

Determining Character

A New Perspective on Character Evidence

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"I am unable to do what all the text-writers and other legal authorities have failed to do. I am unable to outline the contours of the term "character" in Rule 404..."

Chief Justice Seth D. Montgomery, New Mexico Supreme Court¹

Introduction

"Character" is a difficult concept to define, as Chief Justice Montgomery discovered. It seems intuitive that individuals have characters and that these characters influence the way people behave; that character is a person's "propensity," "disposition," "proclivity," or "tendency" to act in certain ways in certain situations. Well known examples of character traits include "honesty," "violence," "temperance," and "cruelty," as well as their opposites (among countless others). Evidence of character traits is heavily regulated in trial because proof of these propensities—that a defendant or witness has general tendencies to behave in either "good" or "bad" ways according to their character traits—can have enormous consequences on trial outcomes. This is especially true in criminal prosecutions, where character can be a life-or-death matter for criminal defendants.² Yet even with the high stakes riding on determinations of what is and is not character, there is still "no general agreement about the precise meaning of the term [character]."³ And there is reason to believe that, because of this lack of an articulated standard, courts have been getting the answers wrong.⁴

¹ *State v. Williams*, 117 N.M. 551, 564 (1994) (Montgomery, C.J. concurring).

² A defendant is not presumed to have good character, *Greer v. United States*, 245 U.S. 559, 561 (1918), but good character alone can be enough to establish reasonable doubt, *Edgington v. United States*, 164 U.S. 361, 366 (1896).

³ David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 450 (2001); see also *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) ("We doubt that a fully satisfactory, comprehensive definition of "character evidence" is possible...").

⁴ See *infra* note 229 and accompanying text for discussion on why the lack of a standard for identifying character is causing courts to admit improper character evidence.

The law of evidence considers character proof to be especially dangerous but still relevant and has therefore developed special mechanisms to permit and restrict its use.⁵ Few would call these mechanisms rational,⁶ but they exist to guide courts in mediating the influence of character evidence in trials.⁷ Under this current structure, courts must juggle two competing considerations: relevance and prejudice.⁸ However, too often courts lose sight of these fundamental pieces as they evaluate whether or not a given trait is, in fact, character. Such a wooden application of meaningless definitions of character could result in juries being exposed to the very character evidence the law was designed to exclude from trial. Courts require a clear, reasoned standard for identifying “character” when it comes before them to ensure a consistent, predictable, and rational application of the law of evidence.⁹ They need help determining character.

Of course, *determining* what character is is not the same thing as precisely *defining* it. Indeed, there have been many attempts at defining character, in many different contexts. Philosophers¹⁰ and psychologists¹¹ have long studied character, debated its existence, and attempted to make sense of how

⁵ See, e.g., 22 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 5232 (1st ed. Supp. 2011) [hereinafter WRIGHT] (describing the origins of character proof in the law of evidence).

⁶ *Michelson v. United States*, 335 U.S. 469, 486 (1948) (calling the law of evidence a “grotesque structure”).

⁷ See 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54, at 121 (1904) [hereinafter WIGMORE] (detailing common law practice for admission of character evidence); 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 195 (6th ed. 2006) [hereinafter MCCORMICK] (doing the same for the modern Federal Rules of Evidence).

⁸ See WIGMORE § 55 (“The evidentiary use of character . . . cannot be understood without separating the principles of Relevancy and of Undue Prejudice.”).

⁹ See WRIGHT § 5233 (noting that “character” has not yet been satisfactorily defined and that, given changes in the concept of character and the law of evidence, “the need for a definition is...pressing”); Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. L.J. 1, 9-10 (1988) (warning that an imprecise judicial definition of “character” leaves open the possibility of “arbitrary and intrusive decision-making”).

¹⁰ For a look at pre-modern philosophical views of character, see ARISTOTLE, NICOMACHEAN ETHICS (Terence Inuin trans., Hackett Publishing Co., Inc. 2d ed. 1999) (c. 384 B.C.E.) (discussing “virtues” and “vices” as traits of character) [hereinafter ARISTOTLE]; and DAVID HUME, A TREATISE OF HUMAN NATURE (Lewis Amherst Selby-Bigge ed. 1978) (1740) (same). For a more modern discussion, see JOHN M. DORIS, LACK OF CHARACTER (2002) (arguing for the non-existence of general character); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999) (discussing general moral character and character traits); and ROBERT AUDI, MORAL KNOWLEDGE AND ETHICAL CHARACTER (1997) (same).

¹¹ See, e.g., LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991) (discussing character traits); WALTER MISCHEL, PERSONALITY AND ASSESSMENT (1968) (arguing that situations impact behavior over character traits); GORDON ALLPORT, PERSONALITY—A PSYCHOLOGICAL INTERPRETATION (1937) (arguing for strong, global character traits).

it impacts human behavior. The legal world has examined the meaning of character as it relates to human action and responsibility.¹² Especially in the field of evidence, the law has struggled to define what character is, first through the common law¹³ and now revolving around the Federal Rules of Evidence (the Rules).¹⁴ Unfortunately, these attempts have resulted in vague and practically useless definitions, causing one scholar to remark that “[p]erhaps, like obscenity, people believe they know it when they see it.”¹⁵

A review of cases dealing with character evidence shows that courts often attempt their own definitions. Character has alternatively been defined as a “fixed disposition or tendency, as evidenced to others by the man’s habits of life,”¹⁶ the “disposition or propensity to commit certain crimes, wrongs, or acts,”¹⁷ “a person’s tendency to act in a certain way in all the varying situations of life,”¹⁸ among others. Sometimes courts simply skip the question entirely and assume that a trait involves character evidence,¹⁹ or list several character traits as examples with little explanation of how they relate to one another before proceeding to make a decision on the trait in question.²⁰

Commentators have similarly struggled to find a clear definition. In his seminal treatise on evidence law, Wigmore stated that character is a person’s “actual moral or psychical disposition, or sum

¹² See, e.g., Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905, 905 (1973) (discussing “to what extent and in what way we should be legally answerable for our characters”).

¹³ See, e.g., 2 JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 668, at 1243 (2d ed. 1926); WIGMORE § 54; JAMES BRADLEY THAYER, A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW, ch.2 § 2, at 272-284 (1900).

¹⁴ See, e.g., MCCORMICK § 195; 1 STEPHEN A. SALTZBURG, ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 404 (8th ed. 2002); 2 JACK B. WEINSTEIN, ET AL., WEINSTEIN’S EVIDENCE § 404 (1996) [hereinafter WEINSTEIN].

¹⁵ David P. Leonard, *The Use of Character Evidence to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 15 (1986-87).

¹⁶ *Keith v. State*, 152 S.W. 1029, 1030 (Tenn. 1913).

¹⁷ *State v. Johns*, 725 P.2d 312, 320 (Or.1986).

¹⁸ *State v. Dan*, 20 P.3d 829, 830 (Or. App. 2001).

¹⁹ E.g., *Broome v. State*, 687 N.E.2d 590, 600 (Ind. App. 1997) (assuming homosexuality would be character evidence); *United States v. Klein*, 474 F. Supp. 1243, 1247-48 (S.D.N.Y. 1979) (assuming the trait of being “closed-mouthed” implicated forbidden character reasoning without determining if it is a character trait).

²⁰ See, e.g., *Doe*, 149 F.3d at 638 (listing character traits such as honesty, temperance, peacefulness, diligence, and aggressiveness); *People v. Shoemaker*, 135 Cal. App.3d 442, 446 n.2 (1982) (describing character traits of being “violent, bloodthirsty, dangerous, revengeful, and turbulent”).

of [his or her character] traits.”²¹ McCormick called character “a generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.”²² Often, authorities simply invoke common understandings of character.²³ Even more frustrating is the fact that the Rules contain no definition of character.²⁴ The Advisory Committee Notes are obviously vague, stating that “character is defined as the kind of person one is,” and then listing several examples of character traits: honesty, peacefulness, violence.²⁵ Despite these efforts by courts and scholars, clearly “[e]xisting definitions of character are circular, or conclusory, or both.”²⁶

Under the current structure of character proof, courts must attempt to define character traits on a case-by-case basis before applying the relevant Rules. This is far easier said than done. For example, does a “disposition” or “tendency” include a person’s sexuality, or innate skills, or medical conditions such as mental illness? Must character be morally “good” or “bad,” or does character evidence include propensities with no moral overtones? Instead of another vague and confusing definition, courts need a rule-of-thumb to identify when to apply the special mechanisms associated with character evidence; in other words, to determine character traits. Finding a workable standard for

²¹ WIGMORE § 54. Conventionally speaking, “character” is broad, encompassing a person’s entire disposition, and contained within it are “character traits,” or specific avenues by which that disposition is displayed. See WIGMORE § 52 (“[Character is] a trait, or a group of traits, or the sum of his traits...”); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 849 (1982) (“[Character is] a collection of “traits,” each a self-contained packet of potential conduct...”). For example, a defendant may have a “bad” or “criminal” character, which could include the character traits of “violence,” “lying,” “stealing,” or others.

²² MCCORMICK § 195; see also JOHN HENRY WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 52, at 103 (3rd ed. 1937) (“[Character is] any and every quality or tendency of a person’s mind, existing originally or developed from his native substance, and more or less permanent in their existence.”)

²³ See, e.g., M. C. Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 404, 404 (1957) (“[Character is t]hose definite qualities impressed by nature or habit upon the personality of an individual...This is the character of common parlance.”).

²⁴ See FED. R. EVID. 404, 405, 406, 608, 609; see also WRIGHT § 5233 (“The Evidence Rules do not define “character.”); Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 19 (1976-77) (“The Rules seem to designate as “character” anything that cannot be photographed.”).

²⁵ See FED. R. EVID. 404 advisory committee’s notes.

²⁶ Rhode, *supra* note 9, at 9 (commenting on legal definitions of “character” in the bar admission process); see also WRIGHT § 5233 (“The definitions of “character” that appear in prior case law are often erroneous and seldom helpful.”).

determining—rather than defining—what is character is important to identifying why this prophylactic rule exists at all and, moreover, how to properly apply it. In other words, instead of puzzling through whether a trait actually *is* character evidence, courts should simply identify whether a trait implicates the concerns for which character evidence was so heavily regulated in the first place. But how can courts determine what is character, or a trait of character, and what is not?

