucedo-Munoz*, 307 F.3d 344, 347-50 (5th Cir. 2002); see also *supra* notes 100-03 and accompanying text.

consider its size. Prior bad acts often operate as bad character evidence, and of the most persuasive kind.

One far-reaching reform would be to exclude “intent” from the list of 404(b) exceptions. As Professor Morris established, “intent” is just a camouflaged propensity argument.<sup>108</sup> Similarly, “identity” might be removed from the list for the same reason. Another proposal for reform I make is to limit other 404(b) evidence to situations where the argument for its admissibility does not rely on propensity assumptions. Judges would need to become versed in the logic set forth in Professor Morris’s article and perform a gate-keeping function. Other than “motive” evidence, this reform would restrict a good deal of prior bad acts currently coursing through criminal cases.

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108. Morris, *supra* note 4, at 190-96.

Another way that prior bad acts are introduced into criminal trials is as a tax on a defendant who takes the stand. Defendants who testify may be impeached by prior convictions ostensibly to help jurors evaluate their credibility.<sup>109</sup> In that area there is also pretense that instructions will prevent jurors from using these prior convictions as propensity evidence or bad character. Commentators have long recognized the fact that jurors use prior convictions for propensity and bad character purposes.<sup>110</sup>

Uncharged bad conduct has been a growth industry.<sup>111</sup> There are more appellate cases involving bad acts than any other area of evidence.<sup>112</sup> In 1994, Congress amended the Federal Rules of Evidence to specifically allow bad character evidence to be introduced in select cases.<sup>113</sup> There is discussion

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109. Impeachment by prior conviction is the norm in federal court and in most state courts. *See* Dodson, *supra* note 4, at 31.

110. Jurors are only supposed to use the convictions to evaluate the defendant's credibility, not whether or not they are more likely to have committed the crime. *Id.*

111. *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1984).

112. 22 CHARLES WRIGHT & KENNETH GRAHAM, FEDERAL PRACTICE & PROCEDURE 5239, at 427 (1978). Rule 404 of the Federal Rules of Evidence is also the most cited rule of evidence. FED. R. EVID. 404 advisory committee's notes to the 1991 amendment.

113. FED. R. EVID. 413-415. These rules expand bad character for sexual assault trials, allowing evidence of another offense of sexual assault, with or without a conviction. Andrew E. Taslitz writes that these rules were adopted hastily and radically change the historic bar on character evidence. "Of considerable concern is the fact that [the new rule] ignores the empirical data, which require a wider range of behavior than a single prior incident of wrongful conduct, and a closer match between the earlier situations

about doing away with the bad character ban in all cases to prove propensity.<sup>114</sup> In 2002, Congress further amended the Rules of Evidence to allow the state to try to prove that the defendant has a bad character trait, such as a violent nature, once the defense introduces evidence that the victim possesses this bad character trait.<sup>115</sup> In other words, the defendant no longer needs to introduce his own good character in order to open the door to bad character. This growing trend towards bad character evidence has not been matched by any equivalent movement to expand good character evidence.

The paradox is that character law is presently taught as if the rules of evidence are asymmetrical in favor of the defense. It appears that the lawyer for the accused may argue that she lacks the propensity to do the crime while the prosecution is prohibited from offering evidence to prove that the defendant is the type of person who would commit such a crime. It seems as though criminals are privileged at the expense of the state or of victims. In reality, this asymmetry is reversed.

In sum, defendants in some jurisdictions may only introduce reputation testimony. These witnesses may only generalize from what other people told them about their opinion of the defendant's character, testimony so labored and weak that juries could hardly give it much weight. In other instances, courts bar evidence of good character altogether, claiming that the crimes charged do not involve moral turpitude, so evidence of good character is irrelevant. Moreover, disincentives are worked into the rules of evidence, so that the small benefits achieved by presenting good character witnesses are generally offset by the danger posed by cross-examination of these witnesses. Thus, this right is subject to such limitation that it is practically meaningless.

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and the present one, for prior [bad] acts to be predictive of current ones." Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 495 (1996) [hereinafter Taslitz, *Patriarchal Stories*]. Several states have followed suit, adopting similar exceptions to the character ban. See Jones, *supra* note 4, at 20.

114. See Leach, *supra* note 4, at 825.

115. See FED R. EVID. 404(a)(1) advisory committee's notes ("the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim").

Good character evidence is like the children's party game where the big present is but a tiny trinket wrapped within multiple layers of boxes and wrapping paper. In contrast, the prosecution's package appears smaller, but is filled with ammunition. The current rules of good and bad character are not equal for prosecution and defense, but the inequality slants in favor of the prosecution. Other scholars have called for an end to back-door bad character evidence, and the paltry state of good character evidence supports this call.<sup>116</sup> Certainly the best way to go back to the promise that a defendant will only be tried for what he did or did not do on the night in question, rather than for leading an immoral life, is to do away with prior bad acts except in the slimmest possible exceptions.

Rule 404(b) should be amended to exclude identity and intent as categories. As for other Rule 404(b) exceptions, judges should be required to determine if there is a non-propensity purpose in addition to performing the balancing function, and omit that evidence which relies on propensity reasoning for its admissibility.

### III. HOW JURIES REALLY DECIDE CHARACTER

Next we must consider good character evidence in its own right. Quite apart from the expansion of bad character, is there an injustice in disallowing all but the weakest good character evidence? To answer that question, we must look at how jurors currently evaluate character.

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116. *See supra* note 4.

It appears from the Rules of Evidence that the defense chooses whether or not character is injected into a trial,<sup>117</sup> but in fact, character is central to all jury trials. Lawyers understand that courtroom drama is about convincing a jury to view the personalities involved in the action in such a way that benefits their side. Prosecutors do the same with their alleged victims: ask them to dress well, sit with their families in the front row, and consciously relate to them in a manner that signals to the jury the prosecutor's belief in their integrity. From opening statement through closing arguments, jury trials are full of references to character and character motivation. As Samuel Gross notes, the trial lawyer attempts to create a story much the same way as a novelist does, and the one who succeeds in authoring the story the jury believes, "carries the day."<sup>118</sup>

Professor Andrew Taslitz has looked at empirical studies to prove that jurors use narrative and story telling to make decisions.<sup>119</sup> Empirical studies support the idea that juries reason by telling stories.<sup>120</sup> As Professor Taslitz writes, human "need for stories is hardwired into our brains."<sup>121</sup> He cites a study of jury deliberations where jurors filled in gaps in mental states of the

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117. See FED. R. EVID. 404(a); *see infra* Section III.

118. Gross, *supra* note 98, at 853. *See also* Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 812 (1998) ("In short, American trial lawyers have been exploring and discussing human character in their closing arguments for many years.").

119. Taslitz, *Patriarchal Stories*, *supra* note 113, at 436-39.

120. Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 194-95 (Reid Hastie ed., 1993) [hereinafter Pennington & Hastie]; *see also* NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 62-78 (1995) (citing W. LANCE BENNETT & MARTHA FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981), for their experiments in showing that narrative thinking rather than propositional thinking describes the way jurors make decisions).

121. Taslitz, *Patriarchal Stories*, *supra* note 113, at 434.

participants based upon inferences.<sup>122</sup> Almost half of the references during the deliberations were references to inferred events, actions, mental states and goals that turned the trial into coherent stories. Much of story telling focuses on character. Stories turn on what the characters want and how they act to achieve their objectives.<sup>123</sup> Characters are labeled and then motives and actions attributed to the character are based upon the label.<sup>124</sup> In the studies of mock trials, witnesses and defendants were labeled and then actions were attributed to that person based on the label.<sup>125</sup>

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122. *Id.* at 435 (citing Pennington & Hastie, *supra* note 120, at 195).

123. Taslitz, *Patriarchal Stories*, *supra* note 113, at 439-40.

124. *Id.* at 437 n.335.

125. *Id.* at 436-77.

