

Articles:

The Content of Our Character¹

Teneille R. Brown*

ABSTRACT

Common law judges were worried that if jurors learned of the accused's past acts or character traits, they would punish him not for being proved guilty of this crime, but for the kind of person that he is. Unfortunately, our attempt to correct this powerful tendency has only made things worse. When jurors cannot hear how someone has behaved in the past, they will instead rely on immutable facial features—rooted in racist, sexist, and classist stereotypes—to draw character inferences that are even more inaccurate and unfair. Undisputed findings from social psychology demonstrate that we rely on features like the distance between the eyes, the width of the nose, the angles of the jawline, and the color of

1. “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” - Martin Luther King, Jr. at the March on Washington on August 28, 1963. This Article calls for revision to the evidence rules based precisely on the kind of racial prejudice reflected in this famous quote.

* Teneille R. Brown is a Professor of Law in the Center for Law and the Biomedical Sciences at the S.J. Quinney College of Law, and a member of the Center for Health Ethics, Arts and Humanities at the University of Utah. She would like to thank Ron Allen, Michael Risinger, Michael Saks, Emily Murphy, and Ed Cheng for their feedback on drafts of this project, as well as the members of the Utah Supreme Court Evidence Advisory Committee, who likewise provided helpful comments on this proposal. While writing this Article during the early months of the COVID-19 pandemic, she was caring for and teaching two young children at home

skin to spontaneously infer whether someone is threatening, intelligent, or kind. This in turn predicts election outcomes, hiring decisions, teaching evaluations, and even jury verdicts. Because this split-second process is subconscious and pervasive, it is not susceptible to mitigation through jury instructions. Witnesses will be considered untrustworthy based only on their face, and in some cases, justice may require admitting bolstering evidence before their character is technically attacked. I thus propose reversing the ban on character evidence, in favor of a presumption of inadmissibility for immoral traits only. My proposal has a number of benefits, including retethering the rule to its moral, normative roots and acknowledging that not all past act evidence will be unfairly prejudicial. Finally, delivering the greatest balm to judges and attorneys, admissibility would no longer hinge on the gossamer-thin distinction between propensity and non-propensity uses. This is because jurors will automatically use whatever information is available, including evidence of mental states, to infer character traits, predict behavior, and assess blame.

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I. INTRODUCTION: DIFFICULTY APPLYING THE CHARACTER EVIDENCE BAN

The ban on character evidence has noble origins—to ensure that the accused is punished not for what he has done in the past, or for what kind of person he is, but because the current charges are proved beyond a reasonable doubt.² The ban exemplifies a libertarian spirit of autonomy and rehabilitation: yes, you did bad things before, but there is hope. You

2. See David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167–68 (1998).

can still be reformed. The historical essence of the rule is thus unambiguously moralistic and optimistic about the potential for people to change.

The common law of the United Kingdom thus prohibited evidence of the accused's traits or past actions to predict whether he committed *this* crime.³ About two hundred years ago this doctrine became universally accepted in the United States. It is now enshrined in the federal evidence rules and those of every state.⁴

Unfortunately, the premise behind the ban on character evidence was doomed from the start. For one, jurors do not restrict their assessment of character to formal, regulated testimony. They will use whatever evidence is available to them, no matter how unreliable, to automatically infer character traits. These traits are then used to do the very thing the rules prohibit—to predict how others will think and act, and whether they deserve blame.⁵ Jurors cannot *not* do this.

Humans are constantly, subconsciously inferring character traits.⁶ Almost immediately, we move from making a myriad of observations about someone to inferring stable dispositional traits.⁷ Artful attorneys know this. It is why Roger Stone wore a simple navy suit to his arraignment hearing, so he did not look “too rich.”⁸ It is why jury consultants tell women to smile more, and why witnesses wear glasses if they want to appear smart.⁹ It likely also played a role in Harvey Weinstein's use of a walker as he entered his criminal trial.¹⁰ Yet none of these sources of character information are treated as formal evidence or regulated by the rules.

However, this phenomenon goes well beyond manipulating the way you dress or behave in court. It runs much, much deeper. A robust body of

3. *See id.*

4. *See* FED. R. EVID. 404(a)(1). There are notable common law and statutory exceptions built into the rule, which will be discussed below.

5. *See* Kao-Wei Chua & Jonathan Freeman, *Facial Stereotype Bias Is Mitigated by Training*, SOC. PSYCH. & PERSONALITY SCI., Nov. 2020, at 1, 1; *see also* Bastian Jaeger et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?* 16 (Nov. 27, 2020) [hereinafter Jaeger et al., *Can People Detect*] (unpublished manuscript) (<https://bit.ly/34pkf1y>).

6. *See* Chua & Freeman, *supra* note 5, at 1; *see also* Alexander Todorov & James Uleman, *Spontaneous Trait Inferences Are Bound to Actors' Faces: Evidence from a False Recognition Paradigm*, 83 J. PERSONALITY & SOC. PSYCH. 1051, 1051 (2002).

7. *See* David Hamilton et al., *Sowing the Seeds of Stereotypes: Spontaneous Inferences About Groups*, 109 J. PERSONALITY & SOC. PSYCH. 569, 569–70 (2015).

8. *See* Vanessa Friedman, *Does This Dress Make Me Look Guilty?*, N.Y. TIMES (April 25, 2019), <https://nyti.ms/34dwazw>.

9. *See* Michael Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, THE JURY EXPERT, Mar. 2011, at 1, 1–2.

10. *See* Jasmine Harris, *The Truth About Harvey Weinstein's Walker*, N.Y. TIMES (Jan. 30, 2020), <https://nyti.ms/3oJBiox>.

research demonstrates that people make *instant* decisions about whether to trust someone based *only on the features of their face*.¹¹ And unlike our clothing or demeanor, we cannot easily change our facial features. Jurors will immediately draw trait inferences based on the distance between our eyes, the angles of our eyebrows and lips, the prominence of our cheekbones, whether our face is symmetric—and of course, glaringly, the color of our skin. These inferences are not diagnostic of personality or how someone actually behaves, but they reliably predict whether we find people to be trustworthy, aggressive, likeable, or competent.¹²

For decades, psychologists have been studying how we form impressions of others. One relevant process, referred to as spontaneous trait inference (STI), has received considerable scrutiny. These inferences occur without our awareness and enable quick character assessments based on limited information. Remarkably, STIs exert long-lasting effects. They have been shown to predict electoral success,¹³ job opportunities,¹⁴ teaching evaluations,¹⁵ and even guilt and sentencing decisions.¹⁶ Many legally-significant outcomes may be based on nothing more than the facial equivalent of phrenology.¹⁷ And yet, the study of STIs has not yet pierced legal research or doctrine. This is about to change.¹⁸

11. See Tessa Marzi et al., *Trust at First Sight: Evidence from ERPs*, 9 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 63, 63 (2012).

12. See Chua & Freeman, *supra* note 5, at 1; see also Jaeger et al., *Can People Detect*, *supra* note 5, at 16.

13. See Marzi et al., *supra* note 11, at 63.

14. See Sarah V. Stevenage & Yolanda McKay, *Model Applicants: The Effect of Facial Appearance on Recruitment Decisions*, 90 BRIT. J. PSYCH. 221, 229 (1999) (where physical disfigurement had a strong negative impact on hiring decisions); see also Michèle C. Kaufmann et al., *Age Bias in Selection Decisions: The Role of Facial Appearance and Fitness Impressions*, FRONTIERS IN PSYCH., Dec. 2017, at 1, 1; see also Warren B. Scott, *Filling in the Gap: How Dental Aesthetics Impact Future Outcomes Through Inferences of Competence* 73 (Dec. 2020) (Ph.D. dissertation, Howard University) (ProQuest Dissertations & Theses Global) (noting that job candidates with better looking teeth, who are often whiter and wealthier, had higher “hireability” ratings and higher recommended starting salaries than candidates with crooked teeth).

15. See Nalini Ambady & Robert Rosenthal, *Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness*, 64 J. PERSONALITY & SOC. PSYCH. 431, 431 (1993).

16. See Bastian Jaeger et al., *Can We Reduce Facial Biases? Persistent Effects of Facial Trustworthiness on Sentencing Decisions*, J. EXPERIMENTAL SOC. PSYCH., Sept. 2020, at 1, 2 [hereinafter Jaeger et al., *Can We Reduce*].

17. See Ram Hassin & Yaacov Trope, *Facing Faces: Studies on the Cognitive Aspects of Physiognomy*, 78 J. PERSONALITY & SOC. PSYCH. 837, 837 (2000); see also Harriet Over & Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From?*, 170 COGNITION 190, 190 (2018).

18. See Chua & Freeman, *supra* note 5, at 1 (describing empirical support for the idea that face impressions have no correspondence with actual personality).

A. *We Cannot Not Make Character Inferences*

Within 0.1 second of meeting anyone, we have already formed an impression of them—including when we are jurors listening to witness testimony.¹⁹ Almost immediately we have decided whether we think this person is honest, clever, likeable, or dangerous based on superficial information that is outside of their control. Jurors, like the rest of us, then gather information about how the person has behaved. Depending on our goals, new information may or may not lead to updating our initial impressions.²⁰

It turns out that this basic psychological process of forming immediate impressions of others lies beneath *all* of our social interactions. It has enabled humans to cooperate in costly endeavors and to predict whether people would be good allies or cheats.²¹ All day long we constantly make predictions about others' behaviors and intentions based on their past actions and our assessments of their characters, which we incorrectly assume to be stable.²² Because this process is spontaneous and subconscious, we cannot stop doing it when we become jurors in trials.

Humans are so motivated to infer people's traits that, in the absence of information about how others have behaved, we instead rely on crude proxies such as race,²³ dress,²⁴ accent,²⁵ and facial features²⁶ to predict

19. Some impressions can be formed after less than .04 second of exposure. See Sean Baron et al., *Amygdala and Dorsomedial Prefrontal Cortex Responses to Appearance-Based and Behavior-Based Person Impressions*, 6 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 572, 572 (2011); see also Thimna Klatt et al., *Looking Bad: Inferring Criminality After 100 Milliseconds*, 12 APPLIED PSYCH. CRIM. JUST. 114, 114–25 (2016); Over & Cook, *supra* note 17, at 190.

20. See Peter Mende-Siedlecki, *Changing Our Minds: The Neural Bases of Dynamic Impression Updating*, 24 CURRENT OP. PSYCH. 72, 72 (2018); see also Irmak Olcaysoy Okten et al., *On the Updating of Spontaneous Impressions*, 117 J. PERSONALITY & SOC. PSYCH. 1, 18–19 (2019).

21. See *id.* at 93.

22. See Daniel Ames & Susan Fiske, *Outcome Dependency Alters the Neural Substrates of Impression Formation*, 83 NEUROIMAGE 599, 605 (2013); see also Peter Vranas, *The Indeterminacy Paradox: Character Evaluations and Human Psychology*, 39 NOÛS 1, 29 (2005); see also Randy McCarthy & John Skowronski, *What Will Phil Do Next? Spontaneously Inferred Traits Influence Predictions of Behavior*, 47 J. EXPERIMENTAL SOC. PSYCH. 321, 330 (2011).

23. See Jasmine Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 386–87 (2018).

24. See Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 876 (2018) (“[C]lothing is not subjected to evidentiary rules. The smart prosecutor will instruct the victim to dress modestly at trial in order to present the victim as a ‘good girl.’ By doing so, and without uttering a word, the prosecutor is introducing evidence of the victim’s character.”).

25. See Rose, *supra* note 23, at 386–87.

26. See Jaeger et al., *Can People Detect*, *supra* note 5, at 3; see also Todorov & Uleman, *supra* note 6, at 1064 (STIs are bound to actor’s faces in long-term memory).

their personalities.²⁷ We spontaneously infer whether someone is threatening, kind, intelligent or trustworthy based on social context and the superficial features of their face.²⁸ We make these predictions immediately, unintentionally, and without even realizing we are doing so.²⁹

Of course, perceiving someone's mouth and eyes can help to assess their present emotions. However, when drawing character inferences from faces, we cannot easily distinguish transient expressions from permanent facial features.³⁰ We overgeneralize and wrongly assume that people's outward appearance reflects their fixed, interior characters.³¹

*B. The Character Evidence Rules Prohibit Us from Doing
Something We Evolved to Do*

Despite providing inaccurate bases for prediction,³² there is widespread agreement about what features make a face dominant, trustworthy, or agreeable.³³ Indeed, even computers that are trained to classify faces based on a number of objective characteristics can predict personality traits that are consistent with human observation. This is based on the reliable, if inaccurate, perceived correlations between physical features and character traits.³⁴

Our human brain evolved to facilitate social interactions by crudely predicting character traits. For example, our brains are wired to prioritize memories of immoral conduct, to help us sort people into those with good and bad characters.³⁵ Moreover, people with lesions in a specific part of the brain—the medial prefrontal cortex—have difficulty forming impressions of others due to deficits inferring character traits.³⁶ Reliably,

27. See Over & Cook, *supra* note 17, at 190.

28. See *id.*; see also Victoria K. Lee & Lasana T. Harris, *How Social Cognition Can Inform Social Decision Making*, 7 FRONTIERS NEUROSCIENCE 1, 3 (2013); see also Over & Cook, *supra* note 17, at 190.

29. See David Pizarro & David Tannenbaum, BRINGING CHARACTER BACK: HOW THE MOTIVATION TO EVALUATE CHARACTER INFLUENCES JUDGMENTS OF MORAL BLAME (2011), reprinted in THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 91, 92 (Mario Mikulincer & Phillip R. Shaver eds., 2012); see also Todorov & Uleman, *supra* note 6, at 1051.

30. See Over & Cook, *supra* note 17, at 196.

31. See Chua & Freeman, *supra* note 5, at 1.

32. See Jaeger et al., *Can People Detect*, *supra* note 5, at 16.

33. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 5.

34. See Connor J. Parde et al., *Social Trait Information in Deep Convolutional Neural Networks Trained for Face Identification*, COGNITIVE SCI., June 2019, at 1, 1.

35. See Luke J. Chang & Alan G. Sanfey, *Unforgettable Ultimatums? Expectation Violations Promote Enhanced Social Memory Following Economic Exchange*, FRONTIERS BEHAV. NEUROSCIENCE, Oct. 2009, at 1, 1–12.

36. See Chiara Ferrari et al., *The Dorsomedial Prefrontal Cortex Mediates the Interaction Between Moral and Aesthetic Valuation: A TMS Study on the Beauty-is-Good Stereotype*, 12 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 707, 707–17 (2017); see also

if not accurately, encoding and recalling character traits has allowed researchers to use patterns of brain activation to decode the specific identity of someone a subject is thinking about, based just on the subject's neural activity.³⁷ The fact that we have evolutionarily conserved brain architecture for forming character impressions of others tells us something about its importance to our ancestors.³⁸ Convergent data from behavioral and neuroimaging studies demonstrate the continued social value of being able to make quick character assessments.³⁹

In addition to being supported by evolutionary mechanisms, these automatic facial inferences are reinforced by social learning (such as glasses cue intelligence, or Black people are more likely to be violent).⁴⁰ This leads to less accurate predictions about an individual's future behavior, as well as to systematic discrimination against people with particular, often racialized, characteristics.⁴¹ These heuristics can create a feedback loop where learned stereotypes about different races or ethnic groups inform character inferences, which then feed back into the negative stereotypes. We reinforce the association between certain facial features and positive or negative traits through political cartoons, news media, criminal prosecutions, or discriminatory propaganda.⁴²

The psychological processes facilitating these inferences developed in our deep ancestral past, when we traveled in homogenous groups and rarely intermingled with other races or ethnicities. However, despite greater genetic and cultural diversity, these processes endure.⁴³ Psychologists hypothesize this is because: (1) the heuristics are fast and

Ning Ma et al., *Spontaneous and Intentional Trait Inferences Recruit a Common Mentalizing Network to a Different Degree: Spontaneous Inferences Activate Only its Core Areas*, 6 SOC. NEUROSCIENCE 123, 123–38 (2011).

37. See Simon B. Eickhoff & Robert Langner, *Neuroimaging-Based Prediction of Mental Traits: Road to Utopia or Orwell?*, PLOS BIOL., Nov. 14, 2019, at 1, 1–2; see also Demis Hassabis et al., *Imagine All the People: How the Brain Creates and Uses Personality Models to Predict Behavior*, 24 CEREBRAL CORTEX 1979, 1983 (2014); see also Jaeger et al., *Can People Detect*, *supra* note 5, at 16.

38. See Mende-Siedlecki, *supra* note 20, at 72.

39. See Lee & Harris, *supra* note 28, at 11.

40. See Clare Sutherland et al., *Individual Differences in Trust Evaluations Are Shaped Mostly by Environments, Not Genes*, 117 PNAS 10218, 10218 (2020). But see Sutherland et al., *Social Learning and Evolutionary Mechanisms Are Not Mutually Exclusive*, 28 PNAS 16114, 16114 (2020).

41. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 1–2.