This Paper aims to help answer this question by proposing just such a workable standard for courts to apply when confronted with character proofs. Part I provides an overview of how character propensity evidence operates under the current structure of the Rules. Part II explains that evidentiary character must have a propensity component to be logically relevant and examines psychological scholarship to illuminate whether character equals propensity. Part III argues for the inclusion of a moral component in the definition of character and surveys philosophy literature to show how morality fits into conceptions of character. Part IV creates and narrows a space for a determination of character by highlighting what it is not. Finally, Part V contains a proposal for how courts can determine whether, for the purposes of the Rules of Evidence, a proof is truly character or if it is, in fact, something else entirely and runs through three evidentiary examples.

I. Character Evidence in the Federal Rules of Evidence

The last time the Supreme Court took up the issue of character evidence, in *Michelson v. United States*, it derisively referred to the law of evidence as a “grotesque structure” that “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.”²⁷ It is commonly understood that the “grotesque structure” of evidentiary law first developed as a prophylaxis to ensure that juries would act as fair fact-finders in trials by preventing jurors’ “cognitive and decisional failings” from impacting their

²⁷ *Michelson*, 335 U.S. at 486. Although this case occurred before the Rules were adopted, the same can be said of the current structure.

solemn duty.²⁸ Therefore, even without a consensus definition, it is generally acknowledged that evidence of a person's character is not admissible in trial to prove propensity, defined by the Rules as "action in conformity" with their character.²⁹ There are exceptions to the ban (as discussed further below), but as one court stated, "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'"³⁰

To this end, two primary justifications are usually given for the ban on character evidence.³¹ First, jurors might misuse evidence of a person's character, especially if it is bad character evidence, and choose to convict because they think the defendant is a "bad person." The concern is that someone's past actions could "deny him a fair opportunity to defend against a particular charge."³² In other words, "jurors could be tempted to find [a defendant] guilty—and thereby protect the public from him—even if he was not guilty of the charged crime."³³ Indeed, this is intuitive: justice seems to demand that defendants be convicted only on the basis of facts as opposed to their general character.

²⁸ Frederick Shauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 199 (2006).

²⁹ See *Michelson*, 335 U.S. at 475-76 (holding that character evidence is generally inadmissible); *United States v. Comi*, 336 F.2d 856, 861 (4th Cir. 1964) ("[I]t is generally well settled that a defendant's evil character cannot be used by the prosecution to establish a probability of his guilt."); see also; Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938).

³⁰ *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)); see also *Robinson v. California*, 370 U.S. 660, 665-66 (1962) (holding that, under the Eighth Amendment, no person may be punished for his or her status).

³¹ The character evidence ban has also been defended on grounds that it "tends to prevent confusion of the issues, unfair surprise, and undue prejudice," *Michelson*, 335 U.S. at 476, that evidence of a witness's prior misconduct could "condemn[a defendant] through guilt by association," Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 347 (1979), and that character proof could make the jury "unduly emotional," the inquiry might "become too time consuming," or that "witnesses and parties might be humiliated and discouraged from coming forward," PAUL F. ROTHSTEIN, ET AL., *EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES* 105 (3d ed. 1997).

³² *Michelson*, 335 U.S. at 476.

³³ See Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U.L. REV. 741, 742 (2008) (concluding that jurors might punish a defendant for his past misconduct irrespective of his guilt on the charged crime); Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003, 1007 (1984) (same).

Second, character evidence might “weigh too much with the jury and . . . overpersuade them.”³⁴ In other words, it is too convincing and may cause the jury to “overestimate the value of the evidence as proof that the defendant committed the crime charged.”³⁵ This justification rests on the assumption that character evidence is “logically probative,”³⁶ or that it actually does have an impact, even if minimal,³⁷ on a person’s actions.³⁸ The logical relevance of character often depends on propensity reasoning, or the inference that character can predict action on a specific occasion.³⁹ Propensity reasoning works in a two steps: proof of an individual’s character suggests that he or she has a particular character trait; then, from the existence of that character trait, jurors revise upward their estimate that the individual acted in conformity with that trait on the instance in question.⁴⁰ Using propensity reasoning, character evidence is logically relevant in a trial if offered to attack a witness’s credibility or to show action in conformity on a particular instance. Courts have long assumed this reasoning to be true;⁴¹ that character propensity evidence is “essentially relevant,” as Wigmore claimed.⁴²

³⁴ *Michelson*, 335 U.S. at 476; see also *Mendez*, *supra* note 34, at 1007 (“[There is the] concern that if the jurors learn that the accused has on other occasions engaged in misconduct for which he is on trial, they may jump to the unwarranted conclusion that he committed the offense for which he is presently charged.”).

³⁵ ROGER C. PARK, ET AL., *EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS* 130, 129 (3rd ed. 2011).

³⁶ JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 264-65 (1898); see also George F. James, *Relevancy, Probability and the Law*, 29 *Calif. L. Rev.* 689, 699 (1941) (“If an item of evidence tends to prove or disprove any proposition, it is relevant to that proposition.”)

³⁷ Although still admissible, marginally relevant propensity evidence gives rise to concerns about “fundamental attribution error.” See *infra* notes 86-88 and accompanying text.

³⁸ If evidence is not logically relevant, it is inadmissible. See *FED. R. EVID.* 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.”).

³⁹ Character might also be logically relevant if it is an element of the charged offense, but does not involve propensity reasoning and is beyond the scope of this Paper. For more information, see Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 *CRIM. L. BULL.* 504, 507 (1991); and Leonard, *supra* note 15, at 15.

⁴⁰ Leonard, *supra* note 15, at 2.

⁴¹ In fact, some courts refuse to even consider that character does not influence action. See, e.g., *Keith*, 152 S.W. at 1030 (“No valid reason can be offered to show that a bad character will not prompt to a bad action, as readily as good character will prompt to a good action, or restrain its possessor from the commission of a bad one.”).

⁴² WIGMORE § 55; see also *Michelson*, 335 U.S. at 475-76, 476 n.9 (“The inquiry isn’t rejected because character is irrelevant...As long ago as 1865, Chief Justice Cockburn said... ‘...logically speaking, it is quite clear that an

Although “substantial psychological research”⁴³ (discussed further in Part II below) has shown that the logical relevance of character evidence may be in doubt, the Rules continue the practice of assuming character evidence is relevant to predicting a person’s behavior on a specific instance.⁴⁴ On the basis of its logical relevance combined with its prejudicial effect, the common law barred most instances of proof of character in both criminal and civil cases.⁴⁵ The Rules also contain this blanket prohibition on general character evidence, split into two parts: a description of the evidence to be barred (“character or trait of character”) and a statement of the forbidden purpose (“[to prove] that he acted in conformity therewith on a particular occasion”).⁴⁶ This Paper will focus on the first part in an attempt to discern how courts can discover what are and are not character traits.

Although the character evidence prohibition is well established in theory, there exist several exemptions and exceptions that permit the admission of otherwise barred evidence. Before discussing these exceptions, it is helpful to understand the methods of proof by which character can be shown. Character cannot be “directly perceived, it must be inferred from the conduct of a person,”⁴⁷ so even when character proof is admissible, there still remains the problem of how to prove it. Three possible methods exist for proving character: (1) evidence of the person’s reputation in the community, (2) other witnesses’ opinion as to the person’s character, and (3) specific instances of the person’s prior

antecedent bad character would form...a reasonable ground for the presumption and probability of guilt...”) (quoting *Regina v. Rowton*, 10 Cox’s Criminal Cases 25, 29-30 (1865)).

⁴³ *Id.* (collecting studies); see also 1 HUGH HARTSHORNE & MARK A. MAY, *STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT* (1928) (examining cheating behavior in children); John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 100 (1973) (testing helping behavior in seminary students); Alice M. Isen & Paula F. Levin, *Effect of Feeling Good on Helping: Cookies and Kindness*, 21 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 384 (1972) (testing phone booth users for their helpfulness); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. OF ABNORMAL AND SOCIAL PSYCHOLOGY 371 (1963) (testing subjects’ willingness to electrically shock innocents); Philip G. Zimbardo, et al., *The Mind is a Formidable Jailer: A Pirandellian Prison*, N.Y. TIMES MAGAZINE, Apr. 8, 1973, at 38 (testing prisoner/prison guard roles, also known as the “Stanford prison experiment”).

⁴⁴ See FED. R. EVID. 404(a) (“Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion...”).

⁴⁵ See WRIGHT § 5233; WIGMORE § 55.

⁴⁶ FED. R. EVID. 404(a)

⁴⁷ WRIGHT § 5233.

conduct.⁴⁸ However, parties are not permitted to use all of these methods in court, depending on the context and substance of the proof. These exceptions and exemptions are discussed below in conjunction with the specific rules under which they are applicable.

Rule 404 is the blanket character evidence prohibition: it restricts litigants' attempts to use character evidence for substantive purposes, with two primary exceptions. Under Rule 404(a)(1), the accused may offer proof about his own "good" character⁴⁹ to challenge an element of the charged offense,⁵⁰ but the accused is then open to the prosecution introducing evidence of his or her bad character in rebuttal.⁵¹ Using Rule 404(a)(2), the accused may offer character proof about the bad character of the alleged victim, unless it involves prior sexual activity barred by the rape-shield provision in Rule 412.⁵² Again, this opens the accused to the prosecution's rebuttal using evidence of character to demonstrate the victim's good character.⁵³ In these circumstances, the method of proof is strictly defined: if character evidence is admissible for substantive purposes—for example, to show that the defendant acted in a certain way at a certain time—common law courts permitted only reputation evidence.⁵⁴ The Rules are more expansive and allow opinion testimony.⁵⁵ They also permit proof of specific prior bad acts, but only when those acts involve sexual assault or child molestation.⁵⁶

⁴⁸ See Davies, *supra* note 40, at 507-10; Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 760 (1975); WIGMORE § 52.

⁴⁹ Commentators think of this as "good" character, but it need not be morally good as long as it is "pertinent" to the issue in dispute and tends to show that the accused would not be the type of person to act in that manner. See Fed. R. Evid. 404(a) (stating "pertinent trait of character" without including "good").

⁵⁰ See, e.g., *Edgington*, 164 U.S. at 366; *United States v. Maxwell*, 12 C.M.R. 902, 911 (1953) ("[T]he greater moral turpitude involved in the crime, the more unlikely one of good character would so offend against society.") (quoting *United States v. Phillips*, 11 C.M.R. 137, 142 (1953)).

⁵¹ FED. R. EVID. 404(a)(1).

⁵² FED. R. EVID. 404(a)(2); FED. R. EVID. 412.

⁵³ FED. R. EVID. 404(a)(2).

⁵⁴ See PARK, ET AL., *supra* note 36, at 133 (noting that reputation "represented the community's collected wisdom about a lifetime of activity").