This story model of jury deliberation supports the idea that good character evidence could affect jury deliberations if the rules were changed. Assuming that jurors do reason in terms of stories, the most persuasive evidence of good character would be vignettes from the life of the accused. Stories of the accused saving the life of a drowning man or stories of the accused helping her children with homework would carry meaning. In contrast, reputation evidence that “Ms. X has a reputation for good moral character” sounds like a form letter for an application to the Bar. It falls outside narrative reasoning. Moreover, the studies’ most striking implication is that if truth is not provided, the jury will rely on inferences and labels.<sup>126</sup> These labels do not provide individualized justice. Instead, the labels are prone to cultural bias.

Defense lawyers have a particular burden regarding the way juries see their clients. One of their chief missions is to humanize them in the eyes of the jury. To some jurors, the mere fact that a person has been charged with a crime will make them assume that the defendant is different from them, a bad person, a criminal.<sup>127</sup> By finding ways to humanize their clients, defense lawyers try to offset the imbalance caused by the accusation and by public

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126. See also NORMAN T. FEATHER, *VALUES, ACHIEVEMENT, AND JUSTICE: STUDIES IN THE PSYCHOLOGY OF DESERVINGNESS* (1999). Feather, an Australian psychologist writes that “the study of moral character has been relatively neglected in both social psychology and personality research.” *Id.* at 222. He did studies that showed that simulated jurors made links between moral worth and status, and showed that status acted as a shield to protect the offender in certain situations. *Id.* at 222-31.

127. See Adele Bernhard, *Effective Assistance of Counsel*, in RICHARD A. LEO, *FALSE CONFESSIONS: CAUSE, CONSEQUENCES AND SOLUTIONS IN WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 213-33 (Saundra D. Westervet & John A. Humphrey eds., 2001) (discussing the “unacknowledged but pervasive belief that all participants in the criminal justice system—even defense attorneys—that anyone who has been arrested is guilty”).



approbation towards criminal defendants.<sup>128</sup> Character evidence must be understood in this light.

*A. Humanizing the Accused*

Defense lawyers put character witnesses on the stand primarily to humanize the accused. It is always easier for a jury to convict someone they do not empathize with, than one they do. If the government is able to portray the accused as “the other,” not someone like themselves, the chances of conviction soar.<sup>129</sup>

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128. Certainly, this is something I did in my own practice. Also, in conversations with other lawyers about their cases, I observed attorneys to be very aware of how their client was likely to be perceived by the jury.

129. See Johnson, *infra* note 146, at 182.

Most of what lawyers do to humanize their client does not fall under the rubric of “good character evidence.” Just as prosecutors know that evidence of defendant’s prior bad behavior introduced under some exception to the rule still serves as bad character evidence for the jury, defense lawyers think of ways to humanize their clients regardless of whether this evidence counts as good character evidence or not. One basic example is how defense lawyers purposely communicate with their clients in front of the jury in such a way as to humanize them, so the jury will see the “defendant” as a real person, a thinking person, perhaps a likable person.<sup>130</sup> For those who are troubled by a lawyer pretending to like a client he does not, consider the alternative; would we want a system where people would be more likely to be convicted if their lawyer did not like them? In deciding whether the rules of good character are too limited, we must first understand the other tools at the defense counsel’s disposal and whether those tools suffice.

Defense lawyers attempt to put the character of the accused before the jury through other methods, such as through the defendant herself or through percipient witnesses in a manner not technically considered good character evidence. For example, the defense lawyer may think of ways to bring out the fact that the accused has a job, education, or a family. Perhaps where the accused has talked to the police, defense counsel might bring out that the accused has never been arrested or questioned by police officers before; the jury learns of the defendant’s clean record, ostensibly to help them evaluate the coercive nature of the interrogation. If the accused testifies, the defense lawyer will try to phrase the questions and answers in such a way so as to highlight the best qualities of the accused without bringing up “good character.” Some defendants, by sheer force of their personality, are able to convince a jury of their integrity and character through direct examination and by withstanding hostile cross-examination.<sup>131</sup>

Humanizing the accused can sometimes be accomplished without introducing character evidence in cases where percipient witnesses know the

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130. For example, when I prepare my students for trial, we discuss what the client will wear, what he will be doing at counsel table, and which student will be making sure the client is perceived as part of the team.

131. In one case I tried, the jury came back with a not guilty verdict in five minutes despite the client having signed a confession. She was a thoroughly convincing witness.

defendant. For example, two students of mine in the clinic tried a case where the defendant's wife testified he had eaten dinner with her one hour before he was arrested for drunken driving. While she was ostensibly called only to say that he had not had anything to drink at dinner, her testimony was much more important than that. She came across as honest, someone who refused to pretend that he was there minutes before, and yet it was clear that she believed he was innocent, that she cared for him and that she stood by him. The underlying message was more important than the factual information given. Although not considered as such, she served as a character witness.

However, the resourcefulness of defense attorneys should not be an excuse to block expansion of character evidence. There are often no percipient witnesses to an event or non-event, nor do all innocent defendants perform well on the stand. Many times, as dramatized in *Snow Falling On Cedars*, difference plays a role. In many cases, the only method to set forth a defendant's honesty, integrity or other personality trait is good character evidence, particularly if it were expanded to allow specific instances of generosity and honesty.

*B. Using Libel and Slander Law to Understand a Criminal Accusation as Character Assassination*

As both prosecution and defense use what tools are available to them to create impressions about the defendant's character and motivation, the prosecution has the decided advantage. First and foremost is the fact that the prosecutor is accusing the defendant of a crime. Even in cases where no other bad acts are introduced, the government is impugning the character of the defendant. That is because the allegation itself, that the defendant did X, includes the corollary proposition that defendant has the character trait of someone who commits X crime. This is true not only as a statement of logic, but more importantly, it is how jurors evaluate evidence. Even if the prosecutor is not allowed to bring up the "bad character" of the accused in order to show that he acted in conformity therewith, as a practical matter, the accusation itself serves as a character assassination.

Defense lawyers experience first hand the effect of the accusation itself on the jury. In his opening statement, the prosecuting attorney informs the jury that the accused is a criminal. Through his words and demeanor, the government lawyer convinces the jury that he knows this to be true.

Accusations alone carry a great deal of weight and power. If there can be any doubt of the power of an accusation, even a false allegation, consider libel law.

Laws regulating libel and slander recognize that calling someone a criminal damages that person's reputation.<sup>132</sup> Accusing someone of criminal behavior is libel per se, meaning that the harm to the person accused is so obvious it need not be proven.<sup>133</sup> Consider the Tawana Brawley affair. False allegations were made that an assistant district attorney named Steven Pagonis kidnapped and raped a fifteen-year-old girl. No charges were ever brought against him, and a grand jury cleared him. Nevertheless he successfully sued for defamation against the alleged victim and her three advisors.<sup>134</sup>

Richard Jewell was another recent case involving a false allegation. Mr. Jewell was the security guard named as a suspect in the bomb blast at the 1996 Atlanta Olympics. He went from the status of hero, for moving people away from a suspicious briefcase before it exploded, to suspect in three days.<sup>135</sup> Like Steven Pagonis, Richard Jewell was never charged and was publicly cleared. Unlike Mr. Pagonis, the insinuation against Mr. Jewell appeared to have governmental backing since the sources of the allegation were unidentified FBI officials who were said to be "close to making the case."<sup>136</sup> NBC, who reported that Jewell was a suspect, paid him over \$500,000 to prevent an action for libel.<sup>137</sup>

If incorrect accusations of criminal behavior destroy reputation when uttered by anyone, think how much more powerful an accusation by a

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132. RESTATEMENT (SECOND) OF TORTS § 569 cmt. d. (1977).

133. *Id.*

134. The three advisors were Al Sharpton, C. Vernon Mason and Alton Maddox. (This is the same Al Sharpton who is running in the 2004 presidential campaign). The jury awarded damages against the advisors in the amount of \$345,000, damages that could have been higher, legal commentators note, had the lawyer itemized the damages. *Court Decisions Second Judicial Department Dutchess County Supreme Court, Pagonis v. Maddox*, QDS:04700356, N.Y. L.J., Oct. 16, 1998, at 35. Instead, some jurors said they took their cue from Mr. Pagonis when he testified that "he did not want to destroy" the three men. Joseph Kelner & Robert S. Kelner, *Post-Trial Critique of Tawana Brawley Case*, N.Y. L.J., Aug. 25, 1998, at 3. Further damages were awarded by the judge against Ms. Brawley in the amount of \$185,000. This includes compensatory and punitive damages. *Supra* at 35.