42. See Over & Cook, *supra* note 17, at 195.

43. Nikolaas N. Oosterhof & Alexander Todorov, *The Functional Basis of Face Evaluation*, 105 PROC. NAT'L ACAD. SCI. 11087, 11091 (2008) (“These compelling impressions are constructed from facial cues that have evolutionary significance. The accurate perceptions of emotional expressions and the dominance of conspecifics are critical for survival and successful social interaction.”).

efficient, requiring very little cognitive effort; and (2) we implicitly assume facial cues are more predictive of behavior than they actually are.⁴⁴

Despite the primacy with which humans use character traits to predict how others may have acted at another time, this sort of reasoning is *explicitly prohibited* in civil and criminal trials. As mentioned briefly above, attorneys are not allowed to introduce evidence of someone's past acts or traits for "propensity purposes." That is, attorneys cannot suggest that someone acted in conformity with a trait or behavior on a particular occasion.

If this tendency to infer character traits is as implicit and ubiquitous as I suggest, then how could courts possibly hope to enforce such a far-reaching ban? At the heart of the answer is our magical thinking about jurors and trials. Our rules of evidence presume that jurors can and should suspend the very attributes that make them human—namely, their emotional, social, and, in some cases, their moral intuitions.⁴⁵ The common law rules of evidence and the federal rules of evidence (FRE) imagine that judges can put a halt to subconscious and automatic human inferences by either explicitly prohibiting any evidence that triggers them, or by issuing limiting instructions that jurors disregard particular inferences.⁴⁶ There is abundant research that these limiting instructions do not work, and might actually backfire by drawing attention to the very thing that is meant to be ignored.⁴⁷ If a witness is described as a "junkie" or a "racist," the jury is almost certainly going to infer something negative about the kind of person the witness is. This is going to happen regardless of any instruction that the evidence only be used for purposes of assessing impeachment, for example.⁴⁸

Most of our evidentiary rules developed when we had no data on whether jurors could be perfectly rational in their legal reasoning. However, the last fifty years have produced a great deal of knowledge about the powerful forces of social psychology and emotion, which operate in the wings of the theater of trials. In many cases, automatic and

44. The belief that personality traits are reflected in a person's facial characteristics is called "physiognomy." See Jaeger et al., *Can We Reduce*, *supra* note 16, at 2.

45. See Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 47–48 (2011).

46. Judges are presumed to be capable of the herculean task of dodging most human cognitive biases, simply by virtue of the robes they wear and experience they have had. See Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 790 (1998).

47. See T. Brown, *supra* note 45, at 66.

48. For example, the infamous "Mark Fuhrman tapes," where an LAPD detective on the O.J. Simpson case repeatedly used racial slurs, were introduced not to prove the detective was a racist, but to impeach his testimony that he had not used a particular racial slur in over a decade. However, once this evidence was heard, Fuhrman's racism colored every aspect of the prosecution. See ROBERTO ARON ET AL., *The Fuhrman Tapes*, TRIAL COMMUNICATION SKILLS § 38:6 (2d ed. 2020).

unconscious psychological inferences—the product of millions of years of evolution and psychology—cannot simply be muted by carefully orchestrated evidence rules. We must revise the character evidence rules to reflect what psychologists already know—that people cannot *not* make character inferences.

This Article will proceed in three more parts. First, I will detail why the common law got it right—we do tend to assume that behavior can be explained by people’s fixed traits, but this is not always an error. Next, I describe how humans immediately use spontaneous trait inferences (STIs) to engage in person-centered blame.⁴⁹ This evidence from social psychology significantly weakens the power of evidence rules to mitigate character inferences. Lastly, I articulate and defend my proposed revisions to the character evidence rules in light of the previous Section. Ironically, to achieve the normative commitments of the rule, we must permit more character evidence, rather than less.

Below is my proposed rule, which I provide both here and at the end for reference:

My proposed rule 404:

- (a) Evidence of a person’s character, trait, or past acts (“character evidence”) may be admissible to prove that on a particular occasion a person acted in accordance with that trait.
- (b) If the judge makes a preliminary determination that the character evidence speaks to a trait that is not considered immoral, the evidence should be admitted subject only to the balancing test of FRE 403.
- (c) If the judge makes a preliminary determination that the character evidence speaks to a trait that is considered immoral, it is admissible only if:
 - (1) its probative value substantially outweighs its prejudicial effect; and
 - (2) if offered against a criminal defendant, the occurrence of the past act is proved by clear and convincing evidence, and
 - (A) the proponent gives reasonable written notice to defense counsel of the intent to use it so that the criminal defendant has a fair opportunity to contest its use.
 - (B) If contested, the judge should provide a record of the reasoning used to admit or exclude this evidence.

My proposal recognizes that, in some cases, character evidence can be substantially more probative than prejudicial and should be admitted. It

49. See Samuel Johnson et al., *Predictions from Uncertain Moral Character*, in PROCEEDINGS OF THE 41ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 506, 509 (2019); see also Mark A. Thornton et al., *The Social Brain Automatically Predicts Others’ Future Mental States*, 39 J. NEUROSCIENCE 140, 140 (2019).

also permits evidence of past acts that are not considered bad or immoral, subject only to the balancing test of FRE 403.⁵⁰ This removes a great deal from the rule's crosshairs, and retethers it to its normative, moral roots. If the character evidence triggers an inference that someone is immoral, my rule adopts a strong presumption against admissibility that can be overcome only if the evidence is substantially more probative than prejudicial. Judges are familiar with this balancing test as it is employed under FRE 609 for credibility impeachment evidence.⁵¹ Finally, and perhaps delivering the greatest balm to judges and attorneys everywhere, the admissibility of character evidence would no longer hinge on the gossamer-thin distinction between propensity and non-propensity uses. This aspect of the current rule generates widespread confusion, logical mistakes, and is the reason why FRE 404 is the most frequently litigated evidence rule and the most likely basis for reversal.⁵² My proposed rule will permit the many instances where past acts are critical for demonstrating victim credibility, or to rebut a claim of fabrication, while prohibiting many non-propensity uses that are likely to be more prejudicial than probative.

The ban on character evidence only heightens our reliance on unreliable facial traits. If we deny jurors information about how an accused has behaved in the past, they will instead subconsciously rely on immutable facial characteristics rooted in race, class, or sex, that will be even more inaccurate and unfair. But all hope is not lost. Research suggests that the effects of facial impressions may be mitigated through training. This training does not involve simple instructions about the presence of automatic inferences and the need to silence them. Instead, it involves sharing counter-stereotypical information about how the individual has actually behaved. Quite simply, the effect of automatic facial impressions may be mitigated by hearing about a witness's past

50. Federal Rule of Evidence 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

51. The arguments I provide here could likewise be used to motivate evidence committees to revise FRE 609 as well. Indeed, all credibility impeachment evidence could be treated under the proposal I suggest. However, there is no immediate reason to subsume the credibility impeachment inquiry of FRE 609 into that of FRE 404.

52. See Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, CRIM. JUST., Summer 1986, at 6, 7 [hereinafter Imwinkelried, *Uncharged Misconduct*]; see also Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 576 (1990) [hereinafter Imwinkelried, *The Use*].

acts.⁵³ Counterintuitively, to achieve the goals of the character evidence ban, we should permit more character evidence, rather than less.

C. In Practice, Lots of Character Evidence is Admitted

Technically speaking, the ban on character evidence applies to all types of conduct, all types of traits, and to all human beings. Before we think that the rule is constantly fighting human nature and losing, however, this is not the case. Because the ban is so incomprehensibly far-reaching, it is quite often simply ignored. Many types of evidence fly under the radar. Character evidence is routinely admitted when the rules, if applied carefully, would preclude it. For example, if a prosecutor referred to the defendant as having purchased a home in a gated community and having hired a driver to suggest that he acted in conformity with being a posh and snobby person, this would technically implicate the character ban, and the evidence should not be admitted. However, such evidence is often admitted.

Determining whether the character ban is implicated hangs on strategic framing and context, as well as on how clever the attorneys are in filing motions *in limine*, objecting in real-time, and explaining circumstantial evidence as implicating propensity evidence.⁵⁴ Unless attorneys astutely raise objections, instances of “character evidence” are likely to go undetected. And if there is no objection made to preserve the erroneous admission, there is no possibility of correcting this on appeal. Character evidence is also sometimes admitted for policy reasons, despite violating the rule. A former federal judge and evidence scholar observed, “[i]f the prior bad acts involve sexual misconduct, or child abuse, or a combination of both, courts generally find a theory of admissibility, even if no specific theory of admissibility makes sense.”⁵⁵

53. See Chua & Freeman, *supra* note 5, at 1.

54. See Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 89 (2013).

55. R. COLLIN MANGRUM & DEE BENSON, MANGRUM & BENSON ON UTAH EVIDENCE 227 (2018–2019 ed.), *as cited in* State v. Murphy, 441 P.3d 787, 802 (Jan. 27, 2020) (Harris J., concurring); *see also* Hillel Bavli, *Objective Chance and the Rule Against Character Evidence 5* (SMU Dedman Sch. of L. Legal Stud., Research Paper No. 513, 2021) (“[T]he admissibility or inadmissibility of other-acts character evidence—a category of evidence that is undoubtedly highly impactful on the outcome of a case—is frequently left to chance. This leads to arbitrary outcomes and substantial injustices in both criminal and civil cases.”).

1. Exceptions Permit Many Forms of Character Evidence

In addition to courts flat out ignoring the ban, there are a number of common law exceptions built into the current character rules.⁵⁶ From the beginning of the common law, there have been many *de facto* and *de jure* exceptions to the bar on the use of character evidence. The “mercy rule” allows criminal defendants to admit evidence of a “pertinent trait” of the victim or of himself, and the prosecution is then allowed to rebut this trait. In homicide cases, the prosecution may also introduce evidence of the victim’s character for peacefulness to rebut defendant’s claim of self-defense.⁵⁷ Additionally, jurors are explicitly invited to make predictions about people’s actions according to their character traits when it is an element of the offense, when sentencing, or when assessing money damages.⁵⁸ If testifying at trial, one’s character for dishonesty or bias is considered so relevant that it is almost always admitted. Congress and state legislators have also passed evidence rules that permit character evidence in sexual assault cases.⁵⁹

2. Demeanor Evidence Invites Unregulated Character Evidence

Character evidence also plays a huge role, explicitly and implicitly, in assessing credibility.⁶⁰ Jurors infer witnesses’ characters from the way

56. ROGER PARK & AVIVA ORENSTEIN, *Character Evidence, Including Evidence of Other Crimes, Wrongs, or Acts: Exceptions*, TRIAL OBJECTIONS HANDBOOK § 2:7 (2d ed. 2020).

57. See FED. R. EVID. 404(a)(2).

58. See Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1282 (2001). In these instances, jurors are asked to use evidence of someone’s past acts or character traits to predict conformity with that trait. See, e.g., *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054–55 (2018). For older examples, see *Umphrey v. Deery*, 48 N.W.2d 897, 909 (N.D. 1951); see also *City of Chicago v. Scholten*, 75 Ill. 468, 472 (Ill. 1874).

59. See R.P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses, Part 1 of 2*, 77 A.L.R.2d 841 (1961); see also David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 630 (2006). The exceptions to 404 created for sexual assault cases provide a roadmap for more sweeping, comprehensive reform. However, the failure to more significantly revise the character evidence rules seems to come down not to lack of knowledge of its defects, but to lack of political will:

[T]here is another explanation [for the passage of FRE 413–415]: the lobbying efforts of feminists, who particularly targeted rape, coincided with the inclinations of a Senate Judiciary Committee that favored broad admissibility of evidence in criminal cases. In other words, the difference between the usual character rules and Rules 413 through 415 is the product of political forces.

Id.

60. See Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 357 (2019) (“That tension between our reluctance to convict based on character and our recognition of its frequent relevance has led to policies that are sometimes unjust in principle and unworkable in practice.”); see also Julia Simon-Kerr, *Credibility by*

they look, dress, speak, and behave in court. This is why attorneys frequently counsel their clients to dress professionally or to wear pastel colors to appear childlike,⁶¹ to wear glasses,⁶² to groom their hair, and even to cover tattoos. This is what Bennet Capers aptly referred to as “evidence without rules” as this demeanor evidence is heard by the jury but is not really regulated.⁶³ There are obvious racial and class overtones to these unregulated inferences.⁶⁴

One might then suggest that we blind jurors to any identifying characteristics of the witness that could be unfairly used to infer character traits. But this is not a realistic option. Observing the face and demeanor of a witness has been considered so important that some argue it is required to comply with the criminal defendant’s Sixth Amendment right to confront their accusers.⁶⁵ And even if we returned to the dreaded trial by affidavit, jurors would still infer character traits from the wording of the affidavit itself.⁶⁶ People cannot *not* infer character traits.⁶⁷ Shielding the jury from the physical characteristics of the parties and witnesses may also lead to the erasure of differences, which could inadvertently exacerbate racist, sexist, ageist, and ableist thought.

Proxy, 85 GEO. WASH. L. REV. 152, 154 (2017) (explaining how the impeachment rules of 609 are already geared at signaling which witnesses do not comply with “norms of honorable behavior”).

61. See Capers, *supra* note 24, at 876–77.

62. See M. Brown, *supra* note 9, at 23.

63. See Capers, *supra* note 24, at 867.

64. See Rose, *supra* note 23, at 405 (“It would be unheard of for a young white female to be perceived as violent, aggressive, or otherwise threatening to law enforcement or the ‘neighborhood watch’ for wearing a hoodie, listening to hip-hop music, playing basketball, experimenting with marijuana, or using popular slang on social media.”).

65. See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1283 (2020) (“Live testimony has, since its inception, been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor Demeanor evidence ‘relies heavily on the interpretation of facial expression and body language.’” (quoting Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, 3 J. L., RELIGION, & ST. 170, 172 (2014))).

66. See SoYon Rim et al., *Seeing Others Through Rose-Colored Glasses: An Affiliation Goal and Positivity Bias in Implicit Trait Impressions*, 49 J. EXPERIMENTAL SOC. PSYCH. 1204, 1205 (2013); see also Frank Van Overwalle et al., *Spontaneous Goal Inferences are Often Inferred Faster Than Spontaneous Trait Inferences*, 48 J. EXPERIMENTAL SOC. PSYCH. 13, 16 (2012).

67. Spontaneous trait inferences and character assessments rely on the “four horsemen” of automaticity—they occur without awareness, are unintentional, we lack control over them, and they are efficient. See Lasana Harris et al., *Exploring the Generalization Process from Past Behavior to Predicting Future Behavior*, 29 J. BEHAV. DECISION MAKING 419, 420 (2016).

D. The Broad Scope of the Modern Character Evidence Rule

Despite the many *de facto* and *de jure* exceptions, the scope of the character evidence rule is vast and should prohibit a great deal of evidence. FRE 404(a), as adopted, merely states that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”⁶⁸ While there is some variation between states on how they phrase this rule, many are identical to the federal version. What is prohibited is the necessary propensity reasoning—for example, that because someone stole something before and is a thief, they are more likely to have stolen on another date. If propensity reasoning is not required, but is merely possible, then the evidence can be admitted with an instruction limiting it to its non-propensity use.

Historically, the common law was principally concerned with jurors hearing about a criminal defendant’s past bad acts. Criminal defendants are already at a disadvantage by virtue of the state’s indictment, and the stakes are much higher than in the civil law. And given that testifying witnesses may be impeached with evidence of past convictions, many criminal defendants do not testify on their own behalf. This renders past act testimony regarding criminal defendants quite powerful, and potentially damning.

Despite the historical emphasis on preventing prejudice to the accused, the modern rule bans moral, immoral, and amoral character traits against any person in civil and criminal trials—parties and witnesses alike.⁶⁹ To make it concrete, the ban works this way: if a driver wants to prove that a pedestrian was likely drunk when he crossed the street, and it was his intoxicated state and not the driver’s negligence that caused his injuries, the defense cannot introduce evidence that the injured pedestrian is a notorious alcoholic. Or, if an executive is accused of defrauding investors at his current job, evidence that he had done so at his last two jobs cannot be used to suggest a propensity to commit fraud. To prove that

68. FED. R. EVID. 404(a)(1).

69. FRE 404(b) on its face applies equally in civil and criminal cases, but it is often not taken as seriously or applied at all in civil cases. See 1 EDWARD J. IMWINKELRIED & RAMONA L. LAMPLEY, FEDERAL EVIDENCE TACTICS § 4.04 (2020); see also Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 7–8 (1993). While recognizing that the current rule does not require the past acts to indicate the actor is a “bad person,” Professor Taslitz found this to be sensible:

Note that this definition, contrary to the definition of ‘character’ offered by some commentators, does not necessarily have a moral connotation: the testimony need not concern whether the defendant is in some sense a good or a bad person. This makes sense because a conception of character evidence based solely on morality would be inconsistent with the policy concerns that have led courts to treat such evidence cautiously.

Id.

a civil defendant is a compassionate person and would only behave in a kind way toward the plaintiff, an attorney cannot introduce evidence of this person spending several hours volunteering at a local soup kitchen. The modern rule is sweeping and covers much more than most lawyers realize.

Character evidence is defined to include traits like being violent, as well as past acts that insinuate that someone is violent, such as having previously started three brawls. *Not* acting in conformity with a trait can also be character evidence. For example, psychiatric evidence that an individual accused of sexually deviant misconduct is not a sexual psychopath is typically regarded as character evidence under state and federal evidence rules.⁷⁰

Crucially, it is not the consideration of evidence of someone's traits or past acts *per se* that is prohibited, but rather when factfinders are invited to make predictions about how this person will behave in the future or how they have behaved in the past based on such evidence. Evidence that is used for a purpose other than an inference about one's propensity to behave in a certain way is not subject to the ban. This is referred to as an acceptable "non-propensity purpose." Unfortunately, attorneys and judges sometimes incorrectly assume that evidence that is immoral in nature implicates the rule, even when there is no propensity reasoning.⁷¹ And if the traits are not considered immoral, they often escape scrutiny even when they do require propensity reasoning.