⁵⁵ FED. R. EVID. 405; see also WRIGHT § 5233. Psychological research appears to support the value of opinion over prior specific acts character proof. See D.S. Moskowitz & J. Conrad Schwarz, *Validity Comparison of Behavior Counts and Ratings by Knowledgeable Informants*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 518 (1982) (finding that

While Rule 404 generally bars evidence of prior specific acts of conduct offered under propensity reasoning (except if involving sexual assault or child molestation), Rule 404(b) lists permissible uses of specific acts of prior behavior if logically relevant on grounds other than propensity reasoning.⁵⁷ These include, but are not limited to, “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁵⁸ Additionally, when character is “an essential element of a charge, claim, or defense,” the Rules recognize that it is not being offered under propensity reasoning and is admissible under Rule 405.⁵⁹ Finally, Rule 406 distinguishes between character and “habit,” and permits evidence of prior acts to show that a person acted in conformity with a habit.⁶⁰

As opposed to substantive character evidence, which is used to show someone’s propensity to do the act related to the issue being tried, a witness’s character for “truthfulness” is considered relevant to their testimonial credibility before the jury. Therefore, proof of character is broadly permitted by reputation or opinion evidence when attacking a witness’s credibility on the stand under Rules 608 and 609.⁶¹ Indeed, the law values testimonial credibility to a high degree, so much so that specific instances of a witness’s prior conduct are often admissible. These Rules allow proof of prior criminal convictions under Rule 609 if they involve dishonest conduct as an element of the crime or are felonies, subject to

three knowledgeable informants are as reliable in predicting a subject’s average behavior as 1,440 direct observations conduct over eight weeks).

⁵⁶ FED. R. EVID. 413, 414, 415. These Rules have come under intense criticism. See, e.g., Bryan C. Hathorn, *Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go From Here*, 7 TENN. J.L. & POL’Y 22 (2011) (reviewing empirical data and concluding that these Rules should be repealed).

⁵⁷ See FED. R. EVID. 404(b). But see Davies, *supra* note 40, at 508-509, 509 n.24, 533 n.168 (explaining that these alternative theories are actually impermissible propensity reasoning in disguise and arguing that 404(b) allows “the most probative specific acts evidence...into evidence despite [the character evidence prohibition]”); Edward J. Imwinkelreid, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985) (arguing that Rule 404(b) is too prejudicial to defendants).

⁵⁸ FED. R. EVID. 404(b).

⁵⁹ FED R. EVID. 405.

⁶⁰ See *infra* notes 182-188 and accompanying text for discussion on the difference between character and habit.

⁶¹ See FED. R. EVID. 608, 609.

restrictions such as a time limit, pardons, juvenile adjudications, and appeals.⁶² Evidence of prior acts that did not result in criminal convictions is admissible under Rule 608 if they are probative of Witness A's "truthfulness or untruthfulness" or if evidence of A's prior actions is offered during cross-examination of Witness B, who is testifying to A's character. Finally, a party may not bolster a witness's credibility with "good" character proof until and unless their character has been attacked by the opposing party.⁶³

II. The Propensity Component

Webster's Dictionary defines character as "one of the essentials of structure, form, materials, or function that together make up and usually distinguish the individual."⁶⁴ The Model Code of Evidence, the sole attempt at truly codifying a definition of character, stated that character means the "aggregate of a person's traits, including those relating to care or skill and their opposites."⁶⁵ Both Professor McCormick's definition of character as a "[g]eneralized description of a person's disposition"⁶⁶ and Judge Weinstein's characterization of Rule 404 as the "Propensity Rule"⁶⁷ emphasize the role that behavioral tendency has in modern evidence law.⁶⁸ As these examples demonstrate, propensity (predictably acting in certain ways in certain situations) is a key component of any definition of character evidence.

⁶² FED. R. EVID. 608(b), 609.

⁶³ See FED. R. EVID. 608(a)(2).

⁶⁴ WEBSTER'S NEW INTERNATIONAL DICTIONARY 376 (3d ed. 1986).

⁶⁵ WRIGHT § 5233 (quoting the Model Code of Evidence, Rule 304).

⁶⁶ MCCORMICK § 195.

⁶⁷ WEINSTEIN §404[04] ("Overview of the Propensity Rule.").

⁶⁸ See also ROTHSTEIN, ET AL., *supra* note 32, at 105 (noting that character is a "pattern of, or propensity for, the kind of conduct in issue").

Psychologists have spent a great deal of time researching whether character traits influence human behavior and, if they do, to what degree.⁶⁹ This research has been critical to understanding if “propensity” is truly an aspect of character and if the Rules’ assumption that character proof is logically relevant is valid. After several decades of studies, the results support a narrow version of propensity reasoning. Legal scholars have not ignored how this research helps expand understandings of how character evidence can be useful or harmful in a courtroom, nor have they overlooked how the law of evidence can be greatly improved by examining psychologists’ empirical studies and the resulting discussion.⁷⁰ Before determining if propensity is a component of character, it is helpful to survey the empirical findings from psychology.

A. *An Overview of the Relevant Psychological Research*

Psychological inquiry into character has, since its inception, developed through three discrete stages: trait theory, situationism, and interactionism.⁷¹ The first psychologists to study character believed, like Wigmore, that character is “essentially relevant” as a predictive indicator of human action.⁷² “Trait theory,”⁷³ also known as “globalism” or “generality theory,”⁷⁴ posited that “human behavior is governed by stable personality traits that produce generally consistent behavior in widely divergent situations.”⁷⁵ Indeed, trait theory argued that character is a “useful and reliable predictor of behavior”⁷⁶ and that “[t]raits determined a person’s broad response tendencies insensitive to

⁶⁹ Leonard, *supra* note 15, at 27 (“Since...the late 1960s, psychologists have devoted enormous energy to researching personality.”).

⁷⁰ See, e.g., Imwinkelreid, *supra* note 34 (discussing the implications of psychological research on character propensity proofs); Leonard, *supra* note 15 (same); Davies, *supra* note 40 (same); Mendez, *supra* note 34 (same); Spector, *supra* note 32 (same); Lawson, *supra* note 49 (same).

⁷¹ See Imwinkelreid, *supra* note 34 at 747-52; Mike Redmayne, *The Relevance of Bad Character*, 61 THE CAMBRIDGE L. J. 684, 687-90 (2002).

⁷² WIGMORE § 55.

⁷³ Trait theory is largely credited to Gordon Allport. See ALLPORT, *supra* note 11.

⁷⁴ See DORIS, *supra* note 10, at 22-23; Davies, *supra* note 40, at 513.

⁷⁵ Davies, *supra* note 40, at 513.

⁷⁶ Lawson, *supra* note 49, at 780.

context.”⁷⁷ However, empirical evidence⁷⁸ emerged that cast significant doubt on the existence of “stable, highly influential character traits.”⁷⁹

The next stage saw the pendulum swing to the opposite pole with the advent of “situationism,”⁸⁰ also known as “social behavior theory” or “specificity theory.”⁸¹ According to situationists, “behavior is determined almost exclusively by environmental factors.”⁸² Empirical studies⁸³ conducted in the 1960s showed repeatedly that the “specific circumstances of the situation largely control or determine human conduct.” The results of these studies were so persuasive that globalists retreated and even legal scholars noted that “[t]he legal conclusion therefore ought to be that evidence of character has no probative value.”⁸⁴

Importantly, situationist researchers discovered the existence of “fundamental attribution error,” also known as the “halo effect.”⁸⁵ Research showed that people “tend to assume a single sample of behavior is representative of what the actor ordinarily does” and therefore they make inaccurate

⁷⁷ Imwinkelreid, *supra* note 34, at 748.

⁷⁸ See HARTSHORNE & MAY, *supra* note 44 (finding that it was impossible to predict whether a student would cheat or under what circumstances he would cheat).

⁷⁹ Imwinkelreid, *supra* note 34, at 748.

⁸⁰ Walter Mischel is considered the originator of situationism. See MISCHEL, *supra* note 11.

⁸¹ Davies, *supra* note 40, at 514.

⁸² *Id.*

⁸³ See Darley & Batson, *supra* note 44; Isen & Levin, *supra* note 44; Milgram, *supra* note 44; Zimbardo, *supra* note 44.

⁸⁴ Spector, *supra* note 32, at 351.

⁸⁵ Psychological research has shown that “one outstanding ‘good’ or ‘bad’ quality in a person casts its reflection upon all judgments pertaining to him.” ALLPORT, *supra* note 11, at 521; see also DORIS, *supra* note 10, at 93; Spector, *supra* note 32, at 352-53; Lawson, *supra* note 49, at 775-59. Empirical studies also support the contention that Westerners, especially Americans, are particularly vulnerable to the “halo effect.” See Bernadette Park, *A Method for Studying the Development of Impressions of Real People*, 51 J. OF PERSONALITY AND SOC. PSYCHOLOGY 907 (1986) (finding that Americans strongly favor trait attribution when describing people or explaining behavior); Richard A. Shweder & Edmund J. Bourne, *Does the Concept of the Person Vary Cross-Culturally?*, in CULTURAL CONCEPTIONS OF MENTAL HEALTH AND THERAPY (Anthony J. Marsella & Geoffrey M. White eds. 1982) (discovering that Americans are far more likely than Easterners to attribute traits to other people).

predictions from isolated instances of observed conduct.⁸⁶ Moreover, studies also showed that a “bad” trait is considerably more likely to result in character attribution than a “good” trait of equal intensity.⁸⁷

The evolution of psychological research continued when “methodological flaws” were discovered in several of the situationist studies.⁸⁸ What emerged from the rubble was a more limited conception of character traits under a unified theory known as “interactionism,”⁸⁹ which conceives human conduct as “simultaneously a function of disposition and situation, and their mutual interaction.”⁹⁰ Interactionism is now the “consensus [in psychology] rejecting both extreme trait and situationist positions.”⁹¹ Importantly, interactionism requires that a situational component be considered in conjunction with a character trait; they cannot be understood in isolation.⁹²

Other considerations are important in interactionist literature. For example, both the level of specificity and the changeability of traits can affect their predictive qualities. A prediction of a person’s future conduct will be much more accurate if it is tied to a specific situation.⁹³ Furthermore, the more

⁸⁶ DAVID J. SCHNEIDER, ET AL., PERSON PERCEPTION 239 (2d ed. 1979); see also Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 MIND 47, 51 (2002) (defining the halo effect as an “inflated belief in the importance of personality traits and dispositions, together with [a] failure to recognize situational factors in affecting behavior”) (quoting ROSS & NISBETT, *supra* note 11, at 4).