135. *Ex-Suspect in Bombing Sues Newspapers, College: Jewell's Libel Claim Seeks Unspecified Damages* (AP story), WASH. POST, Jan. 29, 1997, at A8.

136. Amy Stevens, *The Accused: How Richard Jewell and His Lawyers Seek Revenge in the Media*, WALL ST. J., Jan. 3, 1997, at A1. Mr. Brokaw, anchor of the *NBC Nightly News*, said on the air: "The speculation is that the FBI is close to making the case, in their language. They probably have enough to arrest him right now, probably enough to prosecute him, but you always want to have enough to convict him as well. There are still some holes in this case." *Id.* at A4.

137. *Id.* He also reached monetary settlements with CNN, an Atlanta radio station, and with his former employer. *Jewell Settles Lawsuit with Former Employer*, WASH. POST, Aug. 27, 1997, at A11.

government lawyer is, especially when the accusation is accompanied by a complaint or indictment.<sup>138</sup>

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138. See Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299-1307 (2000) (discussing the burdens of the charge that persist even if the defendant is acquitted, especially the stigma on a defendant's reputation).

Jurors are drawn from the public at large and reflect the dominant attitudes. Many jurors assume that most defendants are guilty, or else they would not be there.<sup>139</sup> They assume that there is a weeding out process that protects the innocent.<sup>140</sup> They assume that the prosecuting attorney knows more than they know. Thus, the accusation of criminal wrongdoing, which would be likely to destroy one's reputation if uttered anywhere, is particularly damaging when uttered by someone recognized to be an officer of the court, with the full backing of the court behind him. Given the existing juror attitudes, the accusation itself is character assassination. As Professor Miguel Méndez writes, "these days . . . criminal defendants have replaced the Communists as the principal bogeymen."<sup>141</sup>

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139. See Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1372-74 (1997); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 371-74 (1995).

140. Givelber, *supra* note 139, at 1372 n.213 ("The state's decision to charge the defendant with the crime has considerable evidentiary weight regardless of the presumption of innocence or any other platitude."). The fact that people are refused employment simply for being arrested attests to the presumption of guilt. *Id.* See Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133, 134-38 (1962) (discussed in Leipold, *supra* note 138, at 1310 n.40). Most cases involve police investigation followed by an arrest, and jurors learn of this in the course of trial. There is a grand jury process in bringing the indictment which is often common knowledge even if not specifically mentioned during the course of trial. In some cases, pretrial publicity creates an even more severe problem regarding the assumption of guilt by jurors.

141. Méndez, *supra* note 4, at 884.

Prosecutors almost always press their advantage by referring to the accused not by his name, but as “the defendant,” uttered sometimes with disdain, or perhaps in the right case, a sneer. Many prosecutors point an accusing finger towards the accused in their opening or closing statements, as if the assistant district attorney himself were an identifying eyewitness. In closing arguments, prosecutors have been known to engage in name-calling including “animal,” “mad dog,” “worm,” “leech,” “punk,” “cheap, scaly, slimy crook,” and “the vilest type of character known to humanity.”<sup>142</sup> While appellate courts should overturn convictions when such obvious character assassination occurs, it is sobering to learn that this is not always the case.<sup>143</sup> The point is not that prosecutors sometimes cross the line, but in understanding that these lines exist on a continuum, where obvious illegitimate character assassination is sometimes different only in degree from legitimate argument.

Not surprisingly, prosecutors are specifically exempt from libel law. No matter how untrue, the accusation in and out of the courtroom is not subject to redress under federal civil rights laws as long as the prosecutor was not acting dishonestly or maliciously.<sup>144</sup> As a society we isolate prosecutors from the rules of slander, for certainly to do their jobs properly, prosecutors must call some innocent men and women criminals.<sup>145</sup> It is naive to think that the force of the accusation is easily offset by the judge informing the jury that the defendant is presumed innocent.

The Rules of Evidence speak of good character evidence as if character is brought up for the first time in a case by the defense lawyer when he presents character witnesses as part of the defense case. In reality, good character

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142. Gross, *supra* note 98, at 848-49.

143. Trial court rulings are often affirmed in spite of prosecutors using derogatory language to describe the defendant. *See, e.g.*, *Johnston v. United States*, 154 F. 445, 449 (9th Cir. 1907) (affirming despite prosecutor’s references to the defendant as a “hired gun fighter” and a “hired ruffian” because no error found); *Illinois v. Franklin*, 552 N.E.2d 743, 753 (Ill. 1990) (finding no error despite prosecutor’s references to the defendant as a “hit man” and an “executioner”); *Tennessee v. Prince*, 713 S.W.2d 914, 918 (Tenn. Crim. App. 1986) (affirming despite prosecutors labeling of the defendant as a “dope peddler,” a “dope seller,” and a “dope dealer” in closing arguments); *Williams v. Alabama*, 377 So. 2d 634, 639 (Ala. Crim. App. 1979) (affirming despite prosecutor’s calling the defendant a “wolf” and an “animal” in closing argument). *But see, e.g.*, *Kincade v. Sparkman*, 175 F.3d 444, 445-46 (6th Cir. 1999) (reversing conviction because of prejudice caused by the prosecutor repeatedly calling the defendant a professional burglar and insinuating that the defendant may have been involved in multiple burglaries throughout the county); *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926) (reversing conviction because prosecutor prejudiced jury by referring to the defendant as a “skunk,” a “weak-faced weasel,” and a “cheap, scaly, slimy crook”).

144. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

145. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

evidence is introduced in a more defensive posture. Done well, good character witnesses will offset the character assassination caused by the accusation and undo the negative attitudes of some of the jurors at the commencement of the trial. Such evidence constitutes an attempt to accord the accused the presumption of innocence the law promises.

### C. Racial Difference Strengthens the Cost of the Accusation

Although people charged with crimes constitute “the other” in the dominant American society, racial differences also matter. If the accused is from a race which is unpopular, the prosecutor’s accusation is likely to have greater tenacity. To the extent there has been research on the effect of jurors’ attitudes, the studies bear out the assumptions criminal lawyers have made for decades: biases matter. For example, researchers have documented that the race of the defendant affects how jurors view the accused and what kind of assumptions are made about them.<sup>146</sup> “It would appear that white subjects tend to assume less favorable characteristics about black defendants than white defendants and that such assumptions contribute to these subjects’ greater tendency to find black defendants guilty,” concluded author Sheri Lynn Johnson in summarizing a number of studies measuring the correspondence between the race of defendants and juror attitudes.<sup>147</sup> “When the evidence is not strong enough for conviction a white juror gives the benefit of the doubt to a white defendant but not to a black defendant.”<sup>148</sup> Another study looked at juror sympathy as a factor in acquittal and concluded that white defendants were more likely to be recipients of juror leniency based on sympathy for the

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146. Sheri Lynn Johnson, *Black Innocence and the White Jury*, in CRITICAL RACE THEORY: THE CUTTING EDGE 180-90 (Richard Delgado ed., 1995). See Taslitz, *Myself Alone*, *supra* note 4, at 18 (noting the “powerful pressures on individual jurors to resort to stereotyping for guidance”). For online annotated bibliographies of readings on racial disparity in the criminal justice system, see Steven Kalogeras, *Annotated Bibliography: Racial Discrimination in the Criminal Justice System*, at <http://www.sentencingproject.org/pdfs/5007.pdf> (last visited Nov. 25, 2003); Marc Mauer, *Part I. Americans Behind Bars: The International Use of Incarceration, 1992-93*, THE SENTENCING PROJECT (1994), at <http://www.drugpolicy.org/library/behindbars.cfm> (last visited Nov. 25, 2003); Marc Mauer, *Part II. Americans Behind Bars: The International Use of Incarceration, 1992-93*, THE SENTENCING PROJECT (1994), at <http://www.drugpolicy.org/library/bars-p2.cfm> (last visited Nov. 25, 2003). See also BARRY SCHECK ET AL., ACTUAL INNOCENCE 203-05 (2000).