FRE 404(b) lists various uses of character or past acts evidence that are considered not to require propensity reasoning. Historically, judges have argued that when attorneys use evidence of someone's past acts to impeach their testimony or to prove their *mens rea*, identity, or a *modus operandi*, propensity reasoning is not required. In 1893, in *Moore v. United States*, the Supreme Court stated that if past acts provide a motive for the present charge, then they are competent and admissible.⁷² These uses are permitted, judges have held, because they are thought to avoid making character-based arguments about the defendant being more likely

70. See *Freeman v. State*, 486 P.2d 967, 972 (Alaska 1971).

71. See *Barry v. Aldridge*, No. CIV 13-040, 2016 WL 1060249, at *8 (E.D. Okla. Mar. 15, 2016). The court erroneously assumed that evidence of the defendant's lack of emotion when her baby had just been murdered was character evidence, despite the fact that its use did not require propensity reasoning. See *id.* Focusing on the morality of the evidence, rather than whether it implicates FRE 404, has led many courts astray. See *id.*

72. See *Moore v. United States*, 150 U.S. 57, 61 (1893) ("The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent."); see generally Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 302-03 (1982) (explaining the general history of the federal common law related to character evidence and its permitted use to prove motive or other mental states).

to behave in a particular way. It is this aspect of the rule that is the trickiest to apply and which leads to numerous appeals.

E. The Character Evidence Ban Leads to Many Appeals and Acquittals

Character evidence has been called “the most important evidentiary issue in contemporary criminal practice.”⁷³ Errors in its application yield more reported decisions than any other rule of evidence. In many jurisdictions, the admission of someone’s past bad acts for character inferences provides the most frequently litigated issue in criminal appeals as well as the most likely basis for reversal.⁷⁴ A recent Westlaw search of state and federal cases for just the last five years resulted in over 800 published appeals based on perceived misapplications of FRE 404. This rule devours a significant chunk of trial and appellate resources. It is likewise difficult to overestimate how much scholarly ink has been spilled on the topic, as scholars recognize how illogical the rule has become. Hopefully in spilling just a tad bit more ink here, we can gain clarity on why the rule needs revising. We now have the benefit of many more years of robust social psychological research, which highlights how the rule expects results that humans cannot give.⁷⁵

Many scholars and judges have acknowledged the incoherence of the character evidence rules.⁷⁶ Even the Supreme Court has “concur[red] in the general opinion of courts, textwriters and the profession that much of this [character evidence] law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.”⁷⁷ Nevertheless, many have argued that there is no political will to change

73. See Imwinkelried, *Uncharged Misconduct*, *supra* note 52, at 6; see also Imwinkelried, *The Use*, *supra* note 52, at 576.

74. See Imwinkelried, *Uncharged Misconduct*, *supra* note 52, at 7.

75. See Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 730 (1998) (stating that psychology scholarship has little to say about whether to reform FRE 404(a)–(b)); see also Tillers, *supra* note 46, at 782; M. Brown, *supra* note 9, at 131.

76. See Tillers, *supra* note 46, at 781 (“The rule also has been subjected to withering criticism. But the character evidence rule—which bars the ‘circumstantial’ use of character—is not yet dead. Moreover, the character evidence rule still has many defenders. (Indeed, in the legal community the rule’s defenders seem to outnumber its critics.)”); see also Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 776 (2013) (“The rule’s coherence has degraded so badly that the justifications for the rule and the tools for applying it are anemic in all but the clearest cases.”).

77. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

the rule,⁷⁸ as its basis rests “more in history than in logic.”⁷⁹ Ironically, the United Kingdom, which has an even longer history banning character evidence, has found the political will. In 2003, the U.K. significantly revised their version of the rule.⁸⁰ Similar to what I propose, the U.K.’s rule now only applies to “reprehensible” conduct,⁸¹ which can be admitted so long as it meets specific criteria.

Some argue that the ban on character evidence cannot be reversed in the United States. This is because of our important constitutional guarantees of the presumption of innocence and protection from double jeopardy. However, while FRE 404 echoes these guarantees, it does not violate them.⁸²

Unfortunately, the present rule is both overly broad and overly narrow in pursuit of these goals. The rule permits evidence that is quite prejudicial and invites moral approbation, yet excludes highly probative evidence that is either amoral or unlikely to cause unfair prejudice.⁸³ This Article seeks to retether the rule to its normative justifications by focusing attention on the ways character evidence can be overly prejudicial in some cases and unlikely to cause much prejudice in others.

78. See, e.g., Milich, *supra* note 76, at 791 (“Yet as weak as the character rule is, there is no apparent political will to simply abolish it altogether and adopt the Continental view, admitting character evidence whenever it is relevant.”).

79. See Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 584 (1956).

80. See Criminal Justice Act, 2003, c.44, §§ 98–112.1 (U.K.); see also Michael Stockdale et al., *Bad Character Evidence in the Criminal Trial: The English Statutory Common Law Dichotomy—Anglo-Australian Perspectives*, 3 J. INTL. & COMP. L. 441, 443–44 (2016) (“In the United Kingdom since the passage of the Criminal Justice Act of 2003, ‘bad character evidence, or ‘BCE’ is presumed inadmissible. There are seven ways that the BCE may be admitted, and once admitted under any of them, use of the BCE is not limited to the gateway through which it was admitted.” (citing Criminal Justice Act, 2003, c.44, §§ 98–112.1 (U.K.))).

81. See Criminal Justice Act, 2003, c.44, § 106(2)(b) (U.K.); see also James Goudkamp, *Bad Character Evidence and Reprehensible Behaviour*, 12 INT’L J. EVIDENCE & PROOF 116, 116–17 (2008).

82. See Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1618 (1998); see also *United States v. LeMay*, 260 F.3d 1018, 1024–25 (9th Cir. 2001) (upholding the admission of past sexual assaults for propensity purposes as constitutional, the Ninth Circuit stated that “[t]he Supreme Court has cautioned against the wholesale importation of common law and evidentiary rules into the Due Process Clause of Constitution”); see also *United States v. Mound*, 157 F.3d 1153, 1153 (8th Cir. 1998); see also *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998), *opinion clarified*, No. 96-2285, 1998 WL 133994 (10th Cir. Mar. 25, 1998).

83. See Edward J. Imwinkelried, *Some Comments About Mr. David Karp’s Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 37 (1994) [hereinafter Imwinkelried, *Some Comments*] (“Moreover, the latest psychological research suggests that character evidence may be more probative than we have traditionally assumed it to be.”).

F. *What is Character, And How Does It Affect Legal Blame?*

Evidence giant John Wigmore understood character evidence to encompass “the actual moral or psychological disposition or sum of traits” of an individual.⁸⁴ To him, there was never an appropriate dispositional inference to be made from the bad moral character of a defendant.⁸⁵ This was because a man “may do the act once and may never do it again[,] and not only may he not do it again, but it is in no degree probable that he will do it again”⁸⁶ because “human action [is] infinitely varied.”⁸⁷

Despite the essential role of morality (and free will) to Wigmore’s concept of character, by the mid-twentieth century, scholars began shedding it from the definition.⁸⁸ Charles McCormick defined character as simply “a generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.”⁸⁹ Note that while the examples are highly moralized behaviors, the definition of character itself is amoral. This permitted later judges and scholars to successfully suggest that character need not be moralized to be excluded under the rule.⁹⁰

The FRE adopted McCormick’s definition of character, and the Advisory Committee cited approvingly to him. Today, so long as actions or dispositions are used to argue that someone acted in conformity with them, FRE 404(a) is technically implicated. A minority of states have retained the distinction between moral and immoral acts in practice, if not

84. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 52, at 1148 (Peter Tillers ed., 1983).

85. *See id.*

86. *Id.* at 1160.

87. *Id.* at 1857 (“[I]t must be noted that when the doing of an act is the proposition to be proved there *can never be a direct inference from an act of former conduct to the act charged*; . . . Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again.” (emphasis added)); *see also* JOHN H. WIGMORE, A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 64 (1st ed. 1910).

88. *See, e.g.,* Blinka, *supra* note 54, at 89, 144 (explaining different schools of thought on whether character involves inferences about morality, or whether psychology has anything useful to contribute, and concluding that the “more alluring” approach to character is “non-ideological, value-free, and, best of all, rooted in a purportedly objective scientific school that is devoid of divisive social values”).

89. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 340–41 (1954).

90. *See* Taslitz, *supra* note 69, 7–8 (“Note that this definition, contrary to the definition of ‘character’ offered by some commentators, does not necessarily have a moral connotation: the testimony need not concern whether the defendant is in some sense a good or a bad person. This makes sense because a conception of character evidence based solely on morality would be inconsistent with the policy concerns that have led courts to treat such evidence cautiously.”).

in their rules.⁹¹ Texas, strangely, finds the morality of the past act to be salient, but to *permit* rather than to exclude character evidence that involves “moral turpitude.”⁹² However, most states and the FRE adopted a view of character that is facially amoral.

G. Labels Matter a Great Deal When Determining Whether Behavior is Viewed as Implicating Character Evidence or Not

Determining whether evidence meets the definition of “character evidence” may depend on whether there is a well-recognized label or adjective that can be used to describe the constellation of traits. Things we don’t even consider to be related to character may indeed be quite revealing about one’s personality. For example, a prosecutor argued a “defendant had planned the robbery, selecting ‘somebody he’s got absolutely nothing against, and yet he’s *the kind of person* that would pick someone like that to do this to, because he just doesn’t care. He’s not like you.”⁹³ This is classic character evidence, but it was not recognized as such, because this sort of behavior does not immediately call to mind a one-word trait. It is designed to tell us “what kind of person” the defendant is, but we cannot put our finger on a succinct label other than to suggest that this person is “bad.” There are other examples like this, which might be considered highly diagnostic of character, even though there is not a neat label for this behavior. Word choice matters greatly here, too.⁹⁴

For example, calling someone an “addict” will affect their perceived culpability more negatively than describing them as having a “substance use disorder.”⁹⁵ The same constellation of behavior, say problem drug use, could be described clinically as a “diagnosis,” biologically as a

91. *See, e.g.,* McClure v. State Banking Co., 65 S.E. 33, 33 (Ga. Ct. App. 1909) (“The rule prevailing in England and in most of the American states, that evidence of character is not usually received when offered for the purpose of throwing light on the probability of the doing of a certain act by the person whose character is in question, is not of force in this state. The contrary doctrine has been recognized in our jurisprudence from a very early date.”). The Utah equivalent states “in conformity” rather than “in accordance” but is otherwise identical. Just because the plain language is often identical, however, states may interpret the rules in unique ways. *See* UTAH R. OF EVID. 404(a) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.”).

92. 1 ADELE HEDGES & DANIEL K. HEDGES, TEX. PRAC. GUIDE CIVIL TRIAL § 6:116 (2020) (“Tex. R. Evid. 404(a) permits character evidence offered by a party accused of conduct involving moral turpitude.”).

93. *People v. Dykes*, 209 P.3d 1, 38 n.6 (Cal. 2009).

94. *See* Bernice Pescosolido, *The Public Stigma of Mental Illness: What Do We Think; What Do We Know; What Can We Prove?*, 54 J. OF HEALTH AND SOC. BEHAV. 1, 11 (2013).

95. John Kelly & Cassandra Westerhoff, *Does it Matter How We Refer to Individuals with Substance-Related Conditions? A Randomized Study of Two Commonly Used Terms*, 21 INT’L. J. OF DRUG POL’Y 202, 206 (2010).

“neurogenetic mechanism,” or colloquially as a “moral choice.” Each of these frameworks likely elicit very different judgments of character and blame.

H. Attorneys Are Allowed to Paint a Picture of People’s Characters Without Referring to Well-Recognized Traits

While attorneys cannot use traits or past acts to explicitly draw character inferences, they are often allowed to “paint a picture” of the parties or victims. Artful attorneys take advantage of this grey area to share selected details about someone’s life, to encourage the jury to connect the dots, and to use this to predict how that person likely behaved. Often, the desired inference is precisely the one drawn by the jurors, without the attorney having to spell it out explicitly and running afoul of the rules. These sources of character evidence are no less powerful for their invisibility. In fact, the inferences we draw ourselves might be stronger than those that are explicitly drawn for us.

Consider someone accused of murder who was described as a polite man who “moved back home to assist his family when his father became ill” and “was one of nine children in a large, church-going family.”⁹⁶ Not only did the 10th Circuit not consider this impermissible character evidence, it bolstered the claim that the accused’s counsel had not been ineffective. The obvious character inference the defense counsel sought to draw was that the defendant was an honorable man who would not have committed cold-blooded murder. Character inferences like these are often allowed at the guilt phase and are required at sentencing.

96. *Brecheen v. Reynolds*, 41 F.3d 1343, 1367 (10th Cir. 1994).

Evidence in the form of tattoos⁹⁷ jewelry,⁹⁸ possessions,⁹⁹ or even the attorney's clothing¹⁰⁰ likewise generate automatic inferences. Sometimes these types of proof are found to cross the line into impermissible character evidence.¹⁰¹ But often they escape scrutiny as mere biographical or background evidence or are considered harmless on appeal.¹⁰² Despite often being allowed, these forms of evidence trigger the precise kinds of inferences the character evidence rule seeks to prohibit. A tattoo, possession of guns, or a note in Arabic could each be used to suggest that someone has a particular character trait, and that they acted in accordance with it. Character inferences are just too spontaneous and ubiquitous to be prohibited through evidence rules.

97. See *Taylor v. State*, No. 05-17-00658, 2018 WL 3640467, at *48 (Tex. Ct. App. Aug. 1, 2018) (“A murder victim’s gang tattoos are considered highly inflammatory character evidence and extremely prejudicial.”); see also *Roy v. State*, 997 S.W.2d 863, 866 (Tex. Ct. App. 1999) (appellate judge gave broad discretion to trial court to permit “background” contextual evidence, such as officer’s testimony that gang members often get teardrop tattoos after murdering someone); see also *People v. Vinson*, B247084, 2015 WL 1008087, at *6 (Cal. Ct. App. Mar. 5, 2015) (gang tattoo was permitted against defense objection to it as character evidence, as prosecution claimed it went to motive).

98. See John Schwartz, *Extreme Makeover: Criminal Court Edition*, N.Y. TIMES (Dec. 5, 2010), <https://nyti.ms/3hYtdJF> (describing how Douglas Keene counseled white-collar defendants in the Enron trial not to wear their \$10,000 watches to testify).

99. See, e.g., *People v. Zackowitz*, 254 N.Y. 192, 196, 172 N.E. 466 (1930) (background information on the defendant’s ownership of many guns considered impermissible character evidence); *United States v. Hayat*, 710 F.3d 875, 901 (9th Cir. 2013) (reasoning that the prosecution in a terrorism case was allowed to introduce evidence that a Muslim defendant had a note in his pocket in Arabic, which they interpreted to mean that the accused was a jihadist). In *Hayat*, the court did not treat this as character evidence, despite it being used to draw the explicit inference about the “kind of person” the defendant was, and to then predict how he likely behaved. See *id.*

100. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 685 (1995) (explaining how a Black criminal defense attorney in DC was not allowed to accessorize with a kente cloth stole, as the judge considered it to be sending a message of “racial pride” to the jury).

101. See, e.g., *State v. Hart*, 584 N.W.2d 863, 869 (S.D. 1998); see also Tiffani K. Landeen-Hoeke, *State v. Hart: Tearing the Heart Out of Rules 404(a) & 405(a)*, 45 S.D. L. REV. 130, 134–37 (2000) (prosecution was allowed to paint a picture of the victim as a “peaceable, innocuous man” when drunk, and defendant was not allowed to impeach because this was not treated as impermissible character evidence); *State v. Renneberg*, 522 P.2d 835, 836 (Wash. 1974) (by testifying to biographical information such as having attended college, having been a candidate in the Miss Yakima pageant, and a member of the glee club and drill team in high school, the defendant was found to have put her character into issue, so it could therefore be impeached with evidence of her treatment for drug addiction).

102. See *Spencer v. McDonald*, 705 F. App’x 386, 388–89 (6th Cir. 2017) (reasoning that even if the bolstering biographical narrative were considered “character,” the plaintiff in *Helfrich* had opened the door to positive evidence by the defense, as the plaintiff had introduced evidence that he ““was the star of the family”” (citing *Helfrich v. Lakeside Park Police Dep’t*, 497 F. App’x. 500, 509–10 (6th Cir. 2012))).

II. THE COMMON LAW GOT IT *MOSTLY* RIGHT: PEOPLE EXPLAIN BEHAVIOR IN TERMS OF DISPOSITIONS, BUT THIS IS NOT ALWAYS AN ERROR

The ban on character evidence reflects a folk psychological notion that if the jury hears, for example, that the accused had previously stolen property, they may be too quick to assume he had stolen in this case, without the prosecution proving this beyond a reasonable doubt. Or, even if the jurors do not find that the accused certainly stole in the present case, because they have heard that he is a “bad man,” they may feel anger toward him and think that he deserves to be punished for *something*. These are thought to be errors of attribution: the first attributes behaviors to someone based on a fixed trait (once a thief, always a thief), and the second attributes blameworthiness based on this trait (once a thief, you deserve to be punished now).¹⁰³ It is our tendency to over-attribute behaviors to fixed dispositions that led common law judges to ban character evidence.