⁸⁷ Barbara B. Koltuv, *Some Characteristics of Intrajudge Trait Intercorrelations*, 76 PSYCHOLOGICAL MONOGRAPHS: GENERAL AND APPLIED 1, 3 (1962) (“[A] single negative trait is more prepotent than its opposite positive.”).

⁸⁸ Imwinkelreid, *supra* note 34, at 751.

⁸⁹ For studies on interactionism, see Seymour Epstein, *The Stability of Behavior Across Time and Situations*, in PERSONALITY AND THE PREDICTION OF BEHAVIOR (Robert A. Zucker, et al. eds. 1984); Steven J. Sherman & Russell H. Fazio, *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 PERSONALITY 308 (1983); Seymour Epstein, *The Stability of Behavior: II. Implications for Psychological Research*, 35 AM. PSYCHOLOGIST 790 (1980); and Seymour Epstein, *The Stability of Behavior: I. On Predicting Most of the People Much of the Time*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1097 (1979).

⁹⁰ Davies, *supra* note 40, at 518.

⁹¹ Imwinkelreid, *supra* note 34, at 752.

⁹² *Id.* at 758-59 (“...a situational component must be factored into, included in, or incorporated into the very conception of a disposition or character trait”); Leonard, *supra* note 15, at 28-30 (“Thus, accurate prediction about behavior depends on...whether the individual’s general tendencies are manifested in the kind of situation involved.”); Davies, *supra* note 40, at 518-19 (“The ultimate question to be resolved [is]...how this person...would behave in a particular situation...”).

⁹³ Davies, *supra* note 40, at 532 (noting that there is a “level of generality most appropriate” for “predicting behavior”).

specific the situation, the more likely a prediction of conduct will be accurate.⁹⁴ Additionally, traits are not immutable; they can change over time, so trait-relevant conduct that was manifested long ago is less likely to be predictive than more recent behavior.⁹⁵

Interactionism has also provided several key insights into character directly relevant to propensity proofs in a trial. First, “the existence or non-existence of a trait cannot be inferred in a particular individual from a single observation of that person’s conduct.”⁹⁶ Consequently, a specific prior act cannot accurately predict future action. Second, “even if we know a person’s trait, it will not accurately predict a single, isolated instance of conduct.”⁹⁷ Only when numerous acts by one person are considered can an accurate predictive value of his or her character trait be realized.⁹⁸ If only one specific prior action is observed, then the accuracy of any prediction based on that observation plunges.⁹⁹ However, if many repeated instances of the same conduct are observed, then it “may be possible to accurately predict the conduct of some people most of the time.”¹⁰⁰

The most recent developments in interactionist psychological research involves the “Cognitive-Affective Processing System” or “CAPS.”¹⁰¹ People absorb new information and inputs through “cognitive-affective units” (CAUs), or mental processes which serve to link “memories of people and

⁹⁴ Leonard, *supra* note 15, at 29 (“[T]he level of specificity at which a trait or attitude is measured will affect its predictive value.”).

⁹⁵ Brent W. Roberts & Avshalom Caspi, *Personality Development and the Person-Situation Debate: It’s Déjà vu All Over Again*, 12 PSYCHOLOGICAL INQUIRY 104, 106-07 (2001) (finding that behavioral signatures can change over time).

⁹⁶ *Id.*

⁹⁷ Leonard, *supra* note 15, at 29; *see also* Davies, *supra* note 40, at 519 (“[A] generalization of cross-situational consistency in behavior cannot be made on the basis of one or two observations of behavior in particular situations.”).

⁹⁸ *See* Sherman & Fazio, *supra* note 90, at 325.

⁹⁹ William Fleeson, *Toward a Structure and Process-Integrated View of Personality: Traits as Density Distributions of States*, 80 J. PERSONALITY & SOC. PSYCHOLOGY 1011, 1013 (2001) (“At best, behavior on one occasion predicts behavior on another occasion at around the .30 level...”).

¹⁰⁰ Leonard, *supra* note 15, at 28.

¹⁰¹ *See* Yuichi Shoda & Walter Mischel, *Applying Meta-Theory to Achieve Generalisability and Precision in Personality Science*, 55 APPLIED PSYCHOLOGY: AN INT’L REV. 439 (2006) (discussing the “CAPS”); Walter Mischel, *Toward an Integrative Science of the Person*, 55 ANN. REV. PSYCHOLOGY 1 (2004) (same).

events with thoughts and affects.”¹⁰² A person’s CAUs are activated in new situations based on its resemblance with past situations as determined psychologically by the person perceiving the situation.¹⁰³ This resemblance occurs, and the CAUs are triggered, if the new event is “functionally equivalent to the prior memories.”¹⁰⁴ The CAPS allows individuals to “interpret the new situation, give it meaning, and form behavioral intentions.”¹⁰⁵ Additionally, CAUs are “relatively enduring” (even if not fully immutable), which permits human conduct to be “at least partially predictable.”¹⁰⁶

B. Does Character Implicate Propensity?

Most psychologists agree that character, if it exists, contains an element of propensity.¹⁰⁷ The dispute revolves around whether that propensity has any influence over human behavior. Under globalism, character has a strong propensity component, reinforcing the traditional common law view that character is “essentially relevant.”¹⁰⁸ Situationists agree that “character” may exist, but maintain that it is overshadowed at every turn by situational factors. From their perspective, because character does not tend to predict action and, character proof should be excluded as logically irrelevant.¹⁰⁹

However, given that the prevailing psychological consensus supports interactionism, the true question is whether the CAPS system admits of propensity. It surely does. Under CAPS, behavior can be predicted “at least partially” when the proper situational factors are present.¹¹⁰ As long as the propensity component of character is restricted to similar, specifically defined situations and

¹⁰² Imwinkelreid, *supra* note 34, at 757.

¹⁰³ Shoda & Mischel, *supra* note 102, at 317; Mischel, *supra* note 102, at 11.

¹⁰⁴ Imwinkelreid, *supra* note 34, at 757.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 758. See also Davies, *supra* note 40, at 520 (“[W]here situations are similar, past behavior is an excellent predictor of a person’s likely future behavior.”).

¹⁰⁷ DORIS, *supra* note 40, at 38-39 (“The situationist does not deny that people have personality traits; instead, she denies that people typically have highly general personality traits that effect behavior manifesting a high degree of cross-situational consistency.”).

¹⁰⁸ WIGMORE § 55.

¹⁰⁹ Leonard, *supra* note 15, at 26 (“[A]s currently conceptualized by the law, [under situationism] character evidence often fails the test of logical relevance.”).

¹¹⁰ Imwinkelreid, *supra* note 34, at 758.

incorporates a situational element, then traits can indeed predict behavior.¹¹¹ Whatever the details, there is no doubt that current psychological scholarship supports the claim that character has a propensity component.

III. The Morality Component

Propensity is an uncontested component of character; the true mystery lies in whether morality is also necessary to accurately determine character.¹¹² Webster's,¹¹³ the Model Code, McCormick, and Weinstein uniformly included disposition or propensity in their definitions of character, but they also uniformly reveal that a "Freudian" analysis of the mind and behavioral tendencies has created a societal emphasis on a morality-free conception of character.¹¹⁴ For example, when people speak of "traits" today, it is more often in reference to behavioral propensities, tendencies, proclivities, and dispositions without thought of whether they are morally "good" or "bad."¹¹⁵ Today, it seems that traits are simply ways to explain behavior.

However, character has not always been separated from moral considerations. "Popular psychology" in the 19th century viewed character as a "unique blend of free will and determinism" where a person's voluntary choices came to "limit severely the possibility of choice."¹¹⁶ In other words,

¹¹¹ *Id.* at 757-59.

¹¹² See, e.g., *State v. Johns*, 301 Or. 535, 548 (1986) ("In these days of changing values, we doubt that we could effectively define 'moral' or 'psychical' disposition.")

¹¹³ Webster's fourth definition of character is "the complex of accustomed mental and moral characteristics and habitual ethical traits marking a person . . . and serving to individualize [him or her]," but the point remains that morality is no longer on par with propensity when it comes to modern notions of character. WEBSTER'S NEW INTERNATIONAL DICTIONARY 376 (3d ed. 1986).

¹¹⁴ WRIGHT § 5233 n.16 (noting that the Freudian conception of character has replaced the Wigmorian); see also Brian Johnson, *Psychological Addiction, Physical Addiction, Addictive Character, and Addictive Personality Disorder: A Nosology of Addictive Disorders*, 11 CANADIAN J. OF PSYCHOANALYSIS 135, 142 (2003) (discussing Freud and defining "addictive character" without a moral component as "a style of response to internal and/or external stress during which stereotyped, repetitive defences [sic] are employed").

¹¹⁵ Examples of neutrally moral traits might be "paranoia" or "anxiety." These are "traits" in that they arguably influence conduct, but they certainly do not have moral overtones associated with them.

¹¹⁶ WRIGHT § 5233 (noting that "many of the assumptions about morality, psychology, and society that gave [character] meaning [in the 19th Century] would probably be questioned today").

a person could be held responsible for their propensities because they were the result of voluntary action over time; the development of good or bad propensities through repetition.¹¹⁷ A distinction between “personality traits” and “character traits” helps clarify the point. A personality trait is simply a propensity: a “stable and permanent disposition by means of which one individual may be distinguished from another.”¹¹⁸ Character traits, then, are “personality traits which are generally approved or disapproved.”¹¹⁹ Although the difference between personality and character traits is far from universally recognized,¹²⁰ it at least illustrates that character is often conceived as propensity plus something else.

It was this understanding of character as more than just propensity that prompted common law courts to bar its admission at trial: a defendant’s voluntarily-earned propensities were too likely to prejudice the jury.¹²¹ Indeed, while the Rules refer to what appear to be morally-neutral “character” and “traits,”¹²² the Advisory Committee Notes support the conception of character as laden with morality in that “[t]raditionally character has been regarded primarily in moral overtones of good and

¹¹⁷ See, e.g., *id.* (“According to neurologists of the day, the physical explanation [of character] was that a consistent pattern of choices created a worn nerve path that made it all but impossible for impulses to travel a different route.”).

¹¹⁸ Pincoffs, *supra* note 12, at 906.

¹¹⁹ *Id.* See also DORIS, *supra* note 10, at 19 (“Character traits appear to have an evaluative dimension that personality traits need not...”); Owen Flanagan, *Moral Science? Still Metaphysical After All These Years*, in PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY (Darcia Narváez & Daniel K. Lapsley eds. 2009) (identifying character traits as “habits of the hearts and mind that pertain to moral life”).

¹²⁰ See, e.g., *Freeman v. State*, 486 P.2d 967, 972 (Alaska 1971) (apparently conflating “personality” and “character”).