147. Johnson, *supra* note 146 at 187.

148. *Id.* at 181 & n.31 (citing Denis Chimaeeze E. Ugwuegbu, *Racial Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 139-40 (1979)).



defendant because jurors viewed the black defendant as “extremely unsympathetic.”<sup>149</sup>

Storytelling theory helps us understand the bias. Since jurors use stories in their reasoning, stories that are common to the jurors’ culture will have more resonance, more power.<sup>150</sup> “So cultural tales lay a heavy hand on the scales of justice.”<sup>151</sup> Given the inherent stereotyping within culture, this constitutes a detriment for criminal defendants, especially criminal defendants from unpopular groups. This helps explain why cultural stereotypes can have so much force at trial.

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149. Johnson, *supra* note 146, at 181 (citing to H. KALVIN & H. ZEISEL, *THE AMERICAN JURY* 217, 343-44 (1966) (comparing judges’ view of the evidence to that of jurors. The study would likely have produced even more radical results if minority judges were chosen for the study. There is no reason to suppose that white judges are immune from the stereotyping prevalent in juries)).

150. Taslitz, *Patriarchal Stories*, *supra* note 113, at 435.

151. *Id.*

When the public thinks about criminals they see a dark face. Consider the way doorbells are used in some city stores to keep criminals out. Race is often used as a predictor of bad character.<sup>152</sup> The buzzers are meant to keep the criminals out. Race is used as a predictor of criminality. Consider “driving while black” cases; stops and searches where police use race as a predictor of criminality.<sup>153</sup> When O.J. Simpson was accused of murder, *Time* altered a photograph to give him a darker complexion than he has.<sup>154</sup> Lani Guinier speaks of the rhetorical wink, the way in which politicians can avoid being considered racist because they never mention color; instead they talk about crime and the need for prisons when the public knows they are talking about race and class.<sup>155</sup> Jurors come from the same society that produces the shop owners, police, the readers of *Time*, and the constituents mentioned above. The opening statement of the prosecutor is even more likely to stick when the face they see at counsel table is a dark one. The tendency to think the

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152. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-46 (1991). Professor Williams gives an account of being excluded from Benetton’s one afternoon. “I pressed my round brown face to the window and my finger to the buzzer, seeking admittance.” *Id.* at 44. See also Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1-56 (2003). See also *BOWLING FOR COLUMBINE* (United Artists 2002) (discussing television’s focus on the arrest of people of color and comparing the rarity of depicting arrests of white CEO’s for embezzlement).

153. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 430 (1997) (discussing drug courier profiles).

154. *TIME*, June 27, 1994 (cover); *NEWSWEEK*, June 22, 1994 (cover). The manipulation became apparent when *Newsweek* placed an un-touched-up version of the mug shot on its cover that same week. See also Kate Betts, *The Man Who Makes The Pictures Perfect*, N.Y. TIMES, Feb. 2, 2003, § 9, at 1.

155. Lani Guinier, *Clinton Spoke the Truth on Race*, BALT. EVENING SUN, Oct. 20, 1993, at 25A.

defendant looks guilty will naturally be higher if the defendant fits a stereotype. The likelihood of a jury giving a defendant the benefit of the doubt—the presumption of innocence—diminishes as the margin of difference increases. One way to think about a jury trial is the government’s attempt to label the accused as “the other,” the ultimate outsider, a criminal. Jurors find it easier to consider a defendant as “the other” if they do not share the same race or class.

Stereotypes and bias are natural products of human perception. “All humans tend to categorize in order to make sense of experience.”<sup>156</sup> According to psychologists E. Tory Higgins and Gillian King, information gleaned from people is quickly encoded into categories,

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156. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987)).

about social groups (e.g., blacks, women, gays and lesbians), social roles and occupations (e.g., spouses, maids, police officers), traits and behaviors (e.g., hostile, crime-prone, patriotic, and intelligent), and social types (e.g., intellectual, social activists, and rednecks). Once the behavior is assigned to one of these categories, it is stored in memory, from which it subsequently can be retrieved to make further inferences and predictions about the person.<sup>157</sup>

Results of the studies on human processing, writes Professor Jody Armour, “carry enormous implications for judgments and evaluations” of behavior of people who are members of these groups.<sup>158</sup> For example, people may unconsciously attribute hostile or violent behavior to black men.<sup>159</sup> Thus, the racial aspect of cultural stories is particularly problematic for defendants from unpopular backgrounds.

Stereotypes are especially pernicious when the stereotype fits the accusation. Among whites, 22% believe blacks are more violent than whites.<sup>160</sup> The stereotype that black men are violent is problematic when an African-American man is charged with an assault. Similar stereotypes of violence are attached to masculine-looking women. The stereotype of the Latin-American drug king-pin resonates all too well where the accused is Latino and the charges involve narcotics. Professor Taslitz writes about prevailing stereotypes in current culture that resonate with juries in rape cases: black men and Hispanics as bullies and rapists, and poor black women as “welfare queens” who breed children for cash, are lazy and oversexed.<sup>161</sup>

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157. *Id.* at 750-51 (citing E. Tory Higgins & Gilliam King, *Accessibility of Social Consequences of Individuals and Contextual Variability*, in PERSONALITY, COGNITIVE, AND SOCIAL INTERACTION 69, 71-72 (Nancy Corton & John F. Kihlstrom eds., 1981).

158. *See id.*

159. Taslitz, *Patriarchal Stories*, *supra* note 113, at 466 (citing PAUL N. SNIDERMAR & THOMAS PIAZZA, *THE SCAR OF RACE* 38-44, 51 (1993)).

160. *Id.* at 466 n.521.

161. *Id.* at 456-59 (citing to RICHARD D. RIEKE & RANDALL K. STUTMAN, *COMMUNICATION IN LEGAL ADVOCACY* 94-98 (1990)) [hereinafter RIEKE & STUTMAN]. Other studies about bias are discussed in Armour, *supra* note 156.

Unfair acquittals, not unfair convictions, are what concern Taslitz about jury stereotyping. Taslitz is concerned with factually guilty defendants being acquitted; he searches for ways to prevent acquittals in rape cases where jury stereotypes about rape and about victims of rape conflict with the government's evidence.<sup>162</sup> Nevertheless, these racial images have currency for defendants of color regardless of whether they are factually guilty or innocent.

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162. Taslitz, *Patriarchal Stories*, *supra* note 113.

One of the cases that Taslitz uses to discuss pernicious stereotypes is the Central Park jogger case where a white female investment banker was brutally attacked while jogging. The case raises interesting issues about the limits of good character evidence. Thirty-six non-white youths were convicted of raping her and the word “wilding” was born in the media. While Taslitz acknowledges how public attitudes towards teenaged blacks and Hispanics made it easier to convict them, he assumed they were factually guilty. A decade after the convictions, the world knows better.<sup>163</sup> DNA tests revealed the Central Park jogger was raped by one individual. We are all familiar with the narratives of a “wilding” pack of boys. But what are the narratives of innocence that were missing from the trials and the media? Hindsight indicates that either the confessions themselves should have been barred or, at the very least, jurors needed to learn more about the danger of false confessions through expert testimony. Now that we know they were innocent, we also assume that there is some story of who they were that led them to confess falsely to the police. Did the jury need to hear more from their family members about their character? Or is this an example of a situation where good character evidence will not help. If these boys were in fact intent on robbery, not rape, such a narrative of innocence would not have resonated well. Giving defense counsel the tools to use character evidence does not mean there will be narratives of innocence in most cases.

Much of the effort in eliminating pernicious stereotyping from juries has been centered on jury selection. Courts have cracked down on use of peremptory challenges to eliminate minority jurors from sitting in judgment.<sup>164</sup> Focusing exclusively on jury selection to cure racial bias is problematic for it assumes that diverse juries will not entertain invidious stereotypes. The same study that reported negative white attitudes also examined blacks’ attitudes

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163. Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1.

164. Lonnie J. Brown Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209-31 (2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998).

towards members of their own race. In “every case” they found that blacks were “at least as likely, sometimes even more likely, than whites to accept negative stereotypes about blacks.”<sup>165</sup> Given these numbers, it seems important to seek additional ways to counteract prejudice against the accused rather than simply limiting or prohibiting peremptory challenges.