The common law got it right. People *are* more likely to explain others’ behavior by referencing their “allegedly enduring dispositions and intentions than by other plausible accounts, for example the circumstances.”¹⁰⁴ When people do exactly what their social situation demands, inferences about their enduring character or traits are logically unjustified.¹⁰⁵ For example, someone who is speeding is not inherently selfish; they might be rushing to an emergency room to save a passenger. If I shoot someone who broke into my house and was about to kill me, the situation may have called for it, and it does not reveal much about my character.

As a cognitive bias researcher put it, “[observers] infer wrongly that actions are due to distinctive robust character traits rather than to aspects of the situation,” and this “can be explained in terms of confirmation bias.”¹⁰⁶ This powerful tendency provides the basis behind the ban on character evidence, even though the folk intuition preceded any empirical support.¹⁰⁷ Numerous psychological studies confirm that when people hear

103. See Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1006 (1984); see also Park, *supra* note 75, at 720.

104. Lasana T. Harris et al., *Attributions on the Brain: Neuro-Imaging Dispositional Inferences, Beyond Theory of Mind*, 28 NEUROIMAGE 763, 763 (2005); see also Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 MIND 47, 47 (2002).

105. See Sreenivasan, *supra* note 104, at 47.

106. Gilbert Harman, *The Nonexistence of Character Traits*, 100 PROC. OF THE ARISTOTELIAN SOC’Y. 223, 223 (2000) (emphasis omitted).

107. See Miguel A. Mendez, *Character Evidence Reconsidered: “People Do Not Seem to Be Predictable Characters.”* 49 HASTINGS L.J. 871, 878–79 (1998) [hereinafter Mendez, *Character Evidence*].

about someone's behavior, they will tend to infer something about that person's character and will use that dispositional inference to predict how the person will later behave.¹⁰⁸ While the reasons for this vary, it appears that most people do this because we think character traits and dispositions are fixed and *cause* behavior, rather than being derived from it.¹⁰⁹ This tendency has been dubbed the "correspondence bias," or the "fundamental attribution error."¹¹⁰

The correspondence bias is well-documented across multiple settings and age groups.¹¹¹ It is likely generally adaptive, as it gives us a sense of agency and predictability.¹¹² Assessing others' characters and using this information to predict why or how they behaved allows us to plan our social interactions: "[a] bird is likely to fly; a snake is likely to be venomous. A good person may lend a helping hand; a bad person may stab you in the back."¹¹³

The distinction between dispositions and situations is a bit overblown, however. A recent review of white-collar crime recidivism data found that reoffending could not be explained completely by the situation, and likely included some dispositional factors.¹¹⁴ Most behaviors are a complex, interactive mix of our nature and our nurture. Further, we might exercise our agency to choose certain kinds of environments, and environments might be chosen for us, based on our traits.¹¹⁵

Even so, attribution errors are likely to occur when we assume there is greater "temporal stability" or "cross-situational consistency" between behavioral traits than we should.¹¹⁶ Temporal stability is present when we do the same thing in similar circumstances (i.e., stealing money from a tip jar whenever no one is looking). Cross-situational consistency is present when we do the same thing in very different environments (i.e., stealing

108. See Bertram Gawronski, *Theory-Based Bias Correction in Dispositional Inference: The Fundamental Attribution Error is Dead, Long Live the Correspondence Bias*, 15 EUR. REV. OF SOC. PSYCH. 183, 183 (2004).

109. See Christopher Bauman & Linda Skitka, *Making Attributions for Behaviors: The Prevalence of Correspondence Bias in the General Population*, 32 BASIC AND APPLIED SOC. PSYCH. 269, 271 (2010); see also McCarthy & Skowronski, *supra* note 22, at 330.

110. See Daniel Gilbert & Patrick Malone, *The Correspondence Bias*, 117 PSYCH. BULL. 21, 22, 24 (1995).

111. See Jennifer Stanley & Fredda Blanchard-Fields, *Beliefs About Behavior Account for Age Differences in the Correspondence Bias*, 66 B. J. OF GERONTOLOGY 169, 169 (2011).

112. See Ames & Fiske, *supra* note 22, at 599 ("[R]epresenting the world as coherent and stable makes the world more comprehensible and easier to act on.").

113. Johnson et al., *supra* note 49, at 506.

114. See Shelley Johnson Listwan et al., *Recidivism Among a White-Collar Sample: Does Personality Matter?*, 43 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 156, 167 (2010) ("[W]e found evidence to support that both personality and sociological variables (i.e., race, employment, SES) are important in predicting recidivism among our sample.").

115. See Harman, *supra* note 106, at 223–24.

116. See Sreenivasan, *supra* note 104, at 50.

from tip jars, family members' purses, neighbors' yards, etc.) whenever we have the opportunity.¹¹⁷

Our desire for predictability and coherence can go awry when we put people into buckets that do not capture their remarkable behavioral variability—both in different situations and across time.¹¹⁸ Intuitively, we understand that humans are not perfectly predictable. Even very young children can attend to situational constraints when reasoning about others' actions.¹¹⁹ It is not as if we *never* consider the situation; it's just much easier and automatic for us to assume the behavior flows from a stable character trait.

This is particularly true when assessing the behavior of people who are not part of our "ingroup." The correspondence bias is exaggerated in these settings. The moral failures of people of different races or ethnicities are more likely to be attributed to their fixed characters, rather than to their environment. Their successes, however, are more likely to be explained away by the situation.¹²⁰ *Our* successes are, of course, due to our fixed traits.

A. *Correcting the Correspondence Bias Takes Effort—Especially if Assessing Outgroups*

Because the correspondence bias can occur spontaneously and outside of our control, mitigating it takes attention and cognitive effort.¹²¹ Its effects can be lessened if we are aware of its existence and motivated to account for situational factors.¹²² Being trained to take the perspective of others, or adopt their viewpoint, has been found to significantly reduce dispositional inferences.¹²³ However, when subjects are mentally taxed, such as when jurors are hearing hours of conflicting testimony in a complicated trial, or when they lack the personal motivation to change their minds because they're assessing people who look different from

117. See *id.* at 49–50.

118. See Ames & Fiske, *supra* note 22, at 599.

119. See Melissa A. Koenig et al., *Children's Judgments of Epistemic and Moral Agents: From Situations to Intentions*, 14 PERSPS. ON PSYCH. SCI. 344, 344 (2019).

120. See Miles Hewstone, *The 'Ultimate Attribution Error'? A Review of the Literature on Intergroup Causal Attribution*, 20 EUR. J. OF SOC. PSYCH. 311, 311 (1990) (“[E]xplaining away’ outgroup success to good luck, high effort or an easy task . . .”).

121. See Duane Wegener & Jason K. Clark, *Not All Stereotyping is Created Equal: Differential Consequences of Thoughtful Versus Nonthoughtful Stereotyping*, 90 J. PERSONALITY & SOC. PSYCH. 42, 42 (2006); see also Harris et al., *supra* note 67, at 419.

122. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 2.

123. See Nic Hooper et al., *Perspective Taking Reduces the Fundamental Attribution Error*, 4 J. OF CONTEXTUAL BEHAV. SCI. 69, 71 (2015).

them, they are more likely to rely on sticky character evidence to explain behavior.¹²⁴

B. It is Not Always an Error

The correspondence bias does not render all use of past acts to prove future conduct overly prejudicial or insufficiently probative. For example, if someone openly mocked a disabled person on public television, this might be relevant in a future charge of intentional discrimination of people with disabilities. More formal types of recidivism data can also support the use of past act evidence.¹²⁵ But even in the absence of empirical data, common sense tells us that if someone was previously convicted of bribing an official, for example, this conviction is highly probative of whether they bribed an official on another occasion.

The proper use of past acts or character traits depends on the cross-situational and cross-temporal consistency of the trait or act in question. Where someone has done something distinctive, highly unusual, compulsive, or diagnostic of a specific type of immorality, this might be quite probative of whether he would do this thing again and may not be unduly prejudicial.

For example, someone who has intentionally under-reported income for federal tax purposes for the last fifteen years has expressed temporal stability for this trait, so the predictive value of the past act is high. Someone who has intentionally committed corporate fraud in very different institutions has demonstrated cross-situational consistency. In these cases, it might not be overly prejudicial to infer something like a character trait for opportunistic corporate dishonesty.

1. The Perfect Should Not Be the Enemy of the Good

Attributions of behavior need not be perfect to have probative value that substantially exceeds any potential for prejudice.¹²⁶ The key question is just how predictive this past behavior needs to be to overcome the

124. See Bret Wells et al., *Inference Making and Linking Both Require Thinking: Spontaneous Trait Inference and Spontaneous Trait Transference Both Rely on Working Memory Capacity*, 47 J. EXPERIMENTAL SOC. PSYCH. 1116, 1124 (2011); see also Ames & Fiske, *supra* note 22, at 605; see also David Hamilton, et al., *Sowing the Seeds of Stereotypes: Spontaneous Inferences About Groups*, 109 J. OF PERSONALITY & SOC. PSYCH. 569, 583 (2015) (explaining how spontaneous trait inferences about groups can sow the seeds of stereotypes).

125. See Crump, *supra* note 59, at 626 (“In other words, evidence of repetition of behavior, or propensity, can be good evidence. People who commit armed robberies on particular occasions are more likely to commit them on other occasions. For other kinds of crimes, such as child molestation or heroin possession, the inference of repetition is even stronger; in fact, it is powerful.”).

126. See 7 LAURIE K. DORÉ, IOWA PRACTICE SERIES EVIDENCE § 5.404:6 (2020–2021 ed., 2020).

potential for prejudice. Some behaviors can be weakly, or even strongly, predicted by past actions.¹²⁷

People who purchase child pornography (i.e., sexual assault) have crossed a moral boundary, which makes it more likely they will cross it again. Someone who steals a car is more likely to do so again,¹²⁸ and someone who sells drugs is also more likely to do this again. Just how likely they are to repeat these acts depends on several factors, but recidivism data can help make predictions.¹²⁹ Someone who commits violent crimes is much less likely to recidivate than someone who robs someone, commits pedophilia, or sells drugs, but the likelihood is still greater than for the general population.¹³⁰

2. Great Prejudice Could Result if We Do Not Ensure the Act Actually Occurred

For fairness purposes, we must also ask the extent to which the predicate acts were proved to have actually occurred. To do so, not only should parties be permitted to introduce specific instances of conduct on direct examination, but it might be prudent to permit extrinsic evidence as to whether the past act occurred, so long as it could be procured and admitted easily. The present FRE 405 does not allow this.¹³¹

Once we are confident, either by clear and convincing evidence, or beyond a reasonable doubt, that the individual in fact committed the original bad acts, the likelihood of his doing them again is not just possible, but in some cases quite probable.¹³² Rather than using the presence of correspondence bias to reject all past acts evidence, judges should permit some past act evidence when the recidivism rate, or propensity to reoccur,

127. See Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 535–36 (1991); see also Park, *supra* note 75, at 729 (explaining how evidence of past misconduct can be useful).

128. See Joshua A. Markman et al., *Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patterns from 2005 to 2010*, U.S. DEP'T. OF JUST.: BUREAU OF JUST. STAT. (June 2016), <https://bit.ly/3hAGBVZ>.

129. See Harris et al., *supra* note 67, at 419 (“Empirical results suggest methodological improvements could increase traits’ predictive power if they are used to predict behavior in a specific-enough social context; if the social context from which the trait is inferred (previous context) and the social context that was being predicted (future context) are similar enough, then correlation coefficients rise above the modest mark of +.30, and traits become better predictors.”); see also Crump, *supra* note 59, at 626 (explaining that if cross-situational and cross-temporal consistency are demonstrated, data can be useful in predicting recidivism).

130. See Crump, *supra* note 59, at 626–27.

131. See FED. R. EVID. 405.

132. See Crump, *supra* note 59, at 626 (“In other words, evidence of repetition of behavior, or propensity, can be good evidence.”).

is quite high, there is high cross-temporal or cross-situational consistency, and the potential for unfair prejudice is low.¹³³

3. Prejudice Should Not Be Conflated with Probative Value

Recall that the justification for the ban on character evidence was that it was considered substantially more prejudicial than probative *in every case*. Essentially, it always flunks the balancing test of FRE 403, which is the rule permitting the judge to exclude evidence that is too prejudicial. Every state has a nearly identical counterpart, which states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.¹³⁴

It is this concept of prejudice that should be used by courts when evaluating character evidence. Highly probative evidence that favors one party will almost always injure the opposition's case. This does not mean it should be excluded.

For example, testimony that Larry Nassar molested several young gymnasts while giving them physical therapy makes it much more likely that he molested a particular gymnast. This testimony about his past acts can be quite useful testimony if he claims, as he did, that an individual victim was fabricating her account. But we must stop referring to evidence as prejudicial merely because it is important to one side and damning to another. Jurors might be giving evidence great weight because it deserves it.

In some cases, evidence of past acts that are strikingly similar to the crimes charged are deemed unfairly prejudicial based on this alone. In other cases, similarity renders them highly probative.¹³⁵ However, there must be some independent argument—aside from similarity—that makes the evidence unfairly prejudicial.¹³⁶ This will depend on factors such as:

133. There are serious problems with the way some recidivism data are currently collected, as they put too much weight on whether there is an arrest and prosecution. See Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 98 (2017) (discussing racial biases reflected in arrest data). Even so, if the base rate is higher, the positive predictive value improves.

134. FED. R. EVID. 403.

135. See Crump, *supra* note 59, at 628 (“The result is that other crimes are excluded if they are similar—but not if they are closely similar!”).

136. “Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.” *Woods v. Zeluff*, 158 P.3d 552, 554 (Utah 2007) (quoting *State v.*

(a) whether it goes to a peripheral point and is just meant to denigrate the defendant's character in the eyes of the jury; (b) whether there is low confidence that the past act indeed occurred as described; (c) how much time has passed; (d) whether the act speaks to an immoral character trait; (e) how unique or distinguishing the situation was that gave rise to that past act; (f) how common this sort of behavior is, such that it is not diagnostic of an enduring negative trait; and (g) whether there is an incorrect folk assumption that people who do this sort of thing are much more likely than they actually are to repeat it.¹³⁷ If the answer to these questions suggests that the jury is being told this evidence to smear a witness, rather than to provide essential evidence that might be necessary for their fact-finding, then it will likely be too prejudicial to be admitted.¹³⁸ Likewise, if the past act evidence is some of the only incriminating evidence, and there is no other physical evidence suggesting guilt, its admission could be too prejudicial.

Predicting someone's actions and mental states may in fact be aided by knowing how they have behaved under very similar circumstances. Keeping this information from the jury in all cases unnecessarily hinders their factfinding mission. This is particularly true given that social science data suggest that "a jury's learning of prior crimes directly through the evidence is not the inflammatory, unfairly prejudicial, conviction-ensuring information it is often depicted as being."¹³⁹

III. WE WILL USE WHATEVER INFORMATION IS AVAILABLE TO INFER CHARACTER AND ASSESS BLAME

Blame ought to be an ascription of responsibility for a morally bad action.¹⁴⁰ The emphasis on actions as a basis for legal responsibility reflects the prevailing ethical theories of consequentialism and deontology.¹⁴¹ Consequentialism prioritizes the outcomes of acts to determine whether they are good or bad, while deontology asks whether the actor adhered to a set of moral obligations or rules while acting.¹⁴²

Maurer, 770 P.2d 981, 984 (Utah 1989)). My thanks to John Nielsen for directing me to this case.

137. See Sreenivasan, *supra* note 104, at 50.

138. See, e.g., *State v. Williams*, 87 S.W.2d 175, 180 (Mo. 1935); see also *Taylor v. State*, 262 S.W.3d 231, 243 (Mo. 2008).

139. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 497-99 (2011).

140. See Pizarro & Tannenbaum, *supra* note 29, at 95.

141. See Augusto Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 PSYCH. BULL. 1, 1 (1980) ("[M]orality ultimately lies in action and that the study of moral development should use action as the final criterion.").

142. See Eric Luis Uhlmann et al., *A Person-Centered Approach to Moral Judgment*, 10 PERSP. ON PSYCH. SCI. 72, 73 (2014).

While the intent of the actor matters a great deal in the Kantian account,¹⁴³ in both Kantian and utilitarian views on ethics, the character of the actor should be largely irrelevant. This influenced the thinking of evidence giant, John Wigmore. These philosophies have also dominated normative ethics for the past 100 years and are at the heart of criminal theory.

However, it turns out that when humans make moral judgments, we are neither pure consequentialists nor deontologists. We use character inferences to guide our assessments of moral blame, in keeping with Aristotle's virtue ethics.¹⁴⁴ His philosophy had fallen out of favor but is seeing a comeback in moral philosophy (called the "Aretaic Turn"),¹⁴⁵ given evidence that we are "intuitive virtue theorists."¹⁴⁶

Indeed, diverse research teams, focused on different aspects of psychology, have converged on this finding: morality drives our perceptions of people and whether they deserve blame.¹⁴⁷ We often blame people not only for what they have done in this instance, but for *who* they are, and everything they have ever done. Rather than asking the question, "Is this act right or wrong," we primarily ask, "Is this person good or bad?"¹⁴⁸ "[P]eople quickly and easily attribute morally good or bad traits to others, and they often do so early in an interaction and with limited information."¹⁴⁹ This is referred to as the person-centered approach to blame.