¹²¹ See WRIGHT § 5233.

¹²² See FED. R. EVID. 404, 405, 608, 609.

bad...”¹²³ Additionally, courts have long supported the presence of a moral component. For example, in *Michelson*, the Supreme Court recognized that character includes “moral traits.”¹²⁴

However, even with the obvious lineage of the moral component, legal scholarship in the field of evidence has ignored philosophical literature in morality,¹²⁵ especially the particularly relevant specialty of virtue ethics.¹²⁶ Given that history supports—and many legal academics agree with¹²⁷—the claim that a moral component is an indispensable part of character, the lack of dialogue on what is or ought to be regarded as moral conduct is a surprising omission by evidence scholars. An overview of the two opposite views of character traits from philosophy will set the stage for an analysis of how these insights can shape character evidence doctrine in the future.¹²⁸

A. A Survey of Relevant Philosophical Scholarship

Philosophical scholarship reveals the same split as in the psychological literature: those who believe character has an influence on behavior, and the skeptics.¹²⁹ Aristotle, well known as one of

¹²³ FED. R. EVID. 405 advisory committee notes. However, the drafters also seem to suggest that the Rules are not necessarily bound by a moral component by stating that “[n]evertheless, on occasion nonmoral considerations crop up...and this seems bound to happen increasingly....No effective dividing line exists between character and mental capacity...” *Id.* This should not be read as preventing courts from finding a moral component in character definitions to cabin propensity proofs appropriately.

¹²⁴ 335 U.S. at 477.

¹²⁵ I am not aware of any academic piece which applies virtue ethics to the law of evidence.

¹²⁶ Rosalind Hursthouse writes that “virtue ethics” is a “normative [approach] to ethics which emphasizes...moral character.” HURSTHOUSE, *supra* note 10, at 1.

¹²⁷ See WRIGHT § 5233 (noting that a “moral component” has an historical basis and seems necessary to properly cabin character evidence); PARK, *supra* note 36, at 127 (“To constitute a character trait, one would think (although this is not settled) that the tendency must arise in some reasonable degree from the person’s moral being...”); MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 97 (1996) (arguing that “concept of character has acquired strong moral overtones”); Leonard, *supra* note 3, at 450 (“Thus, from the perspective of the law of evidence, it is best to conceive of character as a subset of propensity, embracing only the moral aspects of a person.”); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264-65 (1995) (differentiating between moral “character” propensities and nonmoral “habit” propensities).

¹²⁸ Obviously there are more than two differing philosophical perspectives on character, but distilling two general perspectives will serve to illustrate the key differences in the philosophical literature.

¹²⁹ Of course philosophers occupy a range of different perspectives in between, *see, e.g.* Flanagan, *supra* note 120 (arguing for a middle ground between Aristotle and Doris), but for the purposes of this analysis it is helpful to distill them into two general schools of thought.

leading ancient philosophers,¹³⁰ was the proponent of virtue ethics and posited the existence of morally good “virtues”¹³¹ and bad “vices,” defining them as “states of character,” or precursors to character traits.¹³² He focused his attention on the virtues, as to pursue a virtuous character is to pursue the notion of *eudaimonia*, or “true happiness” or “flourishing.”¹³³ But a virtuous character is not developed quickly or easily; it takes many years of mental conditioning.¹³⁴ Once someone¹³⁵ has achieved a virtuous character, that person will display virtue in a “wide variety of trait-relevant situations,”¹³⁶ creating robust character traits.¹³⁷ Furthermore, Aristotelian virtues are not separable; if someone has established a virtuous character, then he or she will have all of them together.¹³⁸ Aristotle’s conception of character matches closely with trait theory in psychology: both posit robust character traits that exhibit cross-situational¹³⁹ influence over conduct.

However, Aristotle’s virtues and vices “involv[e] much more than tendencies or dispositions to act, even for certain reasons.”¹⁴⁰ They “go all the way down”¹⁴¹ in the sense that they couple “systematically a person’s values, choices, desires, strength or weakness of will, emotions, feelings,

¹³⁰ See Flanagan, *supra* note 120, at 52 (identifying Aristotle’s book *Nicomachean Ethics* as “the most influential secular ethics text in the West”).

¹³¹ Aristotle identified virtues as “means” between two extreme character traits; for example, “courage” was between foolishness and cowardice. ARISTOTLE, B2C8, B3C6. He proposed that the mean was not based on reason, but rather perception. ARISTOTLE, B2C9. Moreover, he listed what he believed were the virtues: courage, temperance, and unnamed virtues dealing with money, honor (including pride and ambition), anger, social intercourse (including friendliness, truthfulness, and wit), and shame. ARISTOTLE, B3-4.

¹³² ARISTOTLE B2C5.

¹³³ HURSTHOUSE, *supra* note 10, at 10.

¹³⁴ ARISTOTLE B2C1; see also Erik J. Weilenberg, *Saving Character*, 9 *ETHICAL THEORY AND MORAL PRACTICE* 461, 464 (2006) (“Aristotle recognized that ethical knowledge alone does not guarantee right action.”).

¹³⁵ Rather regrettably, Aristotle did not believe that women or slaves could have a virtuous character, but modern virtue ethicists disavow this position. See HURSTHOUSE, *supra* note 10, at 8.

¹³⁶ DORIS, *supra* note 10, at 18.

¹³⁷ See HURSTHOUSE, *supra* note 10, at 12 (noting that “once acquired,” Aristotelian virtues and vices “are deeply entrenched”).

¹³⁸ See DORIS, *supra* note 10, at 20-22 (explaining Aristotelian inseparability); HURSTHOUSE, *supra* note 10, at 11-12 (same).

¹³⁹ This simply means that a trait will manifest in varying situations without regard to how similar they are. An example would be a trait of “honesty” manifesting in a single person as the refusal to lie, cheat, or steal.

¹⁴⁰ HURSTHOUSE, *supra* note 10, at 11.

¹⁴¹ *Id.* at 12.

perceptions, interests, expectations, and sensibilities.”¹⁴² A person cannot simply perform virtuous actions to gain a virtuous character; she must know her actions are virtuous, purposely decide to do them, and do them from a firm and unchanging state.¹⁴³ In other words, actor must truly feel pleasure through his or her behavior for it to truly be the result of a virtuous character.¹⁴⁴

Additionally, each virtue is an “excellence of character” in addition to a propensity; each incorporates “the ability to reason correctly about practical matters.”¹⁴⁵ In other words, Aristotelian virtues have an evaluative component; that is, virtues are defined by their voluntariness.¹⁴⁶ Each person has “a moral right to demand” that everyone else be “responsible for making ourselves beings who can help doing what we do.”¹⁴⁷ Therefore, much like the character of the defendant that Rule 404 bars from court, virtue ethics focuses on the morality of the actor and the “voluntary passions and actions” on which “praise and blame are bestowed.”¹⁴⁸

Opposed to the Aristotelian view of virtues is John Doris.¹⁴⁹ Instead of cross-situationally robust character traits, Doris argues that “personality should be conceived as *fragmented*: an evaluatively disintegrated association of situation-specific local traits.”¹⁵⁰ In other words, traits are separable and are only exhibited in “trait-eliciting” situations.¹⁵¹ Doris first outlines three principles of globalist views on

¹⁴² STEPHEN HUDSON, HUMAN CHARACTER AND MORALITY 43 (1986).

¹⁴³ ARISTOTLE, B2P4S3.

¹⁴⁴ *Id.* at B2P3S1.

¹⁴⁵ HURSTHOUSE, *supra* note 10, at 12; *see also* DORIS, *supra* note 10, at 17 (“Virtues are not *mere* dispositions but *intelligent* dispositions...”).

¹⁴⁶ *See* ARISTOTLE, B3S(d)1-2.

¹⁴⁷ Pincoffs, *supra* note 12, at 919.

¹⁴⁸ ARISTOTLE, B3Ch1

¹⁴⁹ Most philosophers concede that traits affect behavior to some extent and only Gilbert Harman in philosophy joins Doris doubting they do. In any case, Doris’s position is most useful as a critique of virtue ethics. *See* Flanagan, *supra* note 120, at 55 (“So I will begin...to try to quiet the cheerleaders within philosophy [Doris and Harman], who say that character traits are like phlogiston or unicorns...”).

¹⁵⁰ DORIS, *supra* note 10, at 64 (emphasis in original). These traits appear to be empirically-based and lack a moral underpinning. *See* Candace L. Upton, *The Structure of Character*, 13 J. ETHICS 175, 176 (2009) (“...Doris provides no reason why the ethicist should embrace local traits as traits of *character*, as opposed to mere behavioral dispositions.”) (emphasis in original).

¹⁵¹ DORIS, *supra* note 10, at 16.

character: traits are consistent across varied situations, temporally stable across repeated situations, and evaluatively integrated between similar traits.¹⁵² Relying on the situationist empirical studies of character, Doris deconstructs the globalist principles until only what he terms “temporally stable, situation-particular ‘local’ traits” remain.¹⁵³ These “local traits” seem to track closely with “CAUs” in that they gain strength as situations become more alike and are repeated over time.¹⁵⁴ Indeed, because local traits are empirically observable and contain no moral component,¹⁵⁵ they also closely resemble what the Rules define as “habit.”¹⁵⁶

Besides positing local traits, Doris notes that “talk of character . . . intermingl[es] evaluative and descriptive elements.”¹⁵⁷ Descriptively, people believe that traits can be used to predict behavior.¹⁵⁸ Evaluatively, people judge individuals based on their character traits, believing that they were at least partly the result of free choice.¹⁵⁹ Doris’s theory is not that the descriptive and evaluative elements reflect reality, but instead that people believe they are accurate.¹⁶⁰ To put it simply, although Doris derides the existence of robust character traits,¹⁶¹ he acknowledges that people cannot escape moral demands, what he terms “socially shared standards for interpersonal conduct.”¹⁶² Indeed, Doris’s true goal in dismantling globalism is not to destroy morality, but rather to strengthen it. In his view, because situations are the true influence on individual’s lives, individuals should strive to create an environment

¹⁵² See DORIS, *supra* note 10, at 22.

¹⁵³ DORIS, *supra* note 10, at 25. *But cf.* Candace L. Upton, *The Structure of Character*, 13 J. ETHICS 175 (2009) (proposing that local traits are true traits of character, complete with a moral component).

¹⁵⁴ See, e.g., *id.*, at 176 (identifying examples of local traits such as “mountain-climbing-courageous” and “away-from-crying-baby-temperate”).