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165. Taslitz, *Patriarchal Stories*, *supra* note 113, at 466. But see REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 138 (2001) (discussing how African-American citizens reacted differently than European Americans to the O.J. Simpson verdict based on the experiences of themselves and family of unfair police treatment).

How can character evidence help cross this great divide? As a public defender I once handled a rape case where the accused was a black man and the alleged victim was a white woman in a long-term relationship with a white man. Given the attitudes I saw around me in central Massachusetts, I assumed race was going to be a factor in the jury's deliberations. The accused was a soldier, and I spent a few days meeting with other soldiers, both black and white, who knew my client and would testify to his good character. Under the Massachusetts character rules, they would not be allowed to testify to anything more than knowing the accused and the fact that he had a reputation for truthfulness and for upstanding character. Nevertheless, I thought they would dilute the racism directed towards the accused. After all, some of these soldiers were white young men, men like the jurors' own sons, who would tell the jury that this was a normal man, not some crazy rapist.<sup>166</sup> But this case is just an example of the defense using stereotyping too. My client crossed over the division from "the other" because he was a soldier in an integrated army, because he had white friends. His friends were the cows and horses so enamored by the lawyer in *Map of the World*, superficial markers of belonging. They are the white friend Patricia Williams could take shopping if she wants to better her chances of being buzzed into Benetton.<sup>167</sup> But not all defendants have close friends from other races and classes. Is it possible for witnesses from the same racial background as an outsider defendant to

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166. Unfortunately, I never had a chance to see how my theory worked in practice. I agreed to continue the case a number of times for it looked as if the alleged victim did not want to press forward with the case and the charges would be dropped. When it finally did go to trial, I had left the public defender's office and the soldiers I had put on my witness list had all moved out of state. My client was acquitted thanks to some wonderful lawyering of a colleague of mine, but not until the jury was out for five hours. It was the exact type of case where character evidence could make a difference.

167. WILLIAMS, *supra* note 152.



translate the humanity of a moral defendant effectively for a white jury?<sup>168</sup> If we expand the right of good character evidence, are we only going to benefit those who are already advantaged under the present system?

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168. In a recent article, Thomas J. Reed wrote “*Martinez* is the only case since the adoption of the Federal Rules of Evidence in which the defendant was acquitted on account of good character standing by itself.” Reed, *supra* note 4, at 3521 (citing *United States v. Martinez*, 924 F. Supp. 1025 (D. Or. 1996), *aff’d*, 122 F.3d 1161 (9th Cir. 1997)). Since it is impossible to know through regular research methods what causes jurors to acquit, I suppose that what Reed meant was that *Martinez* is the only case where a trial judge overturned the jury’s conviction based on good character evidence presented. *See id.* at 351 n.55.

Although lawyers might wish for middle-class white character witnesses, it is not always problematic to have witnesses from the same background as a minority defendant. One way character evidence sometimes works to alleviate prejudice is when the jury connects with a character witness from the same background as the defendant. For example, I tried a case where the all-white jury looked scared of the defendant and his alibi witness, both of whom were African-American teenagers. The alibi witness wore baggy trousers, a headscarf, and had a rolling walk. Some of the jurors shrank back as he walked by.<sup>169</sup> However, when I put him on the stand, I could see the jurors gradually change their attitudes. He was a sweet young man with an equally sweet young voice. The evaporation of bias regarding the witness's character could only have a salutary effect in dissipating the jury's attitude about my client's character, since he was from the same background. In that case, the defendant's mother also made a wonderful witness and further humanized my client. Again, these were not character witnesses, but percipient witnesses. Nevertheless, they served a dual function; they were character witnesses in the sense that they helped humanize my client, helped undue stereotypes about African-American youth, and may even have given the accused the presumption of innocence.<sup>170</sup>

Not all minority clients are lucky enough to have alibis or percipient witnesses who can double as de facto character witnesses. Expanding good character evidence gives defense attorneys the opportunity to put on witnesses like my client's mother and friends, even where there is no alibi defense.

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169. I displayed him to the jury for identification purposes while cross-examining a police officer. In fact, I asked the witness to dress the way he did for trial because that was the way he dressed in a store camera video the prosecution showed to the jury. The clinic case discussed earlier in the article also involved an African-American defendant. The witness that doubled as a de facto character witness, his wife, was also African-American.

170. The defendant was acquitted but the defense practically proved innocence, so it is unclear whether the jury actually gave the defendant the presumption of innocence. On the other hand, I felt the lessening of racial stereotyping helped make the verdict possible. In that case, the witnesses probably served better than a psychologist in dissipating stereotypes.

Good character should not just be a lucky by-product of percipient witnesses' testimony where it may dissipate stereotypes and bias in the jury room.

Thus far, this article has focused on expanding lay testimony on character.

Expert testimony by psychologists also provide a good alternative method for presenting good character evidence.<sup>171</sup> As long as experts base their opinion on life histories as well as personality tests, the psychologist may be the best type of witness to present the jury with a full picture of the accused. Expert witnesses may indeed make the best translators from the culture of the client to the culture of the jury.<sup>172</sup> Clients' lives are often distasteful to juries: unwed mothers and fathers, welfare checks, or friends who are in gangs. These cultural differences make it difficult to find lay witnesses with whom the jury will identify. Psychologists are likely to be from the same background as the jurors and may communicate the personality traits of the accused without interference from the cultural baggage of poverty. In addition, psychologists may be able to explain behaviors of the group better than lay witnesses.<sup>173</sup>

The choice should be left to defense counsel whether to rely solely on lay testimony or to seek psychological testing. Attorneys may find experts make the defendant more of an outsider, a subject of study, rather than someone similar to the jurors' sons, co-workers or neighbors. Certainly, the cost of lay witnesses will be less expensive. Defense attorneys may want to put on the friends and co-workers of the defendant instead of an expert or in conjunction with expert testimony. Both methods of creating a human narrative should be available.

#### IV. THE EXPANSION OF GOOD CHARACTER EVIDENCE SHOULD NOT ENCOURAGE MORE BAD CHARACTER EVIDENCE

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171. Professor Taslitz has laid out some of the advantages of expert testimony about a defendant's personality in criminal trials. Taslitz, *Myself Alone*, *supra* note 4, at 63-86. *See also* Reed, *supra* note 4, at 401 (advocating the acceptance of expert opinion evidence on personality traits).

172. *See* Reed, *supra* note 4, at 401 (urging courts to accept expert opinion evidence on personality traits). The problem posed by life histories is that it would seem to open the door to cross-examination on everything in that person's life. This is a problem of both time, money for proper investigation, as well as questions of accuracy. Some limits would need to be imposed on the cross-examination.

173. For example, if the defendant avoids eye contact with the lawyers at trial, it may be understood as evasiveness unless an expert explains the culture from which the defendant comes and the meaning associated with eye contact. *See* Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 358 (1997). "Limited eye contact is culturally normative in African-American, . . . Latino, and Asian communities."

“Connie will be a constant reminder for the jury that I’m not just some faceless defendant. I’m not just some midwife. I’m a mother. I have a daughter, a family.” . . . .  
Nonny finally asked, “And that means they’ll have mercy?”  
“This is not about mercy!” my mother snapped back.

Chris Bohjalian<sup>174</sup>

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174. CHRIS BOHJALIAN, *MIDWIVES* 236-37 (1998).

The rule permitting good character has been called the “mercy rule.” The designation has some negative connotations, as if good character is not really evidence of innocence but a ploy for mercy or jury nullification. Many observers believe the relevance of good character evidence is little or none.<sup>175</sup> Just because a criminal defendant appears well-meaning to his co-workers at the office does not mean he did not rape his date. Just because a defendant has never committed a crime before does not mean that she did not commit one this time. While this is true, relevance is an intentionally low standard, defined as any evidence that tends to make the existence of a particular fact at issue more or less likely.<sup>176</sup> If any change in probability can be shown, then the proffered evidence meets the relevance test.<sup>177</sup>

Social science data supports the notion that persons who act violently in the past are more likely to act violently in the future than those who have no prior history of violence, although this does not mean that violence can be predicted with any accuracy.<sup>178</sup> Most evidence law is not based on science but on a common understanding of the world, and that includes the relevance standard.<sup>179</sup> In everyday life, we look at people’s past behavior as predictors of future behavior and as aids to understand current behavior. Although it is true that someone with no criminal history may commit her first crime, no one is saying that the lack of a criminal past is dispositive of whether she committed this crime. Most evidence in criminal trials is not dispositive, but serves as just one building block—in this case a building block of innocence.