We likely disagree with this normatively.¹⁵⁰ It is too simplistic. People are typically neither completely good nor bad. Most of us "would behave deplorably in many and admirably in many other situations."¹⁵¹ The use of a person-centered approach to blame may often lead to unfair outcomes. It might only be useful when "we can reliably distinguish the minority of people who are good or bad from the majority who are

143. See Pizarro & Tannenbaum, *supra* note 29, at 95.

144. See Jennifer Ray et al., *The Role of Morality in Social Cognition*, in *THE NEURAL BASES OF MENTALIZING* 554–55 (Michael Gilead & Kevin N. Ochsner eds., 2021).

145. See Pizarro & Tannenbaum, *supra* note 29, at 95. According to Pizarro, virtue ethics is experiencing a resurgence. See *id.* Empirical evidence demonstrates lay people place a great deal of value on moral character when determining who ought to be responsible and who ought to be blamed. See *id.*

146. Uhlmann et al., *supra* note 142.

147. See Ray et al., *supra* note 144, at 95.

148. Uhlmann et al., *supra* note 142, at 72; see also Jennifer Siegel et al., *Inferences About Moral Character Moderate the Impact of Consequences on Blame and Praise*, 167 *COGNITION* 201, 202 (2017).

149. Uhlmann et al., *supra* note 142, at 72.

150. See Harman, *supra* note 106, at 224. *Contra* Maria Merritt, *Virtue Ethics and Social Psychology of Character* (2020) (Ph.D. dissertation, UC Berkeley) (on file with author).

151. Peter B.M. Vranas, *The Indeterminacy Paradox: Character Evaluations and Human Psychology*, 39 *NOÛS* 1, 1 (2005).

indeterminate.”¹⁵² Even so, given how quickly we form character assessments to steer how we blame, the rules of evidence must at least acknowledge this powerful tendency. So long as we rely on humans to deliver judgments of moral and legal blame, our rules cannot be naïve about how humans actually do this.

Most of us judge people not for what they do or cause, but because of the kinds of people they are.¹⁵³ We think that “good” people deserve less punishment, and “bad” people deserve greater punishment, for the same bad acts.¹⁵⁴

A. Character Inferences Cannot be Isolated: There is a Positive Feedback Loop Between Ascriptions of Mental States, Causation, and Character

Robust findings from social psychology and moral philosophy demonstrate that we use predictions about intent to assess character and use character evidence to predict intent.¹⁵⁵ And we use evidence of someone’s past acts to inform both character and intent. Thus, past acts, character, and mental states exist in a feedback loop, where one automatically feeds into predictions of the other.¹⁵⁶ These concepts cannot be easily isolated, despite legal requirements to do so. We will infer future intent based on evidence of past actions and will infer character from both.¹⁵⁷ If we have already decided someone has a bad character, we will infer conforming mental states, and if the circumstantial evidence points to intentionally harming someone, we will assume this person has a bad character. A recent review of the role of morality in social cognition demonstrates that “there is a close, bi-directional relationship between inferring mental states and attributing stable traits.”¹⁵⁸ We cannot treat mental state inferences as wholly separate from character inferences. In practice, the two are tightly interrelated.

The positive feedback between trait inferences and mental states exists at the neurological level, too. When we think about others, the activation patterns in our brain reflect the mental states we believe they

152. *Id.* at 29 (emphasis omitted).

153. See Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 279–82 (2012) (discussing data that ratings of responsibility for transgressions are tied to the actor’s perceived moral character).

154. See Pizarro & Tannenbaum, *supra* note 29, at 97.

155. See Ray et al., *supra* note 144, at 556.

156. See *id.* (“[T]here is a close, bi-directional relationship between inferring mental states and attributing stable traits.”).

157. See Clayton Crittcher et al., *Moral Character Evaluation: Testing Another’s Moral-Cognitive Machinery*, J. OF EXPERIMENTAL SOC. PSYCH., Mar. 2020, at 1, 13.

158. Ray et al., *supra* note 144, at 556.

habitually experience.¹⁵⁹ And when we try to understand how someone might behave in the future, we automatically activate these schemas to infer their mental states and their character traits. These “judgments interact and inform one another,” and so to understand how we perceive short-term mental states like intent or carelessness, we must also consider character assessments.¹⁶⁰

B. The Person-Centered Approach to Blame Reconciles Many Social Psychology Findings

A robust body of moral psychology research explains many findings that at first seemed like cognitive errors, but which actually reinforce a person-centered account of blame. This body of research establishes the powerful role of emotions and intuitions in moral judgments. While deliberative processes can influence moral decisions, in many instances the intuitive, emotional reaction drives our *ex post* rational justifications.¹⁶¹ Emotions such as disgust, which might have developed to encourage us not to eat spoiled food or to discourage inbreeding, may spillover into more complex social settings. The same may be true for anger or jealousy. Emotional reactions to terrible outcomes may generate feelings of moral outrage, which then bias us to seek someone to blame. The common law appreciated this, which is why gruesome depictions of crime scenes are often excluded as overly prejudicial. Jurors who see these images may experience a powerful emotional impulse to blame *someone*.

1. Moral Character Impacts Ratings of Causation

If the cause of an accident is ambiguous or not known, people will rate someone with a “bad character” as more likely the cause. For example, when we hear that a driver was speeding home to hide cocaine (rather than speeding home to hide a gift), we are more likely to think that he caused a car accident in which he was involved. In these scenarios, his reason for speeding should have no bearing on the physical cause of the crash, but it does. This is because hiding drugs suggests an immoral character while hiding a gift does not.¹⁶²

159. See Mark A. Thornton et al., *The Brain Represents People as the Mental States They Habitually Experience*, NATURE COMM'NS., May 23, 2019, at 1, 22.

160. See Ray et al., *supra* note 144, at 556.

161. See generally Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814, 815 (2001) (explaining Haidt's model of moral judgments as resulting from “quick, automatic evaluations (intuitions)” despite our “experience[ing an] illusion of objective reasoning”).

162. See Mark Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368, 376–77 (1992) (explaining culpable causation as perhaps being caused by an “observer's affective reaction to an actor's nefarious motives, an actor's reckless behavior, or the degree of harm produced, [which] instills an active desire to place a ‘stain’ on the source

When people violate even more benign social expectations and norms, this can also increase the degree to which we attribute causation and moral blame to them.¹⁶³ Take, for example, two people who engage in nearly identical conduct, such as taking pens out of a stocked cabinet. Only one is said to be violating a norm (the faculty member) and the other is not (an administrative assistant). When there are no more pens, it will be the faculty member who is thought to have caused this result because she is the one who violated the arbitrary norm. The body of research into “culpable causation” demonstrates that causation is not an objective, discoverable fact of nature, but is influenced by social norms and character assessments.¹⁶⁴

This should be shocking to any student of tort or criminal law. If we think the actor is a bad person or did a bad thing, then controlling for all other variables, we are more likely to say that he caused and intended the harm.¹⁶⁵ This is fascinating stuff. Social psychology data are eviscerating the very idea of a sharp distinction between assessing a defendant’s mental state, the cause of the victim’s injury, and his character.¹⁶⁶ Once we have determined someone has a bad character, it creates a jaundiced lens through which we view all other aspects of their case. This includes whether we think they deserve blame. When an actor is labeled “bad,” we blame them for bad outcomes that they intend or desire but did not cause.

2. Moral Character Impacts Ratings of Intent

Previous models of intentionality held that for an act to be considered intentional, three things had to be present. The actor must have believed that an action would result in a particular outcome, desired this outcome, and had full awareness of his behavior. Research now challenges this account, “showing that individuals attribute intentions to others even (and largely) in the absence of these components.”¹⁶⁷

Even where an actor could not have acted otherwise, and thus was coerced to kill, study participants found the actor to be more morally responsible for an act if he “identified” with it, meaning that he desired the

of the emotional response. A relatively direct way to validate this stain on the actor’s character is to exaggerate his or her causal influence on the harmful outcome.”)

163. See Nadler & McDonnell, *supra* note 153; see also Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 184–85 (2020).

164. See Knobe & Shapiro, *supra* note 163, at 184 n.59.

165. See Pizarro & Tannenbaum, *supra* note 29, at 98; see also Rajen Anderson et al., *A Theory of Moral Praise*, 24 TRENDS COGNITIVE SCI. 694, 694 (2020).

166. See Ray et al., *supra* note 144, at 556.

167. Micaela Maria Zucchellia et al., *Intentionality Attribution and Emotion: The Knobe Effect in Alexithymia*, COGNITION, Oct. 2019, at 1.

compelled outcome.¹⁶⁸ These findings do not fit with our typical model of blame, which requires freedom to act in order to assign responsibility.¹⁶⁹ However, they make sense if we adopt a character-based approach to blame. We are quick to infer a bad character and intent when there is very little evidence of it.¹⁷⁰

An example of this is the hindsight bias called the “praise-blame asymmetry,” where people blame actors for accidental bad outcomes that they caused but did not intend, but do not praise people for accidental good outcomes that they likewise caused but did not intend.¹⁷¹ The classic example is the CEO who considers a development project that will increase profits. The CEO is agnostic to the project’s environmental effects and gives it the go-ahead. If the project’s outcome turns out to harm the environment, people say the CEO intended the bad outcome and they blame him for it. However, if instead the project turns out to benefit the environment, the CEO receives no praise. Our folk conception of intentionality is tied to morality and aversion to negative outcomes.¹⁷² If a foreseen outcome is negative, people will attribute intentionality to the decision-maker, but not if the foreseen outcome is positive; the over-attribution of intent only seems to cut one way.¹⁷³ *Mens rea* ascriptions are “sensitive to moral valence If the outcome is negative, foreknowledge standardly suffices for people to ascribe intentionality.”¹⁷⁴ This effect has been found not just in laypeople, but also in French judges.¹⁷⁵ If an action is considered immoral, then our emotional reaction to it can bias mental state ascriptions.¹⁷⁶

This occurs not just when the outcome is bad, but also when the actor is seen to be immoral. For example, in economic trust games, “the untrustworthy agent was more likely to be evaluated as intending negative outcomes than the trustworthy agent.”¹⁷⁷ This is consistent with the idea

168. See Robert L. Woolfolk et al., *Identification, Situational Constraint, and Social Cognition: Studies in the Attribution of Moral Responsibility*, 100 *COGNITION* 283, 297 (2006).

169. See *id.* at 299; see also Steve Guglielmo, *Moral Judgment as Information Processing: An Integrative Review*, 6 *FRONTIERS PSYCH.* 1, 7 (2015).

170. See Pizarro & Tannenbaum, *supra* note 29, at 100.

171. See Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 *ANALYSIS* 190, 193 (2003); see also Joshua Knobe, *Intentional Action in Folk Psychology: An Experimental Investigation*, 16 *PHIL. PSYCH.* 309, 309 (2003).

172. See Markus Kneer & Sacha Bourgeois-Gironde, *Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed*, 169 *COGNITION* 139, 139 (2017).

173. See Siegel et al., *supra* note 148, at 206–07.

174. Kneer & Bourgeois-Gironde, *supra* note 172, at 144.

175. See *id.*

176. See Nadler & McDonnell, *supra* note 153, at 279–82; see also Thomas Nadelhoffer, *Bad Acts, Blameworthy Agents, and Intentional Actions: Some Problems for Juror Impartiality*, 9 *PHIL. EXPLS.* 203, 203 (2006).

177. Siegel et al., *supra* note 148, at 202.

that our representations of others reflect the mental states we imagine they habitually experience.¹⁷⁸

3. Person-Centered Blame Explains Why We Want to Punish Harmless Transgressions

The person-centered approach to blame, and the emotional response that triggers it, can explain why certain fairly innocuous acts elicit such strong moral judgment.¹⁷⁹ For example, small misdeeds that are seen to be highly diagnostic of an immoral character elicit powerful social condemnation. When given the hypothetical task of hiring a corporate executive, participants in one study favored paying one candidate \$1 million more than another candidate who requested a \$40,000 marble desk as a hiring perk. The request for the desk was given great weight and was punished because it appeared to say something about the kind of person the candidate was—entitled and immoral.¹⁸⁰

The person-centered approach to blame also helps explain why we have negative visceral reactions to “harmless transgressions such as eating a dead dog that had been hit by a car.”¹⁸¹ People routinely rate this behavior as disgusting and wrong, but struggle to explain why, given that the dog was not physically harmed by being eaten. We cannot condemn the behavior by the outcomes, as the dog was already dead. We also cannot condemn the behavior based on a principle that we should never eat a living being, or that we should never hurt a dog, because the actor did not injure the dog. This inability to explain our negative gut reactions has been referred to as “moral dumbfounding.”¹⁸² Our intuitions here may be guided not by consequences or by rule violations, but instead by a sense that this behavior is particularly diagnostic of a disturbed individual, one who has an immoral character. Because these behaviors are rare and unambiguous, they have even greater informational value about someone’s character.¹⁸³ This will be discussed in greater detail below.

When information is presented to research participants in a way that permits multiple inferences, but the neutral non-trait reason or the amoral trait reason is described as more likely, the study participants still placed

178. See also Thornton et al., *supra* note 49, at 146.

179. See Uhlmann et al., *supra* note 142, at 72–81.

180. See David Tannenbaum et al., *Moral Signals, Public Outrage, and Immaterial Harms*, 47 J. EXPERIMENTAL SOC. PSYCH. 1249, 1253 (2011) (“As a candidate’s requests became increasingly frivolous—from a cash bonus to a marble table to a marble table with his face carved into it—participants viewed the request as ever more informative of negative moral characteristics, and opposed hiring the candidate.”).

181. Uhlmann et al., *supra* note 142, at 75.

182. See Jonathan Haidt et al., *Moral Dumbfounding: When Intuition Finds No Reason* 11 (Aug. 10, 2000) (unpublished manuscript) (<https://bit.ly/2RXuQhY>).

183. See Lee & Harris, *supra* note 28, at 4.

greater weight on an immoral intent.¹⁸⁴ For example, even when it was more probable that a driver forgot to turn on her lights or did not realize that the road was one-way, participants were still much more likely to infer that the driver intentionally hit a cyclist. The researchers suspect when you must consider two distinct possibilities at once, this uncertainty is computationally difficult. Because this is cognitively taxing, people do not integrate relative probabilities, and instead select the possibility with the most moral valence and treat it as if it were certain.¹⁸⁵ Therefore, when the situation is ambiguous, we are quick to infer intentional action and a bad moral character.

C. Resolving the Tension in Applying 404(b)

Recall that FRE 404(b) permits the use of past actions so long as propensity reasoning is not required. For example, a defendant's previous arson conviction may not be admitted to prove that he was an arsonist who was likely to burn another house down but could be admitted to prove that it could not have been an accident when the second house burned down—the defendant must have intended it. Evidence scholar Ed Imwinkelried, perhaps the most respected supporter of the doctrine of chances, argues that when jurors hear that a defendant has had three of his wives die in a bathtub, they are not “compelled to focus on the accused's past” and thus do not address “the type of person the accused is.”¹⁸⁶ Rather than relying on a character theory, Imwinkelried argues the jury is making an “objective” calculation about the likelihood that his wives would all have accidentally died.¹⁸⁷ There is a logical problem with this, however. Because the wives could not have both accidentally died and been intentionally murdered, proving that three of the defendant's ex-wives had died in a bathtub suggests that at least one of these was not an accident: the defendant intentionally killed them. And if he intentionally killed them, he is “the kind of person” who kills his wives. If the reader is interested in going down this logical rabbit hole, there is a great deal of content to explore elsewhere.¹⁸⁸ Suffice it to say that attorneys and judges have become exceedingly frustrated with the difficulty of applying FRE 404(b) in a principled way.¹⁸⁹

184. See Johnson et al., *supra* note 49, at 509.

185. See *id.*

186. See Imwinkelried, *The Use*, *supra* note 52, at 587.

187. See *id.* at 589.

188. See Crump, *supra* note 59, at 628; see also Hillel Bavli, *Objective Chance and the Rule Against Character Evidence* 6–7 (SMU Dedman Sch. of L. Legal Stud., Research Paper No. 513, 2021).

189. See *id.* at 628–29; see also D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and “Offender Profiling”*: Some Lessons of Modern Cognitive Science for the Law of Evidence, 24 *CARDOZO L. REV.* 193, 206 (2002).

1. Jurors Will Use FRE 404(b) Evidence to Infer Moral Character

There is another problem with FRE 404(b). Many FRE 404(b) uses of character evidence that are thought not to require an inference about someone's propensity to behave in a particular way, likely require—or at the very least invite—exactly this sort of inference. This is due to person-centered blame and the crosscutting nature of inferences about character, intent, and blame. Once we hear about someone's past acts, we will use this to infer mental states and also to assess character, propensity, and blame.