¹⁵⁵ See *id.*, at 176 (“...Doris provides no reason why the ethicist should embrace local traits as traits of *character*, as opposed to mere behavioral dispositions.”) (emphasis in original).

¹⁵⁶ Indeed, to the extent that Doris’s local traits are empirically-based and lack a moral underpinning, they may overlap substantially with habit. See *infra* notes 182-188 and accompanying text for the Rules’ definition of habit.

¹⁵⁷ DORIS, *supra* note 10, at 5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 5-6.

¹⁶¹ Even many of Doris’s critics have accepted that “situationally insensitive” traits are unlikely. See Flanagan, *supra* note 120, at 57.

¹⁶² DORIS, *supra* note 10, at 80.

reflective of their morals.¹⁶³ Ideally, someone would display his or her morality through the situations in which he or she chose to, and not to, participate.¹⁶⁴

B. Should Character Implicate Morality?

Discussing “virtue ethics” by definition implicates morality. Therefore, it is not surprising that Aristotle’s virtue ethics involves morality because it is “agent-centred [sic] rather than consequences- or rules-centred [sic].”¹⁶⁵ Even Doris recognizes that character and personality are subtly different because character is evaluative, while personality is not.¹⁶⁶ His stated goal of improving responsibility in ethical decision-making demonstrates that—despite his belief that character is not capable of predicting behavior—he, too, is searching for a way to live morally.

Indeed, both Aristotle and Doris support the idea that people are the masters of their moral destiny. Aristotle sees morality at work when actors choose what kind of character to build: be it a strong, virtuous character, or permit the vices to take hold. Doris uses empirical data to suggest that morality activates when actors choose what kind of situations to construct or join: either entering those contexts that reinforce morality, or those that destroy it.¹⁶⁷

Although both philosophers seek to identify how to live morally, that does not alone answer the question of why a moral component is necessary for character in the law of evidence. A moral component should be incorporated into evidentiary character because, to the extent that moral decisions are evaluative where non-moral propensities are not, individuals should only be held responsible for their voluntary choices and actions. Condemning a person based solely on evidence of

¹⁶³ *Id.* at 146.

¹⁶⁴ *Id.* at 147 (suggesting that “attending to the determinative features of situations” is “[t]he way to get things right more often”).

¹⁶⁵ HURSTHOUSE, *supra* note 10, at 29.

¹⁶⁶ DORIS, *supra* note 10, at 19 (“Character traits appear to have an evaluative dimension that personality traits need not...”).

¹⁶⁷ See DORIS, *supra* note 10, at 147 (using the example of a co-worker who knows she cannot be faithful to her husband if she goes to dinner with a colleague, and therefore choosing to reject the invitation).

their character “is not only unfair, but inconsistent with a fundamental supposition that criminal behavior is punishable because it represents a free choice . . . to commit an immoral act.”¹⁶⁸ With this understanding, a definition of “character evidence” as simply disposition or propensity is too broad. The moral component restricts character trait determinations to those that are voluntary moral choices of an actor,¹⁶⁹ and further ensure that courts do not arbitrarily pick propensities to classify as character traits.¹⁷⁰

Furthermore, restricting character to moral choices acknowledges that the risk of prejudice to an individual is highest when his or her actions are morally condemnable.¹⁷¹ As the Court noted in *Michelson*, it is the danger of undue prejudice that truly motivates the ban on character evidence in the first place.¹⁷² Clearly, a fact-finder could be prejudiced if he or she perceives someone’s character as morally blameworthy, whereas simply knowing that someone has a propensity that has no moral overtones is unlikely to have the same risk.¹⁷³ This fear is especially pointed given Americans’ fondness for attributing character traits to others¹⁷⁴ and then “generaliz[ing] from one instance to an entire personality.”¹⁷⁵ In order to cabin character to evaluative actions and to target the true risk of prejudice, a moral component should continue to be an integral part of a court’s conception of character.

¹⁶⁸ Gerard E. Lynch, *Rico: The Crime of Being Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 936, 936 n.85 (1987) (noting that both the retributionist who believes each act of a morally autonomous actor and the reformist who believes people can change are interested in limiting the use of character evidence in trial).

¹⁶⁹ See Pincoffs, *supra* note 12, at 923 (stating that if a character trait results “from conditions over which [an actor] has no control..., then in justice we cannot hold him answerable”).

¹⁷⁰ See WRIGHT § 5233 (arguing that courts need a precise definition of character); Rhode, *supra* note 9, at 9-10 (cautioning against broad definitions of character).

¹⁷¹ See Leonard, *supra* note 15, at 450 (“Only those aspects of a person that bear on her morality create th[e] danger [of prejudice].”).

¹⁷² 335 U.S. at 476.

¹⁷³ See Leonard, *supra* note 3, at 450-51 (distinguishing between moral and nonmoral propensities as perceived by a jury).

¹⁷⁴ See note 44 for relevant empirical studies.

¹⁷⁵ Spector, *supra* note 32, at 352. Additionally, see notes 86-88 and accompanying text for a discussion on “fundamental attribution error.”

IV. What Character Evidence is Not

As Part I and II showed, “character” contains two components—propensity and morality—so the standard for character is beginning to take shape.¹⁷⁶ Before reaching an affirmative standard, it is useful to examine what character excludes. These non-character traits are boundaries that create a conceptual space in which character can exist. This list is culled from a variety of cases, treatises, and scholarship and is non-exhaustive, but will help explain and define character by marking its outer limits. However, while character is indeed different from the items on the list below, that should not keep a court from excluding them if they closely resemble character in a given circumstance.

1. Character is not “reputation.”¹⁷⁷ Reputation is simply a way of proving character; it is the community belief of what someone’s disposition actually is.¹⁷⁸ Very early on, Wigmore noted that courts often confused character and reputation, and he took pains to distinguish them.¹⁷⁹ His conclusion remains helpful to this day: “Character and reputation are as distinct as destination and journey.”¹⁸⁰

2. Character is not “habit.”¹⁸¹ Habit is “a person’s regular practice of responding to a particular type of [situation].”¹⁸² Three elements help to separate habit from character: the level of abstraction, the actor’s volition, and the moral component.¹⁸³ First, habit is observable, while character cannot be

¹⁷⁶ See also WRIGHT § 5233 (noting that character contains two components: repeated behavior and morality).

¹⁷⁷ See *Amos v. Commonwealth*, 516 S.W.2d 836, 837 (Ky. 1974) (“The words ‘reputation’ and ‘character’ are not synonymous and different rules apply to [each]...”); WEINSTEIN § 404[01] (“Character...must be differentiated from reputation which is but one of the ways of evidencing character.”).

¹⁷⁸ WRIGHT § 5233.

¹⁷⁹ WIGMORE § 52.

¹⁸⁰ *Id.*

¹⁸¹ See FED. R. EVID. 406 (distinguishing habit and character); *United States v. Holman*, 680 F.2d 1340, 1350-51 (1982) (“In contrast to character evidence,...habit denotes conduct of a much more specific variety.”); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 511-12 (4th Cir. 1977) (same); WEINSTEIN § 404[01] (“Character and habit...are not synonymous.”).

¹⁸² MCCORMICK § 195.

¹⁸³ WRIGHT § 5233.

seen.¹⁸⁴ A common example of a habit is someone's ritual of brushing his or her teeth every morning, while it seems improbable that someone's "viciousness" could be displayed without inferring the trait from an observed action. Second, habit is "semi-automatic" and unthinking.¹⁸⁵ If character is a matter of free choice in a given situation, then habit is a Pavlovian response.¹⁸⁶ Third, as previously established, character must have a moral component, but habits do not necessarily have moral overtones.¹⁸⁷ Although not character proof as defined by the Rules, habit evidence matches up well with interactionism's CAPS and CAUs (as long as no morality is involved) and Doris's theory of "local traits."

3. Character is not "emotion" or "motive."¹⁸⁸ Emotion and motive are often grouped together, as they are both "states of mind."¹⁸⁹ They are both "human experience[s]" that are focused on an object.¹⁹⁰ Generally, emotions happen to a person, while character is formed by repeated interactions with various situations. There is dispute over whether emotions can be "educated," and therefore whether someone can be help responsible for their emotional responses.¹⁹¹ Regardless, because emotion (and motive) is focused on a specific object and their "existence in a given situation does not depend on the person's general moral fiber," they are distinct from character.¹⁹²

4. Character is not "values" or "attitude."¹⁹³ Values and attitudes can also be conceived as tendencies for action that have moral overtones, so it can be difficult to distinguish them from

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ WEINSTEIN § 404[01].

¹⁸⁷ WRIGHT § 5233.

¹⁸⁸ See WIGMORE § 385 (distinguishing emotion and motive from character by implication); Leonard, *supra* note 3, at 452 (distinguishing motive from character); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 276 n.14 (1996) (analyzing "pride" and "humility" as borderline cases between emotions and traits of character).

¹⁸⁹ See Leonard, *supra* note 3, at 445; see also ARISTOTLE, B2C5 (classifying emotion separate from character).

¹⁹⁰ Leonard, *supra* note 3, at 452 (motive); Kahan & Nussbaum, *supra* note 189, at 275-76 (emotion).

¹⁹¹ *Id.* at 277-78.

¹⁹² Leonard, *supra* note 3, at 452.

¹⁹³ See DORIS, *supra* note 10, at 86-89 (distinguishing values and attitude from character).

character; indeed, they may even overlap on occasion.¹⁹⁴ However, Doris helps discriminate between these concepts by identifying that people do not always act in accordance with their values or attitudes. Indeed, this is “an important reason people feel badly about their inconsistent behavior.”¹⁹⁵ One useful difference is that values and attitudes are consciously held affinities—they are ways of acting that people wish to, but need not, follow—whereas character traits are propensities that people tend to follow, although not all of the time. In other words, character traits are imperceptible but result in observable action, but values and attitudes need not ever be acted upon.

5. Character is not “physical characteristics,” “ability,” or “skill.”¹⁹⁶ Obviously, physical characteristics can be perceived, are in no way propensities to act in certain ways, and do not implicate moral concerns.¹⁹⁷ Additionally, skills and abilities (such as intelligence¹⁹⁸) or their opposites (such as “slowness to answer, forgetfulness, or poor ability to express oneself”¹⁹⁹) do not signal propensity or imply a moral choice. In this way, they can generally be differentiated from character. However, courts should be careful to prevent different characterizations of skill or ability that simulate forbidden character proofs from entering the evidentiary record, such as calling a doctor in a medical malpractice case a “butcher.”²⁰⁰

6. Character is not “mental condition” or “mental illness.”²⁰¹ Mental conditions (such as paranoia²⁰²) and mental illnesses (such as “insanity or other medically diagnosed ailments”²⁰³) are more

¹⁹⁴ See Leonard, *supra* note 15, at 27 n.41 (describing similarities between attitudes and character).