DNA evidence has led to exonerations in many different types of cases, pointing to an over-conviction problem in the justice system.<sup>180</sup> While most commentators seek solutions to the problem through limiting what the government may introduce, it is certainly important to use these revelations to

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175. See, e.g., Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1305 (2001) (Sanchirico assumes that the mercy rule is only useful for those with impressive friends and who appear to be guilty beyond a reasonable doubt).

176. See FED. R. EVID. 401.

177. *Id.*

178. MCCORMICK, *supra* note 36, at 793 & n.4 (“By and large, persons reputed to be violent commit more assaults than persons known to be peaceable.”).

Studies reveal that the single best predictor of future violence is past violence. On the other hand, a 1981 study showed that psychiatric experts were wrong in predicting future violent behavior in two out of three instances. Méndez, *supra* note 4, at 876. This article will not attempt to examine the psychological literature and social science literature in this regard. See Reed, *supra* note 4, at 356 (summarizing personality theory in psychology).

179. See Kim Lane Scheppelle, *The Ground Zero Theory of Evidence*, 49 HASTINGS L.J. 321, 330 (1998).

180. SCHECK ET AL., *supra* note 146, at 262-67; Givelber, *supra* note 139, at 1318-19 & n.7.

consider the absence of defendant narratives at trial. Generally this type of narrative—what Jeffrey Pokorak calls “The Human Story” which he contrasts to “The Kill Story”<sup>181</sup>—comes in at the sentencing phase rather than during the guilt/innocence phase. Given what we know about jurors using story-telling models to fill in the gaps and decide the facts, the human story may well belong in the guilt/innocence phase also.

One proposal this article makes is that the rules be changed to allow a wide variety of good character evidence and that admissibility not be limited to specific charges or specific traits. The main benefit of good character evidence is that it strengthens the legal presumption of innocence and off-sets the slander-like damage of the charge. Owing to juror bias, some defendants need to be humanized in order for the jury to give the defendant the presumption of innocence. If the accused brings food every day to an elderly neighbor, that information helps humanize him in the eyes of the jury, whatever the charge is.

It may be difficult to explain what generosity has to do with being charged with car-jacking or a bar-room fight, but trying to fit people’s personality into specific pertinent traits proves too constricting and ignores the general defamatory nature of a criminal accusation. I further recommend that good character evidence be expanded to allow specific instances of good conduct as well as opinion evidence.

Expanding good character evidence takes valuable court time. As with bad character evidence, there is a concern that the trial will get off course and the jurors subjected to extraneous information. The jury may become sidetracked. This problem may not seem to be very serious given the fact that the expansion of bad character evidence also takes time and judicial resources.

What is troubling for many about broadening the type and extent of good character testimony is that it may seem to take the fact finder farther away from the alleged crime than prior bad acts would.

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181. Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY’S L.J. 421, 434, 438 (1999).

“Ground zero” is the point at which the crime was committed or allegedly committed.<sup>182</sup> Underwriting most evidence law is a bias that evidence in close proximity to the alleged crime is the most relevant and probative means to finding truth.<sup>183</sup> Since character evidence is about how a person acts elsewhere, it is necessarily distant in time as well as in place. That may make the evidence less convincing in some judges’ minds and perhaps judges’ also in the minds of many on the jury, but it does not make it irrelevant. Moreover, while a focus on recency in trials serves to shorten them, it may not improve the truth-finding function as a wide-lens view would. Usually the prosecution’s narrative focuses on the time the crime was committed or the time shortly before that. It is only when the evidence is weak or susceptible of disbelief that the prosecution needs to delve into the past to gain convictions. But the defense narrative is bound to be different in many cases. Under the defendant’s narrative of innocence in battered women defense cases, for example, there is a long history of abuse that needs to be explained.<sup>184</sup> For a narrative of innocence centered on good character evidence, of course the focal point will be different from the day the crime happened. The “ground zero” notion of relevancy is often a device that favors the prosecution’s case.

Unfortunately, once commentators determine that character is relevant to decisionmaking, they often urge the use of prior bad act evidence. To the extent scholars refer at all to good character, which is not often, they tend to discuss good and bad character evidence as if the two were interchangeable.<sup>185</sup>

This section explains why symmetry—although an improvement to the status quo—is not ideal for character evidence.

There is a difference in the kind of dangers posed by the two forms of character evidence as well as the degree of harm. The original asymmetry that was intended to favor the accused was unequal for a reason. Asymmetry between good and bad character evidence has been justified historically by the danger of unfair prejudice to a defendant by character assassination with no equally countervailing danger from the admission of good character evidence.<sup>186</sup> Consider the competing dangers in admitting character evidence

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182. Term coined by Scheppelle, *supra* note 179 (coining the term, “Ground zero” for crime scenes).

183. *See id.*

184. James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 *YALE L.J.* 1845, 1866 (1999).

185. *See* Reed, *supra* note 4, at 354-56.

186. For the risk of unfair prejudice with the introduction of prior bad acts, see *Huddleston v. United States*, 485 U.S. 681 (1988). *See also* *Spencer v. Texas*, 385 U.S. 554, 570 (1967) (Warren, C.J., dissenting) (suggesting in dissent that propensity evidence would violate the Due Process Clause of the federal

in a drug case. The prosecution wants to put in the following propensity evidence:

1. The accused sold drugs on prior occasions and therefore she probably was guilty this time. (Or the defendant intended to sell drugs once before so probably intended to sell drugs again).

The defense wants to put in the following lack of propensity evidence:

2. The accused led a life that was full of integrity, compassion for the poor, hard work, and honesty from which they can infer she probably did not sell drugs.

The first type of evidence creates a danger of prejudice that the jury will convict a defendant for what she did in the past rather than for the current charge. It also creates a danger that the jury will relax its standard of proof. The jury will be less inclined to give the defendant the benefit of the doubt because she is not a good person so they do not care about her liberty interests in the same way as they would someone else. These are grave dangers indeed, for they undercut the constitutional right that a defendant can only be convicted on proof that satisfies a trier of fact beyond a reasonable doubt as to the truth of a particular charge. In contrast, good character evidence carries much less significant risks. Not only is the danger of unfair prejudice nonexistent; in fact, good character evidence may mitigate other unfair prejudice in the trial.



McCormick explains that propensity evidence both for and against the accused is relevant, but bad propensity evidence is disallowed because it is considered much more prejudicial than is evidence in favor of the accused.<sup>187</sup> “Now, knowledge of the accused’s [good] character may prejudice the jury in his *favor*, but the magnitude of the prejudice or its social cost is thought to be less.”<sup>188</sup> The previous rationale on relevance and prejudice continues to be convincing. The long established purpose of excluding character evidence is to protect the presumption of innocence as well as to foster efficiency at trial by avoiding mini-trials on the uncharged conduct.<sup>189</sup> Yet good character testimony only implicates efficiency, not prejudice against the accused. The only comparable danger to undue prejudice in allowing in good character evidence is a concern that the evidence will increase the chances of jury nullification. By jury nullification, I mean that there is fear that a factually guilty defendant will be set free because a jury likes him, or because they feel that since he has behaved admirably for so many years, the jury will feel it is unfair to convict him for one transgression.

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187. MCCORMICK, *supra* note 36, at 812.

188. *Id.* at 812-13.