Consider a typical case where someone's past drug use or addiction was introduced not to show propensity to use drugs, but to prove motive.¹⁹⁰ Jurors would be given a limiting instruction that they were not supposed to use evidence of the defendant's cocaine addiction to suggest he was a bad person who was likely to use drugs. They could only use this evidence to prove motive, which technically does not require any propensity inferences. However, whether a propensity inference is technically required has no bearing on whether it will be automatically inferred. Because addiction is considered immoral, the jury will automatically use this information to do what is prohibited—to predict action in conformity with addiction and to increase the defendant's blame. Crucially, character inferences that we draw subconsciously and implicitly are no weaker or more extreme than those we draw deliberately.¹⁹¹

2. Past Acts Evidence May be Crucial for Justice

Consider the case of Bill Cosby, who was accused of drugging and raping dozens of women he claimed to mentor. When one woman finally decided to go on the record as a witness, Cosby predictably said she was lying.¹⁹² It was of considerable probative value to introduce the accounts of the many other women who claimed he did the same exact thing, under very similar circumstances.¹⁹³ Pennsylvania has not adopted a version of FRE 413, which permits past sexual assaults to be admitted for propensity purposes. Thus, because FRE 404 does not allow past act evidence to prove conformity, in Cosby's first prosecution, the jury could not hear about the dozens of other rape accusations. The jury was deadlocked,

190. See *United States v. Sutton*, 41 F.3d 1257, 1259 (8th Cir. 1994); see also *People v. Watkins*, No. B174012, 2005 WL 1208306, at *3 (Cal. Ct. App. May 23, 2005); see also *State v. Costello*, 977 A.2d 454, 459–60 (2009).

191. See *McCarthy & Skowronski*, *supra* note 22, at 330.

192. See Sherry F. Colb, *Bill Cosby and the Rule Against Character Evidence*, VERDICT (Jan 15, 2016), <https://bit.ly/3hQaEZL>.

193. See Holly Yan et al., *Bill Cosby Admitted to Getting Quaaludes to Give to Women*, CNN (July 7, 2015, 11:42 PM), <https://cnn.it/3wwXZyU>.

which resulted in a mistrial.¹⁹⁴ Reports suggest the reason for the mistrial was that jurors questioned the victim's credibility.¹⁹⁵ Questioning the victim's credibility is a common problem in sexual assault cases and often leads to non-prosecution or acquittal.¹⁹⁶ When Cosby was prosecuted a second time, for unknown reasons the state was allowed to introduce the testimony of five other women who said they were also sexually assaulted by Cosby. This evidence bolstered the victim's credibility and likely made all the difference because he was convicted on these charges.¹⁹⁷

Character evidence related to domestic violence can also be quite probative without being unfairly prejudicial. Consider the O.J. Simpson case, where a husband was accused of murdering his ex-wife. Past acts of domestic violence would have been highly probative to put the escalating abuse in context. Indeed, the omission of past act evidence would have been potentially misleading and unfair to the prosecution, as data shows that men who repeatedly beat their wives are more likely to murder them when they try to finally leave.¹⁹⁸ There are countless other examples where evidence of someone's past acts or traits would be appropriate and fair for propensity purposes.

D. Trait Inferences from Behavior are Spontaneous, Sticky, and Sensitive to Immoral Conduct

The person-centered account of blame tells us we are right to be worried that jurors will use character evidence to draw an unfair inference about the kind of person that someone is. “[H]umans are highly motivated to explain and predict others behavior” through forming impressions of their characters.¹⁹⁹ Now, decades of social psychology help us understand exactly how this occurs.

Because humans are an incredibly social species,²⁰⁰ it is crucial for us to predict others' behavior in order to choose partners, to not be vulnerable to exploitation, and to survive.²⁰¹ As early as 12 months old,

194. See Lawrence Crook III et al., *Bill Cosby Juror Speaks: “We Had No Real New Evidence,”* CNN (June 23, 2017, 2:40 PM), <https://cnn.it/3yEtkBB>.

195. See *id.*

196. See Stephen Carter, *Bill Cosby's ‘Prior Bad Acts’ — What Will a Jury Hear?*, CHI. TRIB. (Jan. 5, 2016, 4:48 PM), <https://bit.ly/3fH9eyb>; see also *In Support of Amending Utah's Rules of Evidence To Create Presumptive Admissibility [of] Similar Crimes Evidence in Sexual Assault Cases: Hearing Before the Utah Supreme Court Advisory Committee* (Oct. 13, 2020) (testimony of Professor Paul G. Cassell).

197. See Graham Bowley, *Bill Cosby Returns to Court. Here's Why His Retrial Is No Repeat.*, N.Y. TIMES (April 8, 2018), <https://nyti.ms/3fM1V8c>.

198. See Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION AND VIOLENT BEHAV. 514, 516–19 (2006).

199. See Lee & Harris, *supra* note 28, at 3.

200. See Thornton et al., *supra* note 49, at 140–48.

201. See McCarthy & Skowronski, *supra* note 22, at 321.

infants automatically evaluate others on their “goodness or badness.”²⁰² These impressions can be formed intentionally or unintentionally after observing or trying to comprehend someone’s behavior. They can also be based on superficial cues.

There are multiple steps to forming impressions of others. The first involves categorizing people into social groups.²⁰³ When we form an impression of someone based on their behavior, our brains recruit the dorsomedial prefrontal cortex. When we form impressions based on physical features such as skin color or the appearance of the eyes and lips, we rely more on the amygdala, a complex neural structure mediating emotional and fearful responses.²⁰⁴ Collectively, we form impressions of others based on spontaneous trait inferences (STIs). These occur during the encoding stage, “even if people do not intend to infer trait information[,] and can even occur without awareness that such an inference has occurred.”²⁰⁵

After we have categorized someone based on race, sex, class, or age, which we can do with near-perfect accuracy,²⁰⁶ we use both engrained and learned stereotypes to sort them into buckets of how we believe they are likely to think and behave.²⁰⁷ We are very good at categorizing people into groups, even if the categories are terrible predictors of behavior.²⁰⁸ Only if we are motivated to look to individuating factors do we integrate attributes specific to the person. Because this individuating process takes much more effort and cognitive resources, most of us avoid it.

1. When Past Behavior is Unknown, Traits are Automatically Inferred Based on Superficial Appearance

Most of the information we need to make character assessments is obtained within as little as 100 milliseconds of encountering someone, and

202. See Yuki Shimizu et al., *Culture as Automatic Processes for Making Meaning: Spontaneous Trait Inferences*, 69 J. EXPERIMENTAL SOC. PSYCH. 79, 83 (2017) (“Given the likelihood that infants’ social perceptions are spontaneous, STI may be fundamental and universal for humans.” (citing Renée et al., *Psychological Reasoning in Infancy*, 67 ANN. R. PSYCH. 159, 159–86 (2016))).

203. See Jasmine Norman & Jacqueline Chen, *Consequences of Being Unable to Categorize: The Impact of Racial Ambiguity on Spontaneous Trait Inferences 3* (June 2019) (unpublished manuscript) (<https://bit.ly/344ZBDR>).

204. See Mende-Siedlecki, *supra* note 20, at 74.

205. McCarthy & Skowronski, *supra* note 22, at 321.

206. See Jaeger et al., *Can People Detect*, *supra* note 5, at 16.

207. See Neil Hester & Kurt Gray, *The Moral Psychology of Raceless, Genderless Strangers*, 15 PERSP. ON PSYCH. SCI. 216, 218–19 (2020).

208. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 1; *see also* Hamilton et al., *supra* note 7, at 569.

the inferences are not improved with more time.²⁰⁹ In an eyeblink, we have already conducted a “character diagnosis.”²¹⁰ We immediately draw inferences based on whatever limited information is available, regardless of how reliable it is.²¹¹ Surprisingly, subtle facial features generate powerful character assessments.²¹²

There appear to be three key dimensions of facial first impressions: trustworthiness, dominance, and youthful-attractiveness, with the first two relating to assessments of threat, and the third relating to sexual selection.²¹³ These dimensions have helped our ancestors determine whether we might want to approach or avoid another human being.²¹⁴ While they were developed for simpler times, they continue to be powerful means of sorting people today.²¹⁵ Research suggests that trustworthiness is the most salient of these. This factor alone can explain almost all of the variance in ratings of faces by a principal component analysis.²¹⁶ This process has enormous impact on trials, as much of what jurors do is assess the credibility of witnesses.

We assess character by using low-level perceptual cues based upon people’s face traits. “[N]eutral expression faces with wider jaws, heavier brows, and smaller eyes tend to be judged as more dominant.”²¹⁷ Dominant faces are more likely to generate trait inferences of being impulsive, careless, or aggressive. Conversely, neutral-expression faces with high brows and upturned lips tend to be judged as more trustworthy, and submissive.²¹⁸ The neural basis of these processes has been investigated,

209. See Alexander Todorov et al., *Evaluating Faces on Trustworthiness After Minimal Time Exposure*, 27 SOC. COGNITION 813, 819 (2009) [hereinafter Todorov et al., *Evaluating Faces*].

210. See Michael Lupfer et al., *How Pervasive is the Negativity Bias in Judgments Based on Character Appraisal?*, 26 PERSONALITY & SOC. PSYCH. BULL. 1353, 1363 (2000); see also Clayton Critcher et al., *How Quick Decisions Illuminate Moral Character*, 4 SOC. PSYCH. & PERSONALITY SCI. 308, 308 (2012).

211. See Uhlmann et al., *supra* note 142, at 74.

212. See Bastian Jaeger et al., *Who Judges a Book by Its Cover? The Prevalence, Structure, and Correlates of Lay Beliefs in Physiognomy* 3 (June 4, 2020) (unpublished manuscript) (<https://bit.ly/3uLxvbf>).

213. See Evan Westra, *Character and Theory of Mind: An Integrative Approach*, 175 PHIL. STUD. 1217, 1221 (2018); see also Uhlmann et al., *supra* note 142, at 72.

214. See Manuel Oliveira et al., *Dominance and Competence Face to Face: Dissociations Obtained with a Reverse Correlation Approach*, 49 EUR. J. SOC. PSYCH. 413, 413 (2018).

215. See Nikolaas N. Oosterhof & Alexander Todorov, *The Functional Basis of Face Evaluation* 105 PROC. NAT’L ACAD. SCI. 11087, 11091 (2008).

216. See Todorov et al., *Evaluating Faces*, *supra* note 207, at 814.

217. Westra, *supra* note 213, at 1221.

218. See Westra, *supra* note 213, at 1221; see also Uhlmann, et al., *supra* note 142, at 72 (“[P]eople quickly and easily attribute morally good or bad traits to others . . . with limited information.” (citing Geoffrey P. Goodwin et al., *Moral Character Predominates in Person Perception and Evaluation*, 106 J. PERSONALITY & SOC. PSYCH. 1, 1–21 (2014);

with studies showing bilateral amygdala damage impairs discrimination between trustworthy and untrustworthy-looking faces. Untrustworthy-looking faces evoke greater activity in the amygdala than trustworthy-looking faces, which suggests this may be mediated by fear.²¹⁹

Importantly, how we rate a face predicts how we interpret ambiguous behavior—“the same behavior can be interpreted as assertive or unconfident depending on the perceived dominance of an accompanying face.”²²⁰ For example, if someone is described as sitting quietly with a face that appears confident and dominant, this behavior is interpreted as powerful. The same behavior is interpreted as expressing weakness when the target’s face is rated as low in confidence. We read faces to infer people’s character traits, and then use trait information to focus on different aspects of their faces.

Sexism plays a powerful role here. Having a “resting bitch face” leads to automatic negative inferences about one’s character.²²¹ Women’s faces that do not conform to gender-stereotypical traits and that are rated as more “masculine-looking” are assumed to be more unfriendly and cold.²²² Conversely, when we see people with babyfaces, we infer that they are more submissive and trustworthy.²²³ The “babyface” effect is powerful enough to mitigate racial stereotypes about Black men being physically threatening.²²⁴ Shockingly, having a babyface predicted outcomes in small claims court rulings.²²⁵

Facial beauty also influences moral judgments, as people reflect the “beauty-is-good” stereotype and conflate physical attractiveness with moral goodness.²²⁶ In this fascinating area of research, neuroimaging has

Alexander Todorov et al., *Understanding Evaluation of Faces on Social Dimensions*, 12 TRENDS COGNITIVE SCI. 455, 455–60 (2008)).

219. See Todorov et al., *Evaluating Faces*, *supra* note 207, at 814.

220. Richard J. W. Vernon et al., *Modeling First Impressions from Highly Variable Facial Images*, 111 PROC. NAT’L ACAD. SCI. E3353, E3353 (2014).

221. See Hester & Gray, *supra* note 207, at 218–19.

222. See Clare Sutherland et al., *Face Gender and Stereotypicality Influence Facial Trait Evaluation: Counter-Stereotypical Female Faces Are Negatively Evaluated*, 106 BRIT. J. PSYCH. 186, 190 (2015).

223. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 5.

224. See Ryan Stolier et al., *The Conceptual Structure of Face Impressions*, 115 PNAS 9210, 9210 (2018); see also Hester & Gray, *supra* note 205, at 218–19.

225. See Leslie Zebrowitz & Susan McDonald, *The Impact of Litigants’ Baby-Facedness and Attractiveness on Adjudications in Small Claims Courts*, 15 LAW & HUM. BEHAV. 603, 603 (1991) (“As plaintiffs increased in attractiveness, defendants were more likely to lose the case. Also, as defendants increased in baby-facedness, they were more likely to win cases involving intentional actions and less likely to win cases involving negligent actions . . .”).

226. See Quiling Luo et al., *The Neural Correlates of Integrated Aesthetics Between Moral and Facial Beauty*, 9 SCI. REPS. 1, 1 (2019); see also Michael Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45, 45 (1974).

revealed that activation in the medial orbitofrontal cortex is collectively modulated by facial beauty (such as having a symmetrical and statistically average face) and moral beauty (such as watching a boy cover an injured pigeon with a blanket).²²⁷ Both images are aesthetically beautiful, though only the latter is actually based on virtues and morality. Researchers hypothesize that when we see physically attractive individuals, our brains experience beauty, and confuse physical beauty for moral beauty. Interestingly, there is no overlap in brain activation when viewing physically ugly and morally “ugly” scenes.²²⁸

To demonstrate how individuals confuse physical beauty with “goodness” or “competence,” one pioneering study had participants rate a teacher’s effectiveness while only watching ten second video clips where the sound was off. These silent videos of instructors delivering their lectures positively predicted actual students’ end-of-semester evaluations of the instructors. This effect was found to be mediated by physical attractiveness.²²⁹ In another study, attractive candidates in Italian elections were more successful.²³⁰ Physical attractiveness is often conflated with morality.

People who look like us are also more likely to be rated as moral, and people who do not look like us are more likely to be rated as immoral. This is because, to reiterate, our mentalizing frameworks were engineered for simpler times, to create coherent assessments of what were once fairly homogenous peer groups. This may be why, even when we lack sufficient base rate data and are uncertain about people’s characters, we are likely to draw assumptions about the “kinds of people” that they are, especially when they are different from us in some deep or obvious way.²³¹

When white Americans view Black and white faces subliminally (meaning below the threshold of our consciousness), the fear response in the amygdala, indicating a perceived threat, are stronger than when they are presented supraliminally (above the threshold of consciousness).²³² Trait inferences might therefore be moderated in part by emotional responses of fear, which occur immediately and without our realizing it.

227. This region of the brain is also implicated in many other forms of reward as well as appreciating music, food, or art.

228. See Luo et al., *supra* note 226, at 7.

229. See Ambady & Rosenthal, *supra* note 15, at 431.

230. See Bastian Jaeger et al., *Facial Appearance and Electoral Success of Male Italian Politicians: Are Trustworthy-Looking Candidates More Successful in Corrupt Regions?*, 51 SOC. PSYCH. 1, 6 (2021).

231. See Johnson et al., *supra* note 49, at 506.

232. See Jennifer Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 943 (2012); for other paradigms testing the neural correlates of racial biases during trust games, see Damian Stanley et al., *Race and Reputation: Perceived Racial Group Trustworthiness Influences the Neural Correlates of Trust Decisions*, PHIL. TRANS. ROYAL SOC. 744, 750 (2012).

This may also play a role in explaining systemic injustices—i.e., why Black people are given lengthier sentences for the same offenses.²³³

The fact that the stereotypes that fuel these judgments have gone “underground” only makes them more difficult to detect and mitigate.²³⁴ Few people want to admit, even to themselves, that they are racist, sexist, classist, or ableist. Preliminary research suggests that people who are high in perceived power are more likely to rely on stereotypes when inferring traits.²³⁵ This suggests the use of stereotypes may be a means of policing social hierarchy.

These findings might explain why studies have shown that a defendant’s committing prior crimes is the best predictor of conviction, even when juries were not allowed to hear about the past acts.²³⁶ At first these puzzling results had been difficult to explain. How could the existence of a past act predict a subsequent conviction, if the jury was not made aware of the prior act? When past bad acts are kept from the jury, they may instead rely on physical features of the defendant, such as his being a Black man or having an untrustworthy face, to infer traits of criminality. Jurors might implicitly find skin color or Black facial features to reflect something about the person’s character, when in reality this is just highly correlated with being arrested or incarcerated, due to systemic racism in policing and prosecution.²³⁷

Culture plays a large role in terms of which traits are most salient for a given role, and which stereotypes are activated.²³⁸ In the United States, political success can be predicted by face-based judgments of “power,” while in Japan, assessments of politicians’ “warmth” predict election outcomes.²³⁹ Judgments of competence, based solely on viewing

233. See Hester & Gray, *supra* note 205, at 218.

234. See David M. Amodio, *The Neuroscience of Prejudice and Stereotyping*, 15 NATURE REV. NEUROSCIENCE 670, 670 (2014).

235. See Meifang Wang & Feng Yang, *The Malleability of Stereotype Effects on Spontaneous Trait Inferences: The Moderating Role of Perceivers’ Power*, 48 SOC. PSYCH. 3, 3 (2017).