¹⁹⁵ DORIS, *supra* note 10, at 88.

¹⁹⁶ See WRIGHT § 5233 (differentiating “color-blindness, clumsiness, and strength” from character); WIGMORE § 87 (differentiating “special skill, dexterity, or knowledge” from character).

¹⁹⁷ See, e.g., *Phillips v. General Motors Corporation*, No. Civ. A. 99-03423, 2000 WL 1407896, at *3 (E.D. La. Sept. 25, 2000) (“Neither Mr. Fortenberry’s physical condition nor his medical records constitute character evidence...”).

¹⁹⁸ See *United States v. West*, 670 F.2d 675, 682 (1982) (holding that intelligence is not a character trait).

¹⁹⁹ *United States v. Cortez*, 935 F.2d 135, 138 n.3 (8th Cir. 1991) (finding these not character traits).

²⁰⁰ WRIGHT § 5233 (cautioning also against admitting improper characterizations of someone’s “occupation,” “associations,” “political beliefs,” and “life-style”).

²⁰¹ See *id.* (distinguishing, with difficulty, “mental characteristics” from character).

difficult to distinguish from character because they cannot be seen, may create tendencies to act certain ways, and may even have moral overtones.²⁰⁴ However, mental conditions are presumably not the result of voluntary action. To the extent that they are, they should be classified as character evidence because if all mental conditions were admissible, then parties could evade the character evidence prohibition by simply re-defining character traits as mental illnesses. For example, the character trait for “theft” could be re-termed the mental illness of “kleptomania” and theoretically escape the ban.²⁰⁵ Furthermore, the Advisory Committee Notes indicate that some mental conditions should be treated as character evidence, if only to prevent the wasteful and time-consuming discovery that might result if litigants were attempting to prove whether a particular trait implicated character concerns.²⁰⁶

V. A New Standard for Character Evidence

It now remains to outline a workable standard for courts to use to determine what is, and is not, character evidence. This Part will propose a logical, coherent way for courts to identify when a trait²⁰⁷ implicates character as opposed to something else, be it a habit, medical condition, personality trait, or otherwise. It will not propose an amendment to or repeal of any of the Rules, although that should not be taken to suggest that the Rules are perfect. Indeed, the Rules are far from perfect. However, many scholars have already proposed reasonable amendments in line with the psychological scholarship

²⁰² See *State v. Ferguson*, 111 N.M. 191, 200 (N.M. App. 1990) (finding that being “suspicious” and “paranoid” are not necessarily traits of character unless they carry a moral connotation in context); see also *PARK, ET AL.*, *supra* note 36, § 5.04 (“[A] stroke victim’s propensity to forget is considered a medical condition, rather than a trait of character.”). *But cf. United States v. Kepreos*, 759 F.2d 961, 964-65 (1st Cir. 1985) (upholding the exclusion of evidence of “personality traits” such as “avoidance, denial, repression, naiveté, dependency, and tunnel vision” for their likelihood of confusing the jury).

²⁰³ *Bell v. Whitten*, 722 So.2d 1057, 1061 (La. App. 1st Cir. 1998) (“intermittent explosive disorder” and “conduct disorder, solitary aggressive”); see also *Lapime v. Pallazzo*, No. 95-30883, 1996 WL 625367, *1 (5th Cir. 1996) (“anti-social personality disorder” characterized by “manipulative behavior and aggressive reactions to authority figures”); *Bemben v. Hunt*, No. 93-C-509, 1995 WL 27223, *2 (N.D. Ill. Jan. 23, 1995) (“organic delusional disorder with symptoms of paranoid ideations and irrational behavior”).

²⁰⁴ WRIGHT § 5233.

²⁰⁵ WRIGHT § 5233.

²⁰⁶ See FED. R. EVID. 404 advisory committee notes.

²⁰⁷ For the purposes of this Part, “trait” will refer to anything that a court must decide is character evidence or not, and therefore can include habits, medical/mental conditions, values/attitudes, etc.

noted above, especially regarding Rule 609 and prior conviction evidence.²⁰⁸ Instead, the proposed standard will aim to work within current strictures, but still give courts the analytical tools they need to define and categorize character traits.

To review, character contains two components: propensity and morality. Any trait that does not implicate propensity is logically irrelevant. Any trait that does not implicate morality is simply a personality trait, relatively harmless and prejudice-free. Character is bounded and constrained by: reputation; habit; emotion and motive; values and attitude; physical characteristics, skill, and ability; and medical and mental condition. Therefore, a successful character standard must be able to take a proposed trait and either place it within the defined zone of character or exclude it entirely. Given that many of the easier character traits are commonly “known,” the proposed standard can be tested for consistency in outcomes.

The propensity component is roughly aligned with logical relevance and the morality component is roughly aligned with prejudicial effect.²⁰⁹ A trait strong in both components would be character evidence, but one weak in both would likely be logically irrelevant or unfairly prejudicial. When a trait exhibits strong propensity but weak morality qualities, it would be a “personality trait” (such as habit or mental condition), and fall outside the character evidence prohibition. Likewise, if a trait smacks of moral opprobrium but does not implicate propensity reasoning, then it would not be character proof

²⁰⁸ See, e.g., Davies, *supra* note 40, at 536 (advocating that Rule 609 be amended to exclude non-honesty related convictions); Mendez, *supra* note 34 (same); Spector, *supra* note 32 (same). Additionally, Rule 609 contains its own standard for admitting character evidence, so the proposed standard in this Part would likely not apply to prior conviction evidence used to attack a witness’s credibility.

²⁰⁹ One exception to this generalization involves the halo effect. Because traits are over-attributed, in rare cases it may be true that a trait lacking moral weight is still more prejudicial than probative. However, these nonmoral personality traits would not fall under the definition of “character” as they lack the crucial evaluative moral calculus; they do not show the individual to be a “bad person,” but rather just imply that he is more controlled by a trait than in reality. Instead of barring as improper character proof, a court should exclude this evidence as unfairly prejudicial.

per se, but would likely be excluded anyway (without another justification) as unfairly prejudicial.²¹⁰

Therefore, the standard will be bimodal: a trait will either be character evidence, or it will not. To be successful, the standard should assist the court in excluding traits that run to the heart of the character evidence ban: traits that a jury will overestimate and those that will make a jury want to punish for bad character regardless of actual guilt.

A. *Setting Forth the Proposed Standard for Determining Character*

When considering a trait, a court should determine the strengths of the two components by using several factors gleaned from psychology and philosophy. First, under the propensity prong, a court should look at the proof of the existence of the trait and consider its (1) specificity, (2) similarity of the circumstances in question in type, timing, and execution, (3) numerosity of trait-relevant behavior, (4) temporal proximity, and (5) the trait's inherent likeliness of recidivism.²¹¹ Specificity is how well the evidence tends to describe the trait: the more specific, the better. Similarity ensures that the trait-eliciting situations of the evidence closely resemble the situation of the alleged conduct. Numerosity refers to repeated instances of conduct; the more instances there are, the more likely propensity is present. Temporal proximity measures how long ago the trait-relevant conduct was: the further the conduct was in the past, the less likely it is to prove propensity. Finally, some traits may be more likely to repeated than others, and a court should consider evidence of the trait in question to that effect.²¹² Together, these factors approximate the CAPS formulation: a narrow, situationally-specific trait, repeated over a recent enough period of time to be relevant.

²¹⁰ See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

²¹¹ See Davies, *supra* note 40, at 535-36 (proposing roughly analogous factors); Spector, *supra* note 32, at 337-38 (reviewing the Luck factors from *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965), a case involving Rule 609).

²¹² See, e.g., P.B. Carter, *The Admissibility of Similar Facts—Part II*, 70 L.Q. REV. 214, 231-32 (1954) (suggesting that sexual proclivities are stronger than other propensities).

No single factor is likely to be determinative, and they may not all be present in every case. But by considering them in sum, a court will be far more likely to correctly find if a trait is predictive, and therefore if the propensity component is weighty enough. If the trait in question does not qualify under propensity reasoning, a court should find that it is logically irrelevant unless it is supported by an alternative relevant theory. In any case, it should not be barred by the character proof prohibition. The advantage of this propensity standard is that it establishes a sliding scale between habit and character and allows courts to ascertain where on that scale the trait in question falls.²¹³ Undeniably, these factors are imprecise. However, discrete traits are unique and may have unique problems associated with them, so courts must retain the flexibility to determine on a case-by-case basis. Bright-line rules will not work in the context of the admittedly difficult to define character.

Second, a court should concurrently determine whether the trait implicates moral concerns. To find if a trait carries moral baggage, a court should look at: (1) if the conduct is criminalized or otherwise restricted or regulated, (2) if it has been historically criminalized, and (3) if the court finds other compelling reasons that weigh toward moral concerns. The criminal code is a good proxy for the bare minimum of society's moral expectations, so if the trait in question implicates criminal activity, it weighs strongly toward moral opprobrium.²¹⁴ A natural example is physical violence. Furthermore, if the activity is regulated or restricted for some reason (such as prescription drug use), the same reasoning

²¹³ See, e.g., GRAHAM, *supra* note 128, § 406.1 (noting that “the dividing line between habit and character is far from distinct”). *But see* MCCORMICK § 195, at 783 n.7 (“Character may be thought of as the sum of one’s habits, although doubtless it is more than this.”).

²¹⁴ Pincoffs, *supra* note 12, at 909 (noting that a society’s criminal code is the “minimal moral code...because [it] is a reflection of our thinking concerning what is an outrage and should not be permitted, since permitting it would lead to consequences no one in his senses could desire”).

applies, albeit more weakly. Additionally, if an action has been decriminalized, moral overtones may still apply.²¹⁵ Alcohol use is an example here; not only is it currently regulated, but it was also once illegal.²¹⁶

However, often criminal law does not attach to all actions that society views as laden with morality. Therefore, while the third factor of “other compelling reasons” seems vague, in reality it would be a necessary catch-all for a court to import contextual societal events into its analysis. After all, morals can change just as character can. Therefore, this factor might imply that a trait involves morality if it applies equally to all members of society in a type of “Golden Rule” framework, or if it seems “urgent” or “serious” to the court.²¹⁷ This factor would get weaker the more trivial the conduct is; for example, neglecting to wave at someone’s neighbors as he or she walked by may be rude, but it would not rise to the level of morality because people do not have a right to demand that their neighbors greet them. However, a trait like sexuality, while not illegal per se, seems likely to engage moral considerations in jurors, and so a court should take care to find moral weight when and where society does. Overall, a court should be most concerned that a jury will construe a party’s character to convict him or her in spite of the facts.