189. See JACK B. WEINSTEIN ET AL., WEINSTEIN’S EVIDENCE ¶ 404[04] (1996).

To the extent character evidence increases the rate of acquittal, even if such acquittals are a form of jury nullification, it might be an improvement to the justice system. Jury nullification already exists and is a recognized aspect of jury trials.<sup>190</sup> The reason that the Constitution grants jury trials to criminal defendants is because juries are more likely to acquit.<sup>191</sup> Jury nullification at its best serves as a clean up function for prosecutors that fail to properly screen their cases.<sup>192</sup> Judges are under increasing pressure to allow the prosecution to make the decision whether to forge ahead or dismiss, while district attorneys sometimes have a no-drop policy, are politically pressured to continue cases, or simply pulled by the momentum of the case flow.<sup>193</sup> Justice sometimes requires an acquittal. When the public disagrees with a verdict of not guilty the verdict is often called jury nullification, but that does not mean it is a bad verdict.

While we are uncomfortable with the jury nullification of white murders in the Reconstructionist South, most of us are comfortable with the acquittals in runaway slave cases.<sup>194</sup> The recent controversy over jury nullification in favor of black defendants on account of race brought many of these issues to the forefront, including the fact that jury nullification as it is presently constituted tends to help white, middle class defendants, or those that look like the jury.<sup>195</sup> One can also read the acquittal of murder for battered women who detail their abuse as a form of jury nullification. Thus, if good character evidence does increase jury nullification, one question is whether it will

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190. See David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89 (1995); see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); see Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996).

191. See Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 635 & n.105 (1998) (citing THE FEDERALIST PAPERS).

192. Nullification may also reflect societal displeasure at the way laws are enforced. See Butler, *supra* note 190, at 714.

193. See generally Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995). For example, I represented an indigent client charged with disturbing the peace for yelling at the police while they sat on her brother, killing him by suffocation. Even if she was technically disturbing the peace, I felt a jury should and would bring back a verdict of not guilty if the prosecution and judges failed to dismiss. Taslitz writes that “criminal liability is justified primarily by moral values” and “the criminal law’s notions of responsibility in turn must be generally consistent with popular notions of morality.” Taslitz, *Myself Alone*, *supra* note 4, at 20-21.

194. See Butler, *supra* note 190, at 917-18.

195. *Id.* at 692, 722 (pointing to the Rodney King acquittal).

increase the wrong kind of jury nullification— nullification that favors a two-class system of justice in this country, or whether it is more benign.<sup>196</sup>

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196. The problem is multi-faceted, for even if it serves to even the playing field for indigent minority defendants accused of crimes, it certainly does not help alleged victims who are indigent or minorities. Arguably, these changes might disempower them because if the defendant is from a privileged background and his character is built up, the perceived character of the alleged victim might suffer in comparison. Although this might be a problem, alleged victims also come to court with some inherent advantages that might off-set this uneven character battle, such as the advantage of having the government obtain a grand jury indictment based on their word.

Social science data indicates jurors are more influenced by unfavorable character evidence than they are by favorable character evidence.<sup>197</sup> While juries are likely to consider good character in their deliberation, they are unlikely to overvalue this type of defense evidence.

In a recent well-publicized case, a young English woman serving as a nanny was convicted of second-degree murder in the death of an infant in her care. Louise Woodward's defense team mounted a serious challenge to the scientific evidence introduced by the prosecution. Woodward was convicted despite the fact that good character evidence was introduced in her favor.<sup>198</sup> The conviction squares with the social science data suggesting that juries are not unduly influenced by evidence of good character, at least not in the manner that it is presently introduced. *Woodward* is also worth examining on the question of whether good character evidence is useful only for the middle class or wealthy defendants, the type of defendants that are already favored in the criminal justice system. The English nanny had an expensive legal defense team and much of the public was sympathetic to her. Some in the public were convinced of her innocence, but many more viewed her as a victim of situation.<sup>199</sup> They had compassion for her and did not see her as a criminal. Woodward's appeal to television viewers was her white skin and youth, and

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197. See Michael Lupfer et al., *Presenting Favorable and Unfavorable Character Evidence*, 10 LAW & PSYCHOL. REV. 59 (1986). Good character evidence comes into play in close cases. There is no support for the proposition that jurors frequently disregard evidence of guilt just because a person is of good character.

198. William F. Doherty, *Pathologist Says Old Injuries Led to Death of Newton Infant*, BOSTON GLOBE, Oct. 18, 1997, at A1 ("[T]wo teachers at Cheshire schools that Woodward attended before coming to the United States . . . testified as character witnesses. They described Woodward as nonviolent, law-abiding, and honest.").

199. *Nanny Goes Free; the Word on the Street: Shock and Understanding*, BOSTON HERALD, June 17, 1998, at 12; *Letters to the Editor, Guilty of Being English*, BOSTON GLOBE, Dec. 15, 1997, at A22.

the fact that she was English and female did not hurt her either. Woodward's conviction anecdotally supports the notion that for those with the attributes that substitute for good character in present day trials, the addition of good character testimony is largely redundant.<sup>200</sup>

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200. Woodward was arguably a close case on the evidence, despite the fact that it involved the heinous charge of killing an infant. The trial judge must have thought so, for he reduced the verdict on his own motion from second-degree murder to manslaughter. William F. Doherty, *Day of Decision: The Woodward Ruling*, BOSTON GLOBE, Nov. 11, 1997, at A1.

It should not be a disturbing notion that if one has led a blameless life up to the point of accusation, one should get the benefit of that personal history when the jury considers the evidence presented. Moreover, if the jury is using good character evidence to favor acquittal in close cases, as the social science studies indicate, then that is a perfect use of this evidence. Another way of looking at it is that the jury is taking to heart the constitutional mandates of presumption of innocence and proof beyond a reasonable doubt. Evidence that makes them scrupulously honor these oaths should be admitted without reservation. In a recent article, Professor Katherine Goldwasser argued that whenever rules of evidence are used to restrict defense evidence, they should be challenged by the constitutional provisions mandating the presumption of innocence, the beyond a reasonable doubt standard of proof, and the Sixth Amendment right to a jury trial. These constitutional provisions designed to protect the criminal defendant need to be considered holistically, she argues quoting Justice Harlan, “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent [person] than to let a guilty [person] go free.”<sup>201</sup> Her arguments in favor of asymmetry within criminal trials should be imported into the arena of character evidence.

In expanding good character testimony, it is imperative that no symmetrical loosening occur in the bad character rules. Simply put, the force of bad act evidence is much more powerful than the force or affect of good act evidence. Hence, if character were freely allowed in for both sides that would unduly privilege the government and unduly prejudice the defendant. What about leveling the playing field by getting rid of all character evidence, both for and against the accused? A friend who is a public defender commented “*Good* character?! I would happily give up any right to good character evidence if in return I could keep out bad character.” You find no dissenters to this opinion among the defense bar. The data supports the proposition that we should trust jurors to sort out the reliability and strength of good character testimony. It also supports the notion that the rules of evidence should not require symmetry between good and bad evidence but should treat each differently because they are different in fact, as measured by their impact on the jury’s decisionmaking. While equal treatment of good and bad character evidence would appear to level the playing field—and might be an improvement for defendants in some courts and some cases—in fact equal treatment would privilege the prosecution. If no evidence were allowed in

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201. Goldwasser, *supra* note 191.

from either side, that would still favor the government because of the character assassination implicit in most indictments and opening statements.

In sum, asymmetry in favor of good character evidence is justified by the significant danger of unfair prejudice nascent in bad character testimony. Neither concern posed by good character evidence—jury nullification and lack of recency—are comparable harms. Harking back to the notion of the accusation itself as libel, there is no comparable need on the part of the prosecution to off-set the accusation. The need for good character evidence is not counterbalanced by any similar need for bad character evidence, while the risk of harm from bad character evidence is much greater.

#### V. CONCLUSION: REFORMS TO ASSURE THE PRESUMPTION OF INNOCENCE

At present, the right of the accused to present his good character is a hollow promise. A system where the story of George Washington chopping down a cherry tree is fodder for cross-examination but may not be used to show honesty, is a system that needs reform.