236. See Laudan & Allen, *supra* note 139, at 499–500 (“[H]aving prior crimes turns out to be one of the strongest predictors of a guilty verdict that we have available, stronger even than the testimony of an eyewitness to the crime who fingers the defendant. And it remains a powerful predictor of the jurors’ verdict even when the jurors have not been informed of its existence.” (citing Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC’Y REV. 781, 792–93 (1979))).

237. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 137–48 (2010).

238. See Shimizu et al., *supra* note 202, at 83 (“Our results suggest that STIs are universal and culture specific.” (emphasis omitted)).

239. See Ana I. Gheorghiu et al., *A Thin Slice of Science Communication: Are People’s Evaluations of TED Talks Predicted by Superficial Impressions of the Speakers?*, 11 SOC. PSYCH. & PERSONALITY SCI. 117, 118 (2020).

photographs of candidates, predicted the outcome of U.S. Congressional elections.²⁴⁰

While researchers knew that trait inferences could be spontaneous or intentional, research has now demonstrated that the two do not produce significantly different results in terms of the strength of the trait inferences. This means that when we automatically infer traits from faces, the results are indistinguishable from when we deliberately do so. In one study that compared spontaneous with intentional trait inferences, the strength of the inferences between the two conditions were similar or identical.²⁴¹

Spontaneous, unintentional trait inferences based on race, religion, gender, height, obesity, skin color, and the size and shape of our eyes, brows, or noses may be just as strong as the inferences we draw intentionally. They require no mental state inferences about the individual, and thus can be quite poor predictors of individual character.²⁴² Even so, they can also persevere in the face of new, and presumably conflicting, information because they require less cognitive effort than forming impressions based upon individual attributes or behavior, “[t]hus, category-based information is relied upon when possible.”²⁴³

In summary, physical features and corresponding stereotypes will lead to automatic inferences about people’s characters, regardless of their past behavior.²⁴⁴ The jury does not need to hear formal character testimony to infer that someone is a bad person who likely committed the crime and deserves to be punished. Jurors will infer this automatically on their own, based on observable, unreliable facial characteristics.²⁴⁵

2. Mitigating Spontaneous Trait Inferences Requires Motivation

Just as with the correspondence bias, the use of STIs may be mitigated if the individual drawing the inference is motivated to deliberately revise her thinking.²⁴⁶ We are more likely to use new, positive information to update our evaluations of compatriots, and less likely to do so for people who are not part of our ingroup. This leads to skewed

240. See Alexander Todorov et al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1624 (2005) [hereinafter Todorov et al., *Inferences of Competence*].

241. See McCarthy & Skowronski, *supra* note 22, at 330.

242. See Lee & Harris, *supra* note 28, at 4.

243. Norman & Chen, *supra* note 203, at 5.

244. See Jonathan B. Freeman & Kerri L. Johnson, *More Than Meets the Eye: Split-Second Social Perception*, 20 TRENDS COGNITIVE SCIS. 362, 362 (2016).

245. See Vernon et al., *supra* note 220, at E3353.

246. See Joshua D. Greene, *The Rat-a-Gorical Imperative: Moral Intuition and the Limits of Affective Learning*, 167 COGNITION 66, 67–68 (2017).

impressions of ingroup, relative to outgroup, members.²⁴⁷ Also, if we have a personal desire to be accurate, we are more likely to expend the effort to update our character appraisals.²⁴⁸ For example, we are more likely to update our assessments when we need to work with someone in the future and our success in some way depends on correctly guessing how they will behave.²⁴⁹

Unfortunately, most of us do not regularly update the impressions we form of others. We either do not realize we have spontaneously inferred traits to form an impression of someone, or we are not personally motivated to change our perception. Because of this, STIs display significant anchoring effects, exerting a disproportionate influence on downstream decisions.²⁵⁰ In many cases, unless people are specifically invited to update their impressions, people continue to rely on STIs even when more individualized cues are available, and even when specific rules prohibit relying on them.²⁵¹

3. Mitigating Spontaneous Trait Inferences Will Be Difficult at Best and Impossible at Worst

To correct an implicit bias, one must “be aware of the influence of the knowledge that they possess and also be motivated to correct for its influence.”²⁵² People are not aware of the impact of STIs and are therefore unable to “fully correct for their influence.”²⁵³ The automaticity and pervasiveness of, and our obliviousness to, STIs makes them quite difficult to silence. One study found that we can develop modestly successful interventions to reduce implicit bias, so long as the specific social category, such as gender or ethnicity, is identified.²⁵⁴ This suggests that for mitigation to be successful, we cannot make a “general appeal” to be unbiased.²⁵⁵ Pattern jury instructions are therefore unlikely to be effective debiasing tools, as they will not draw attention and correction to an identified social group.

247. See Pascal Molenberghs & Winnifred R. Louis, *Insights From fMRI Studies Into Ingroup Bias*, 9 FRONTIERS PSYCH. 1, 5–6 (2018); see also Jay J. Van Bavel et al., *Modulation of the Fusiform Face Area Following Minimal Exposure to Motivationally Relevant Faces: Evidence of In-Group Enhancement (Not Out-Group Disregard)*, 23 J. COGNITIVE NEUROSCIENCE 3343, 3352 (2011).

248. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 2.

249. See Mende-Siedlecki, *supra* note 20, at 74.

250. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 2.

251. See *id.* at 1.

252. McCarthy & Skowronski, *supra* note 22, at 330.

253. *Id.*

254. See Jordan R. Axt et al., *Reducing Social Judgment Biases May Require Identifying the Potential Source of Bias*, 45 PERSONALITY & SOC. PSYCH. BULL. 1232, 1250 (2019).

255. See *id.* at 1247.

Even if a deliberate instruction could reduce bias in a targeted group, it is magical thinking to assume a quick and authoritative limiting instruction could prevent *all* potentially negative inferences from being drawn.²⁵⁶ There are too many subconscious biases we are constantly interpreting, and it would be impossible to mitigate each of these through a deliberative process. Of course, blinding individuals to the faces of subjects, such as criminal defendants who often do not testify on their own behalf—and whose off-stand facial expressions are heavily scrutinized—would remove some of the implicit bias. But as discussed above, doing this is often impossible, and certainly so for all witnesses in a trial.²⁵⁷ Rather than trying to blind jurors to the facial characteristics of witnesses, judges ought to allow the more accurate predictors of behavior²⁵⁸—past and future behavior—to be heard. Common sense, as well as preliminary social psychology research, suggests this could work.

Previous research in non-legal contexts has shown that people update facial impressions when new behavioral information about specific people is shared.²⁵⁹ One team that was exploring the role of the right amygdala in updating STIs found that “[f]aces that were associated with positive behaviors were judged as more trustworthy than faces that were associated with negative behaviors.”²⁶⁰ Thus, evidence of how someone has behaved in the past can reduce the impact of implicit facial impressions.

A recent paper focused specifically on testing intervention to mitigate the impact of STIs. The team compared facial trait assessments when subjects either heard or did not hear information about the person’s past acts. Despite being highly automatized, STIs of trustworthiness *could be updated* if subjects learned about how targets had actually behaved.²⁶¹ The behavioral information spontaneously triggered a counter-stereotypical inference (i.e., an inference that runs in the opposite direction from those that were automatically inferred from their face). These led participants to revise their trait inferences. This is encouraging.

256. See Greene, *supra* note 244, at 68.

257. See Jaeger et al., *Can We Reduce*, *supra* note 16, at 2.

258. See Sara C. Verosky et al., *Robust Effects of Affective Person Learning on Evaluation of Faces*, 114 J. PERSONALITY & SOC. PSYCH. 516, 516 (2018) (“A more reliable source of information is affective person learning based on others’ past actions.”).

259. See Alexander Todorov & Ingrid R. Olson, *Robust Learning of Affective Trait Associations with Faces When the Hippocampus Is Damaged, But Not When the Amygdala and Temporal Pole Are Damaged*, 3 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 195, 195 (2008); see also Eliza Bliss-Moreau et al., *Individual Differences in Learning the Affective Value of Others Under Minimal Conditions*, 8 EMOTION 479, 490 (2008) (explaining how having either an extraversion and neuroticism disposition may influence how this updating occurs).

260. Baron et al., *supra* note 19, at 579 n.266.

261. See Chua & Freeman, *supra* note 5, at 1.

One drawback of this study is that it only tested the trustworthiness of white male faces. There is good reason to believe that mitigating STIs will be harder in other social groups. Even so, studies have demonstrated that the sticky and subconscious biases from STIs *can be mitigated* with information about someone's past acts that is counter-stereotypical.²⁶²

Other studies have also shown that knowledge of past acts, if presented, can replace or mitigate impressions from faces.²⁶³ This comports with common sense as well. As between information about how someone behaved in the past, and trustworthiness information we glean from their face, it is hard to defend requiring jurors to rely just on facial features. Allowing parties to provide positive, bolstering character evidence might be crucial to justice—to correct subconscious and deeply unfair trait inferences.²⁶⁴

These studies still need to be replicated in more legally valid settings, but there is no reason to believe that the core psychological process would operate differently during trials. There would likely be a great deal more noise in the form of conflicting evidence and cross-examination, which would make testing the specific effect of past act evidence quite difficult. I am currently working with a social psychologist who specializes in racialized STIs to test whether mock jurors may use counter-stereotypical past act evidence to mitigate the impact of having an untrustworthy face in a civil trial. But even if we do not see measurable effects, there is a good common-sense argument for allowing information based on behavior. Behavioral evidence must be at least a bit more probative of character than the unregulated evidence drawn subconsciously from STIs.

E. Immorality Drives Character Assessments

Behaviors that are perceived to be immoral are “more heavily weighted than their positive counterparts” and lead to greater changes in our implicit and explicit impressions of character.²⁶⁵ Negative information is considered more “diagnostic”—that is, it is more readily linked to a category or label, in this case of being a “bad” person.²⁶⁶ It takes fewer

262. See Verosky et al., *supra* note 258, at 525–26.

263. See Chua & Freeman, *supra* note 5, at 1; see also Anna Eiserbeck & Rasha Abdel Rahman, *Visual Consciousness of Faces in the Attentional Blink: Knowledge-Based Effects of Trustworthiness Dominate Over Appearance-Based Impressions*, 83 CONSCIOUSNESS & COGNITION 1, 10 (2020).

264. See *Mosley v. State*, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (en banc).

265. See Mende-Siedlecki, *supra* note 20, at 73; see also David Trafimow et al., *The Role of Affect in Determining the Attributional Weight of Immoral Behaviors*, 31 PERSONALITY & SOC. PSYCH. BULL. 935, 935 (2005); see also Johnson et al., *supra* note 49, at 510 (explaining how research produced little evidence that participants weighted uncertain non-moral traits (e.g., poor eyesight) in predictions).

266. See Trafimow et al., *supra* note 265, at 935.

instances of “bad” behavior to label someone’s character as bad than it takes instances of “good” behavior to label someone’s character as good.²⁶⁷ Having lived through junior high school, we understand this phenomenon: it is easier to move from having a good reputation to a bad reputation, than to move from a bad reputation to a good one.²⁶⁸ As Jonathan Haidt said, “[o]ne scandal can outweigh a lifetime of public service.”²⁶⁹

Judgments about immoral conduct appear to be made very quickly and can be long-lasting. They also lead to more generalized prescriptions from behavior to enduring traits than when the conduct is moral.²⁷⁰ If someone makes one mistake or does one immoral act, we are more likely to extrapolate from this to an assessment that they are “bad” but one or two moral traits is usually insufficient to assess someone as “good.” There is a substantial amount of evidence that amoral or neutral traits are not given the same weight. The more negative the effect evoked by hearing about how someone has acted (e.g., he “pushed other people out of the way”) the more attributional weight this evidence is given.²⁷¹

Immoral behavior possesses greater informational value—it is more salient—because it is perceived as less common.²⁷² To give an example, if on one occasion I denied help to a needy friend, this is considered more indicative of my character than if I were to help a needy friend on one occasion.²⁷³ Immoral behavior “appears to be especially high in category diagnosticity, whereas moral behavior is less so” and this leads to immoral behavior having a great impact on impression formation.²⁷⁴ If the immoral conduct is rare, outrageous, and deliberate, such as tipping over containers of water that were left in the Arizona desert for dehydrated refugees, then drawing a negative inference about one’s character from this action might not be irrational. Conversely, we do not assume that those who leave the water containers alone are especially good people. We expect moral conduct.

The heightened informational value of negative, immoral behavior might relate to our evolutionary past and signal detection theory (how

267. See Douglas S. Krull & Jody C. Dill, *Do Smiles Elicit More Inferences Than Do Frowns? The Effect of Emotional Valence on the Production of Spontaneous Inferences*, 24 PERSONALITY & SOC. PSYCH. BULL. 289, 289 (1998).

268. See Lupfer et al., *supra* note 210, at 1362.

269. Jonathan Haidt & Selin Kesebir, *Morality*, in HANDBOOK OF SOC. PSYCH. 797, 813 (Susan T. Fiske & D. Gilbert eds., 5th ed. 2010).

270. See Jay J. Van Bavel et al., *The Importance of Moral Construal: Moral Versus Non-Moral Construal Elicits Faster, More Extreme, Universal Evaluations of the Same Actions*, PLOS ONE, November 28, 2012, at 1, 12.

271. See Trafimow et al., *supra* note 265, at 945.

272. See Mende-Siedlecki, *supra* note 20, at 73.

273. See Lupfer et al., *supra* note 210, at 1354.

274. See *id.* at 1354.

intense the signal is, and how tuned in we are to it). Being able to make predictions about who might cheat us was probably more critical to our ancestors' survival than predicting who was likely to be kind.²⁷⁵ The risk of getting it wrong was simply greater.

Jurors are not likely to give much weight to amoral or positive trait information. Thus, our common law evidence rules were correct to focus on immoral, or bad traits. However, there may be good normative or social reasons for prioritizing negative information. This is why my proposal does not ban all past immoral acts, but merely those that the judge finds to be substantially more prejudicial than probative.

IV. FRE 404 MUST BE REVISED

A. Take-Aways from the Social Psychology Research

As Edward Imwinkelried acknowledged back in 1994, “there is a growing realization that the rigid American character evidence prohibition is out of step with the more liberal doctrines in effect in other progressive common-law jurisdictions . . . [and] the latest psychological research suggests that character evidence may be more probative than we have traditionally assumed it to be.”²⁷⁶ Since 1994, the strength of this argument has only grown. At this point, a colossal body of psychological research has made several important contributions that undermine our modern character evidence rule. I will summarize these contributions below, some of which have been known for many decades:

- 1) People tend to explain behavior with reference to fixed character traits rather than to situational factors.
- 2) However, if the character inferences are based on rare, highly immoral acts that are quite likely to be repeated, the propensity inference might not be an error and its use in court might be substantially more probative than prejudicial.
- 3) We are driven to blame people for the kinds of people they are, rather than for the things that they do, which is referred to as “person-centered blame.”
- 4) This person-centered blame is facilitated by many automatic inferences. One such type, spontaneous trait inferences (STIs), generates immediate, subconscious, and sticky trait inferences based upon immutable facial characteristics and unreliable social stereotypes.

275. See Marco Brambilla, et al., *Changing Impressions: Moral Character Dominates Impression Updating*, 82 J. EXPERIMENTAL SOC. PSYCH. 64, 65 (2019).

276. Imwinkelried, *Some Comments*, *supra* note 83, at 37.

- 5) If we ban testimony of how someone has behaved in the past, jurors will rely too much on STIs to predict others' characters.
- 6) We cannot treat mental state inferences as wholly separate from character inferences. Jurors will automatically use evidence of mental states to infer character traits, and vice versa.
- 7) Subconscious character inferences cannot feasibly be mitigated through jury instructions.
- 8) Conduct that is perceived to be immoral is given greater weight than moral or amoral conduct, but depending on the circumstances, this might not be irrational, and may even be just.

Compared to when the common law adopted the character evidence rule, we now know much more about how people assess behavior and blame. We are highly motivated to judge people not for what they have done, but for the kinds of people that they are. We will therefore use whatever information is available to sort individuals into groups of those who are "good" and those who are "bad." Unfortunately, this sorting is often informed by mere split-second observations—based on people's face, race, sex, power, and class. The processes that developed to facilitate this are crude, but they persist because they require little cognitive effort or reflection, and we are mostly unaware they exist.

Whether these mechanisms reflect cognitive biases, confusion, or mental shortcuts, the descriptive picture is what it is. To the extent this picture is at odds with legal doctrine, the legal doctrine can either be routinely ignored, or it can change.²⁷⁷ As Bertram Malle and Sarah Nelson suggested, so long as the law continues to rely on laypeople to assess blame, it should reconcile itself to the layperson's view of behavior.²⁷⁸ Reforming our legal rules seems particularly important where the intuitions the rules are fighting against are automatic, spontaneous, unconscious, and persistent.