The myth of asymmetry teaches law students that defendants have the right to prove their good character while the prosecution is prevented from bringing in bad character except in the most narrow of circumstances. What goes on in courtrooms is quite different. Reality is also asymmetrical, but it is prior good acts that are not presented, while prior bad acts are increasingly allowed in. While most of this bad character evidence is ostensibly allowed in for a different purpose than propensity, in most instances jurors will use this evidence as proof of bad character. The original reasons for curtailing bad character evidence are as valid as ever. Prior bad acts entail a danger of unfair prejudice to the accused, the danger that jurors will not give a defendant the presumption of innocence on the current charge once they learn about defendant's bad character. In contrast, prior good acts pose no strong danger to justice. The character rules should be reformed to reflect the original promise, an asymmetry that protects the accused. Good character may be "deeply imbedded in our jurisprudence,"<sup>202</sup> but it also should be imbedded in the practice of law.

Lack of good character evidence in jury trials poses a myriad of problems for justice in this country. First, there is the problem of hypocrisy, with the

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202. *See supra* note 22.

promise of defendant rights taught but not practiced, enforcing the public myth about “coddled criminals”; a myth with negative side effects on the justice system in this country. Second, there is the problem of wrongful convictions. The pervasive lack of good character evidence in wrongful conviction cases (as in all criminal cases) forces us to wonder whether good character evidence might have made a difference in some of these cases. Although more studies are needed to ascertain whether good character evidence will prevent wrongful convictions, I have shown how such evidence serves to strengthen the presumption of innocence and how the lack of evidence enforces the presumption of guilt. Third, there is the problem of the non-level playing field vis-à-vis the prosecution. The prosecution’s allegation of wrongdoing is itself a burden on the jury’s view of the defendant’s character, and the prosecution’s use of prior bad acts is ever increasing. In contrast, good character evidence, if allowed, would simply undergird the benefit of the doubt and presumption of innocence that are cornerstones of criminal jurisprudence. Fourth, there is the problem of the non-level playing field vis-à-vis affluent, white defendants.

Offsetting prejudice is probably the most important use of good character evidence. Where the accused is from a socially unpopular group, accusations are even more likely to stick. Jurors currently make decisions about character based on stereotypes and labels. This is a huge disadvantage to defendants who do not have ways to counteract the prejudice. One form of character evidence that might help alleviate the prejudice is psychologists’ testimony. They have the ability to educate the jury about the defendant’s culture. Aspects of the defendant’s character that may seem bad to the jury may turn out to be cultural, such as the way Kabuo Miyamoto appears to the jury in the novel *Snow Falling on Cedars*. Lay character witnesses could be a less expansive alternative in many cases. They may also help alleviate the prejudice in a number of ways, assuming a reform of good character evidence.

First, the witnesses may have stories to tell about the accused’s life that humanizes her in the eyes of the jury. Second, character witnesses may have backgrounds that the jurors can relate to, either racial similarity to the jurors or middle class indicia such as a job, family and home. The fact that they know, like, and interact with the defendant may dissipate the prejudice. Third, character witnesses from the same background as the defendant may have the kind of personality that jurors will like, and that will dissipate the stereotypes and therefore help alleviate the prejudice against the defendant.

The most serious danger in expanding good character evidence is that it will only help those who are middle class or upper class, those with lifestyles



that the jury will view as worthwhile. If this is true, then these proposed changes would only further the divide between the haves and have-nots, with many of the non-affluent defendants being immigrants or persons of color. On the other hand, the status quo supports the use of stereotyping. The current lack of good character evidence adversely impacts many defendants of color who may have friends, family and co-workers who can help cross the divide. Since those with privilege are advantaged by the current system, the expansion of good character evidence will make the greatest difference for defendants who do not have the usual trappings of good character, such as job, marital status, or home ownership, but who have led good lives.

This article makes several recommendations to shift the balance back in favor of defendants. First, I propose reforms to 404(b), eliminating “intent” and “identity” as exceptions and requiring that the evidence truly be introduced for non-propensity reasons. I also would urge the repeal of new laws that expand bad character evidence.<sup>203</sup>

This article also recommends that the rules of good character evidence be expanded to include specific acts of good character. Defendants should be given the right to tell the jury about their life, hardships, triumphs, and human connections. This would be in addition to the conclusory opinions about character traits that are allowed in most jurisdictions, and in addition to reputation evidence, although this rarely used “right” may become extinct when other options are available to defense counsel. Given that the principle reason against expanding good character is the time it takes to delve into these issues, I propose that this right be time limited. Perhaps a rule can be structured to allow two hours worth of good character evidence for most trials, longer for murder cases or life felonies.<sup>204</sup> Counsel shall be given latitude whether to use those hours to call an expert or to put on lay witnesses who know the defendant personally or professionally. The right should no longer be limited to “traits” that are considered pertinent to the charge, but should allow a defendant to be humanized in whatever manner that counsel considers effective in alleviating the stigma of being accused.

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203. I urge the repeal of the amendment to Federal Rule of Evidence 404(a)(1) that allows bad character traits to be introduced when defense counsel brings up similar bad character traits against the alleged victim. I also urge the repeal of Rules 413-415 of the Federal Rules of Evidence which specifically allow propensity evidence to be introduced.

204. The time should not include objections by opposing counsel or discussions with the judge. Cross-examination of these witnesses should also be time limited. Cross-examination should not be longer than the direct.

Finally, this article recommends that despite *Michelson*'s holding allowing impeachment with bad acts as a tax upon defense counsel's introduction of good character evidence, the statutes should be adjusted to severely restrict the penalty against good character. If the defendant puts on good character, the prosecution should only be able to introduce criminal convictions, not introduce arrests or unsubstantiated allegations.<sup>205</sup> As we can see from the George Washington illustration, the penalty against good character evidence is so sweeping it nullifies the right.

While a change in the rules should bring an increase in the use of good character evidence, it will still be used only in a minority of cases. Many defendants will not benefit by the rule changes, particularly defendants with prior convictions. Many defendants with prior convictions already give up their right to testify in order to keep them out. For those defendants, the bias problems discussed in this article will need another solution. For these defendants, the most important change will be ridding trials of prior bad acts that rely on propensity reasoning to meet the relevance threshold.

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205. *See supra* text accompanying notes 76-77. The federal rules currently allow the prosecutor to introduce good character of a government witness through opinion or reputation. FED. R. EVID. 608. This article is not recommending any change in those rules. The need for expansion of the type of good character evidence a defendant can put on is created by current social attitudes towards criminals and people charged with crimes. No corresponding animosity exists towards victims or witnesses. If the prosecution is allowed to bring in other forms of bad character on cross, voir dire should be used liberally to ensure a good faith basis for other negative behavior before it is set before the jury.

A change in the rules will require defense counsel to talk to character witnesses and prepare a whole other dimension to the trial. One could say it forces criminal trial lawyers to act more like solicitors than barristers. On the other hand, knowing one's client fully is part of the disposition aspect of any case, so lawyers generally should be putting effort into learning their clients' good points whether for a plea or for argument before a judge if the client is convicted. Moreover, the new emphasis in the academy on knowing one's clients and client-centeredness would be enhanced by rules that actually gave space within jury trials for sharing the fruits of these labors.<sup>206</sup>

In literature, trials are the story within a story. Novels, biographies and histories all deal with character as the motivator of human behavior. When we read, we often think about the psychology of the individual. Good literature informs us of how complicated it is to understand people. It may be impossible for a trial to accomplish what a novel can do to lay out character in any depth or honesty. Yet, this article has hopefully laid out the negative consequences caused by lack of information about good character. Certainly jurors look at character in trials the same way readers do, trying to draw meaning from the clues. Defense lawyers use good character evidence to suggest that someone who has acted well in the past is unlikely to have committed the crime charged. Good character evidence allows someone who had a blameless life to gather the benefit of his prior actions when accused of a crime.

In every trial, defense counsel needs to find ways to humanize the accused, to offset the sting of the accusation, to drive home the presumption of innocence. Good character evidence, including evidence of prior good acts, should be one method of humanizing the accused.

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206. Jacobs, *supra* note 173, at 373. (Professor Jacobs writes: “[H]ow can she [the lawyer] assist the listener (court, prosecutor, jury) in understanding the client’s story when the court itself is unfamiliar with the client’s contextual experience?”). According to Jacobs, “[w]e need to begin educating the courts about our clients’ lives and stories, outside of the adversarial context, so that our attempts to ‘empower’ our clients do not become empty rhetoric.” *Id.* at 402.