B. Specifics of My Proposal

1. The Revised Rule Should Be Limited to Immoral Character Evidence

FRE 404 should be replaced with a rule that permits moral and neutral character evidence and presumes inadmissibility for character evidence

277. For the contrary view that psychology has no place in considerations of character, see Blinka, *supra* note 54, at 89 (2013). However, the idea that character is a social construct, as articulated in Professor Blinka's Article, *see id.*, suggests that social psychology might indeed correctly inform how character is assessed.

278. See Bertram F. Malle & Sarah E. Nelson, *Judging Mens Rea: The Tension Between Folk Concepts and Legal Concepts of Intentionality*, 21 BEHAV. SCIS. & THE LAW, 563, 580 (2003).

indicating an immoral trait. This seems like a radical idea, but it is not. Indeed, something like it has been proposed by other evidence scholars, based on different sorts of concerns.²⁷⁹ Though not without its own critics, the U.K.'s Criminal Justice Act of 2003 likewise restricts its focus to "reprehensible" behavior, which may be admitted in courts in the United Kingdom so long as it does not have "an adverse effect on the fairness of the proceedings."²⁸⁰ The proposal I suggest would take a similar course. However, given some early confusion defining what qualifies as bad enough to be "reprehensible," my proposal would ask judges to consider whether the past act or character trait is considered immoral according to a substantial portion of the community.²⁸¹ Judges are well-equipped to perform this function, given their experience with other causes of action that require inquiries into objective social norms, such as defamation and public disclosure of private, embarrassing facts.²⁸²

Evidence of actions or traits that are deemed by the judge to likely be considered virtuous or morally neutral *by the jury* would be admitted subject only to FRE 403's balancing test. This is because they are not likely to trigger strong dispositional inferences or the person-centered approach to blame. Positive evidence would thus be allowed, so long as it did not devolve into a trial-within-a-trial or waste too much time. When witness credibility is critical, and the person perhaps has an untrustworthy-looking face, this would permit witnesses to spend some time bolstering their credibility before it is explicitly attacked.²⁸³

279. A similar reform has been previously discussed by scholars such as Roger Park and David Leonard. *See* Park, *supra* note 75, at 777.

280. Criminal Justice Act, 2003, c.44, § 101(3) (U.K.); *see also* Goudkamp, *supra* note 81, at 124.

281. For example, in one case, the term "reprehensible behavior" was considered ambiguous because the behavior was not disapproved of. *See, e.g.,* R v. Weir (Manister), [2005] EWCA (Crim) 2866, [2006] 1 WLR 1885 (Eng.), *reprinted in* Goudkamp, *supra* note 81, 122–23. In a child molestation case, to prove that the defendant had a sexual interest in young girls, the prosecution introduced evidence of his sexual relationship with a 16-year-old when he was 34. *See id.* The reviewing court found that this was not "reprehensible" as the relationship was not disapproved of by her parents. *See id.* However, under my rule, this would likely still be considered immoral based on a substantial subset of the population.

282. *See* Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1953 (2012). For a discussion of the extensive history and potential pitfalls of imposing a related standard of "moral turpitude" in immigration and voting rights, *see* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1020 (2012). However, as the rule here presumes exclusion rather than admission based on the moral valence of the evidence, morality is less likely to be used in a cursory fashion to enforce racist social norms.

283. In some early cases, it was recognized that in "close call" cases, the accused's good character evidence should be admitted because of its considerable probative value. *See* Davison's Trial (1808) 31 How. St. Tr. 99, 216 (KB), *reprinted in* WIGMORE, *supra* note 84, at 1169; *see also* Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. APPLIED PSYCH. 347, 354 (2004).

If an attorney is going to introduce formal testimony that will likely trigger the jury to infer that the individual is immoral, then the attorney should first file notice with the court of her intention to do so. This would permit a motion *in limine* by the opposing counsel, so that the judge can determine, outside of the hearing of the jury, whether the evidence passes the reverse 403 balancing test of the rule I propose. If an attorney does not do this and introduces evidence of an immoral character trait without prior notice and approval by the judge, then this could lead to sufficient harm that the judge might need to declare a mistrial. This will depend on the circumstances and just how prejudicial and sticky the jury's inference is likely to be.

Either during a hearing on a motion *in limine*, or in response to an objection by opposing counsel, the judge would need to make a preliminary determination under FRE 104 that sufficient evidence exists to support a finding that the conduct or trait in question would likely be considered immoral by some members of the jury. If it is amoral or moral, it would be admitted subject only to FRE 403's balancing test.

While generally FRE 403 presumes that evidence is admissible unless it is overly prejudicial, the rule proposed here assumes the reverse if the trait or past act is considered immoral. This is in keeping with the concerns over the correspondence bias, the person-centered approach to blame, STIs and the high informational value of negative traits. Most evidence that is immoral should be excluded under this test. However, there is built-in discretion for judges to admit evidence in a case like Bill Cosby's or Larry Nasser's, where the past act evidence was not unfairly prejudicial and may be necessary for justice. Even if the offering party could demonstrate, in a motion *in limine*, that the character evidence is substantially more probative than prejudicial, then it could, but not must, be admitted. This proposal provides a great deal more discretion to judges, which will hopefully better tailor the rule to undue prejudice and will lead to fewer appeals.

In making the threshold decision on immorality, judges should be careful not to use their personal, subjective sense of what is moral, but to appeal to social norms that are likely to be reflected in the jury. The touchstone would be whether some members of the jury would likely find the evidence immoral. The test is meant to be descriptive, and not prescriptive about which behaviors *should* be considered immoral. As social mores are not shared universally, not everyone on the jury would need to find the conduct immoral, only some subset. The rule is intended to be flexible and to adapt to common sense and changing social mores.

There, of course, may be debate on the margins as to what counts as immoral and what does not. Two judges may disagree about whether the trait triggers the rule, or not. This disagreement is to be expected and

cannot be entirely avoided.²⁸⁴ Even so, focusing on immorality will likely be more intuitive and less unpredictable than determining whether the evidence implicates propensity reasoning. In case their decision is challenged, judges may be aided by explaining what is likely to be negatively inferred by the admission of this trait and why this trait is likely immoral or moral. Immoral actions and traits likely trigger the jury to feel blame, shame, antipathy, stigma, or even mild moral outrage, anger, or disgust toward the person against whom it is offered. If these are likely, the evidence is probably immoral. Also, the question is not whether they think *this particular witness* is capable of experiencing shame, guilt, etc. Instead, judges should ask whether objectively, by a community standard, these feelings are likely experienced *by the jury*.²⁸⁵

In addition to our common-sense intuitions about morality, judges may also be guided by the taxonomy developed by Jonathan Haidt and Craig Joseph. These moral psychologists identified five domains of moral judgment.²⁸⁶ The first domain is concerned with the suffering of others and would involve character traits of neglecting, scaring, or physically injuring.²⁸⁷ The second domain is fairness and reciprocity, and would include character traits of unequal treatment or unfair discrimination.²⁸⁸ The third domain is ingroup loyalty, with the negative trait speaking to failures to perform the obligations of group membership.²⁸⁹ The fourth is related to respect for social order and authority. The negative traits would include vices of disobedience or disrespect.²⁹⁰ The fifth is purity or sanctity, which would cover immoral traits like indecency, promiscuity, and lack of control over desires.²⁹¹ People who are considered immoral under this domain, such as the unhoused or those with substance use disorder, often engender feelings of disgust, which can be very difficult to

284. In the United Kingdom, for example, evidence that a man shouted at his wife when not taking schizophrenia medications was not considered “reprehensible,” so it could come be admitted subject to regular evidence rules. This is certainly not kind behavior, but it is probably not immoral either. *See R v. Osbourne* [2007] EWCA (Crim) 481 (Eng.), reprinted in Goudkamp, *supra* note 81, at 126.

285. This is important, as people who are dehumanized or socially marginalized are often not perceived to be capable of feeling complex emotions like shame or guilt. *See* Nick Haslam & Steve Loughnan, *Dehumanization and Infracommunication*, 65 ANN. REV. PSYCH. 399, 416 (2014); *see also* Brock Bastian & Nick Haslam, *Experiencing Dehumanization: Cognitive and Emotional Effects of Everyday Dehumanization*, 33 BASIC & APPLIED SOC. PSYCH., 295, 299 (2011).

286. *See* Jonathan Haidt & Craig Joseph, *The Moral Mind: How Five Sets of Innate Intuitions Guide the Development of Many Culture-Specific Virtues, and Perhaps Even Modules*, in 3 THE INNATE MIND: FOUNDATIONS AND THE FUTURE 367, 367 (Peter Carruthers, Stephen Laurence, & Stephen Stich eds., 2006).

287. *See id.* at 383.

288. *See id.*

289. *See id.*

290. *See id.* at 384.

291. *See id.*

mitigate. Together, these five domains reflect the common ethics of autonomy, community, and divinity. Importantly, we do not all prioritize these domains equally; however, they capture a comprehensive and nuanced view of morality, which might be helpful to judges in defending their preliminary findings as to whether past actions or traits may trigger the rule.

2. My Proposal No Longer Defines Character to Require Propensity Reasoning

Given what we know from moral psychology and the spontaneity of trait inferences, the focus on propensity in FRE 404 is unwise. Jurors will draw negative inferences about witnesses and parties on their own, even if they are not explicitly invited to do so. They will then use those inferences to predict future and past behavior and mental states. Further, the reliance on limiting instructions is also misguided. Instructions will not work to focus the jury on the mental state inquiry rather than the propensity to engage in the *actus reus*. Because we reflexively and subconsciously use mental state ascriptions to predict behavior, and use behavioral predictions to infer mental states, it is asking too much to expect jurors to keep these interconnected processes separate.

3. What Are the Likely Impacts of this Rule?

This proposal is motivated by a desire to more narrowly tailor FRE 404 to unfair prejudice, to improve accuracy in judgments, and to make the evidence rules more coherent and easier to apply. These are my priorities. I am agnostic about whether the revised rule will help or hurt particular parties or will be seen as being pro-defendant or pro-prosecution.

It is impossible to know exactly what the impact of my proposal will be, given uncertainty about how particular judges and courts might apply it. That said, there are a couple of likely outcomes. First, jurors will hear less damning character evidence than is currently admitted under FRE 404(b). Judges permit a great deal of highly prejudicial evidence of immoral past acts to prove motive, intent, lack of accident, or the confused “doctrine of chances,” subject only to the balancing rule of FRE 403. My rule ratchets up the presumption against admissibility, such that most evidence of past immoral conduct should be excluded, regardless of whether it is technically used for a non-propensity inference. This is based on the data that jurors will automatically infer character traits from past act evidence and because the line between propensity and non-propensity inferences is often impossible to draw.

Some have argued that giving judges the discretion to admit past acts, subject to an evaluation of prejudicial effects, would be “tantamount to the

virtual free admissibility of character evidence.”²⁹² On the one hand, it *will* increase the admissibility of the defendant’s past good acts. However, given that the character evidence rule applies to all witnesses in all cases, the introduction of more character evidence might help as many defendants as it hurts.²⁹³ Finally, creating a presumption against admissibility for past act evidence that is presently admitted to prove intent, motive, and the like, will make it much harder for judges to admit damning evidence that is currently admitted via FRE 404(b).

Importantly, we cannot know, *ex ante*, whether increased or decreased legal accountability is a good or bad thing. It is near impossible to say that decreasing acquittals or decreasing convictions is *per se* good or bad. Unfair outcomes are still possible under my proposed rule but can be reduced if judges are required to fully evaluate the proffered evidence and make a clear record of the reasoning behind the court’s findings.²⁹⁴

Under my proposal, there will likely be more prosecutions and civil claims for sexual assault cases. This is notable because at present, rape is significantly under-prosecuted.²⁹⁵ Prosecutors are reluctant to indict, and plaintiffs are reluctant to sue, when evidence of the defendant’s past sexual assaults cannot be heard by the jury.²⁹⁶ Defendants often claim that the victim is lying, and the jury is unlikely to believe the victim without corroborating evidence.

There will almost certainly be far fewer appeals based on the character evidence rules. Even if judges disagree about what counts as immoral, the shift to a balancing test, rather than a mandatory ban, means that judges will have discretion in applying the rule. This is precisely the point, and will reduce the inefficiency, confusion, and many appeals the current rule creates.

292. Mendez, *Character Evidence*, *supra* note 107, at 884.

293. Of note here, evidence of a victim’s past sexual history would likely always be excluded under my proposed rule, even in states that have not passed a specific “rape shield” statute. Given that promiscuity in women is considered immoral, is triggered by hostile sexism, and is not relevant to whether the victim consented to rape in this particular case, evidence of the victim’s past sexual history should *always be excluded* as unfairly prejudicial under my proposed rule. Additionally, evidence such as addiction, past unrelated crimes, or other immoral traits should always be excluded if it is of meager probative value and only used to smear the witness’s credibility or prove an ancillary fact.

294. See *United States v. Castillo*, 140 F.3d 874, 884 (10th Cir. 1998) (“[B]ecause of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 [or 414] evidence and make a clear record of the reasoning behind its findings.” (quoting *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998)) (alteration in original)).

295. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 37–38 (2017).

296. See *In Support of Amending Utah’s Rules of Evidence to Create Presumptive Admissibility [of] Similar Crimes Evidence in Sexual Assault Cases: Hearing Before the Utah Supreme Court Advisory Committee* (Oct. 13, 2020) (testimony of Professor Paul G. Cassell).

Here is where the crystal ball gets a little bit murky. There may be fewer convictions (or simply shorter sentences) and findings of liability on the merits if defendants who have “guilty-looking” faces are allowed to provide bolstering evidence of their good character that goes beyond the traits directly pertinent to the crime. Conversely, there may be *greater* convictions and findings of liability if the victim was discredited for having an untrustworthy face, which can be mitigated with evidence of past acts. As civil plaintiffs are often thought to be malingering, allowing them to introduce positive character evidence might engender greater sympathy from juries. Finally, the bolstering of either side’s witnesses might permit them to be more fairly assessed. This will all depend on the composition of the jury and how motivated they are to expend cognitive effort to get it right. But compared to the status quo, my proposal should promote better and fairer factfinding, as witnesses are not assessed just based on their superficial characteristics.

4. A Draft of My Proposed Rule 404

404(a) Evidence of a person’s character, trait, or past acts (“character evidence”) may be admissible to prove that on a particular occasion a person acted in accordance with that trait.

(b) If the judge makes a preliminary determination that the character evidence speaks to a trait that is not considered immoral, the evidence should be admitted subject only to the balancing test of FRE 403.

(c) If the judge makes a preliminary determination that the character speaks to a trait that is considered immoral, it is admissible only if:

(1) its probative value substantially outweighs its prejudicial effect; and
(2) if offered against a criminal defendant, the occurrence of the past act is proved by clear and convincing evidence,²⁹⁷ and

(A) the proponent gives reasonable written notice to defense counsel of the intent to use it so that the criminal defendant has a fair opportunity to contest its use.

(B) If contested, the judge should provide a record of the reasoning used to admit or exclude this evidence.

5. The Benefits of My Proposal

The rule I propose has many benefits. First, it puts morality squarely back into the character evidence rule, where it belongs.²⁹⁸ We know that

297. As discussed briefly above, this proposal invites a revision of FRE 405 as well, to permit specific instances on direct examination and to allow easily accessible and otherwise admissible extrinsic evidence.

298. See David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 451 (2001) (“Thus, from the perspective of the law of evidence, it is best to

morality drives character assessments, so a rule that ignores this fact is likely to be ignored as well. Rather than excluding positive traits that are not likely to trigger an unfair sense of blame or correspondence bias, this rule focuses our sights on traits that are immoral.

Second, the rule I propose will reduce errors in the rule's application. My proposal no longer requires judges to assess whether the evidence is being used to argue propensity to act in conformity with a trait. This simplification also provides a more honest account of how jurors will automatically use evidence of past acts to infer character, as well as mental states. The big benefit of my proposal is the ease of application, and its re-tethering of the rule to notions of prejudice. The current rule permits incredibly prejudicial evidence under FRE 404(b) and then excludes non-prejudicial information under FRE 404(a). It also creates unnecessary appeals based on difficult questions of whether propensity inferences are required or permitted, and whether the defendant "opened the door" to his pertinent trait being impeached on cross-examination. The relevant inquiry under my rule would simply be whether the prosecution's evidence speaks to an immoral trait, and whether it is substantially more probative than prejudicial.

Third, the rule I propose would remove the current rule's rigid, mandatory nature, which has been shown to be both overly broad and overly narrow. Instead, just as FRE 403 does not require exclusion and merely permits it, this rule would not require admission, but merely permits it. My proposal gives more flexibility to the trial judge and will reduce the number of appeals when judges make reasonable judgment calls. Of course, if the judge unreasonably permits evidence that is far too prejudicial or rejects evidence that is not, this can always be challenged on appeal for abuse of discretion.

This proposal will greatly reduce both the burden that FRE 404 places on courts, as well as the widespread confusion and unfairness the rule generates. In addition to being more narrowly tailored and intellectually honest, this proposal better reflects how jurors spontaneously and unconsciously infer character traits from whatever information they have available, and then use this to assess blame. In doing so, the revised rule re-anchors the inquiry to notions of probative value, prejudice, fairness, and morality, rather than to technical adherence to an increasingly incoherent rule.

conceive of character as a subset of propensity, embracing only moral aspects of a person.").