When determining a “good” pertinent trait of character, as the Rules permit the accused to offer in defense,²¹⁸ the court should be more lenient under the morality prong. If a defendant wishes to place his character in controversy, then the court should acquiesce, unless severe injustice would result should the evidence be admitted. Any proof the defendant offered would, of course, still need to

²¹⁵ Although the conduct was decriminalized, indicating at least that society has accepted it enough to remove the stigma of crime, there still may be significant prejudicial nature to such evidence because moral disapproval attached to it at one time.

²¹⁶ See U.S. CONST. amend. XVIII (repealed 1933) (outlawing alcohol sales and consumption).

²¹⁷ See Pincoffs, *supra* note 12, at 915-19 (recognizing morality as demands that can be made by anyone on everyone else and demands that are “urgent” or “serious” in that “to fail to honor them is to do something very wrong indeed”).

²¹⁸ See FED. R. EVID 404(a).

qualify under the propensity prong. Therefore, if the proof fails the test of logical relevance, then a court should not classify it as character evidence regardless of its moral weight.

Now that the two components have factors, but how does a court weigh them? Keeping in mind the ultimate purpose of the character proof ban—to keep prejudicial information out of the presence of the jury—a judge should be willing to define a trait as character evidence when he believes a jury would be likely to view it as proof of character as well. Therefore, if a party objects to proof of a trait that it believes is improper character evidence, the objecting party should bear the burden of proving the moral component (unfair prejudice) by a preponderance of the evidence.²¹⁹ The objecting party should also carry a burden of production to offer evidence tending to show that the trait does not implicate the propensity component.²²⁰

Should that burden be met, then the *offering* party should be required to prove the propensity component by a preponderance of the evidence to the judge.²²¹ In the event that both parties meet their burdens, then the court should find that the trait is character evidence and proceed to determining the second element: if it is being offered for the forbidden purpose of proving “action in conformity.”²²² Presumably this step will be simple, as it will often mirror the same considerations of the propensity component. Of course, this does not mean the evidence is admissible; instead, the court would then apply the special mechanisms in the Rules accordingly.²²³

²¹⁹ For example, referring the judge to the criminal code, or identifying a past criminal law, or producing evidence tending to show social moral approval or disapproval of the trait-eliciting conduct in question.

²²⁰ This could be proof that the trait-eliciting conduct in question is not the same as the conduct in question or that the trait did not manifest in other similar situations, that the trait is too general or vague, that there are too few instances of conduct to adduce a trait, the conduct is too far in the past, or that the trait is inherently unlikely to reoccur.

²²¹ Shifting the burden to the offering party is only reasonable to properly align incentives, as otherwise the objecting party would be forced to prove the probative value of evidence they prefer be excluded.

²²² FED. R. EVID. 404(a).

²²³ This could mean barring admission under Rule 404 or admitting the evidence under Rules 405 or 608.

Under this standard, traditional “general” character evidence may not meet the bar for character evidence.²²⁴ An offering party would need to establish propensity by a preponderance of the evidence, but because psychological research suggests that general character across varied situations is a poor predictor of human behavior, a party could fail to meet its burden. But this does not mean the evidence is admissible past the ban just because it is not “character evidence” under Rule 404. In that case, a court should find the proof logically irrelevant or unfairly prejudicial and exclude it. Under this proposed standard, Rule 404 acts as a mediating tool between the logically probative aspect of proof and its corresponding prejudice, as Wigmore originally identified it to be.²²⁵

B. The Linchpin

The key to this standard—indeed, probably its key contribution—is simply that it separates the propensity and moral components. This can be seen in the important difference between the two prongs: morality is *subjective* and propensity is *objective*. Morality asks the judge to place him- or herself in the jury’s place to determine prejudice, while propensity asks the judge to determine the objective logical relevance without considering it from the jury’s perspective. By disentangling analysis of the objective and subjective components involved with determining character, courts will find it much easier to come to reasoned conclusions. The components help to focus the court’s attention on what is most crucial in each instance: logical relevance under propensity and unfair prejudice under morality.

²²⁴ *But see* FED. R. EVID. 406 advisory committee notes (“If we speak of character...we think of the person’s tendency to act...in all the varying situations of life...”) (quoting MCCORMICK § 162). The Advisory Committee seems to have taken a globalist view of character, which would imply that general character traits should be analyzed under Rule 404. However, given that globalist conceptions of traits will nearly always fail the test of logical relevance, this should not keep courts from applying the proposed standard.

²²⁵ Take a rare, but possible, case where both parties fail to meet their burdens: the proof is offered under propensity reasoning and contains some limited propensity quality, but the probative and prejudicial values both fail to reach the preponderance of the evidence burden. What does a court do? Given the halo effect, a court should exclude the evidence under Rule 403 as unfairly prejudicial. Even though the true propensity value is negligible, the jury will overestimate the proof and use it impermissibly to predict the individual’s behavior.

Propensity is objective because logical relevance can be proven with research on human behavior and proof of an individual's actions, always, of course, with the normal caveat that—as with all trial proof—veracity, credibility, reliability, and other evidentiary concerns are present. Under propensity, the court is simply confirming that the trait in question is as predictive as the jury believes it to be. In other words, the jury naturally expects a trait of character to tell them how the person would act in the future and the court is assessing whether that expectation is well founded or not. If it is not, then the court would not apply the special mechanisms associated with the Rules and instead likely exclude the evidence as unfairly prejudicial or logically irrelevant.

However, when determining morality, a court must determine the prejudicial effect that evidence is likely to have on a jury. Clearly no objective standard is possible, as community values change across time and across political, cultural, and geographic borders.²²⁶ Therefore, the morality prong must be based on subjective considerations. As a subjective standard, its purpose is twofold: first, to allow both parties to be heard on the matter and present evidence and, second, to force the court to clearly articulate the reasons for finding moral weight or not. This would not only make appeals a simpler matter and allow the community to scrutinize a court's rulings, but also allow the court to serve its "legitimizing function" by allowing both parties have their "day in court."²²⁷

For example, courts have often struggled to determine whether a trait is a mental condition or a character trait on the premise that a jury may receive evidence of one, but not the other.²²⁸ However,

²²⁶ Each court would need to determine the "relevant community" for determining morality concerns.

²²⁷ Leonard, *supra* note 15, at 3.

²²⁸ See, e.g., *Bell*, 722 So.2d at 1061 (admitting "intermittent explosive disorder" and "conduct disorder, solitary aggressive"); *Lapime*, 1996 WL 625367, at 1 (admitting "anti-social personality disorder" characterized by "manipulative behavior and aggressive reactions to authority figures"); *Bemben*, 1995 WL 27223, at 2 (admitting "organic delusional disorder with symptoms of paranoid ideations and irrational behavior"); *Ferguson*, 111 N.M. at 200 (admitting "suspicious" and "paranoid," but noting that they may be excluded in the future if they carry a moral connotation in context). For an example of a court that got the result right, see *Kepreos*, 759 F.2d at 964-65 (excluding "avoidance, denial, repression, naiveté, dependency, and tunnel vision" for their likelihood of confusing the jury).

this inquiry is misguided, because some mental conditions may be just as prejudicial as character traits²²⁹ and prejudice the jury just the same. Given the concern about voluntary free choice—indeed, the very concern that prompted the moral component in the first place—this seems like an odd result. Shouldn't a genetic predisposition, and maybe even an acquired addiction, not be construed as voluntary? However, as a subjective component, the moral prong is not concerned with what is, in fact, voluntary, but instead what the jury will *perceive* as voluntary.

Too often courts have gotten the character proof problem wrong by blindly applying basically meaningless distinctions²³⁰ like that between mental conditions and character traits.²³¹ The question judges should be asking is not “is this a mental condition or a trait of character?” Even psychiatry and psychology cannot answer that with certainty and, even if they could, that is no guarantee that society at large—and therefore the theoretically jury—will immediately change course and accept that conclusion. The possibility of prejudice will still remain. Therefore, instead judges should be asking both “is this trait logically relevant?” and, if it is, “how will the jury perceive it?” Only then will the true purpose of the character evidence ban—eliminating unfair prejudice—be fulfilled.

²²⁹ Alcoholism is an example of this, see *infra* note 235 and accompanying text, for even if it is genetic or a non-voluntary addiction, society still often views it with distaste and this moral connotation could prejudice the jury regardless of the lack of free choice. One could imagine this in other contexts, too. For example, if having a stroke carried with it the negative stereotype of resulting from over-eating and obesity, then perhaps the fact that stroke victims have a propensity to forget could prejudice a jury. However, under the current standard, courts are likely to admit this evidence on the distinction that it is a mental condition. PARK, ET AL., *supra* note 36, § 5.04.

²³⁰ Meaningless in the context of the law of evidence, at least.

²³¹ One clear example of this is illustrated in Wright's guide to the Rules. Because the field of character evidence is so confused, the authors are forced to spend an inordinate amount of time attempting to differentiate between character, mental characteristics, habit, skills, and others. Despite the lengthy inquiries, they invariably come to the conclusion that it is difficult to say with certainty because often something that is not technically character would still likely be defined as character and excluded for prejudicial value. In fact, when analyzing different traits, Wright's repeatedly states that “it is difficult to image Congress or the Advisory Committee intended that Rule 404 should not exclude” evidence of them when they are sufficiently prejudicial. WRIGHT § 5233. Instead of conducting a pointless inquiry into what exactly a trait is and leaving character determinations unpredictable, courts should instead determine logical relevance and prejudicial value separately.

C. Testing the Standard

To see how this standard fares, it will be useful to test it with a few examples. First, the standard should be able to tell the difference between a habit and character. Patrick has a trait for “ensuring the safety and security of his property.” Several witnesses would testify, if asked, that Patrick has the reputation for “locking his car door every time he parks his car.” There is a murder in town and evidence from the scene establishes that the perpetrator locked the front door of the house where the murder occurred before the perpetrator left. Patrick is arrested, put on trial, and the prosecution would like to offer Patrick’s reputation for locking doors as propensity evidence that he locked the front door of the house after he murdered the victim. How would the standard apply in this context?

In this case, a court would initially demand that the objecting party—the defense—prove the moral component and produce evidence that tended to rebut the propensity component. Assuming that locking car doors is not, and has never been, criminalized or regulated, the defense would need to prove a general societal moral disapproval, which would appear hopeless in this case. Furthermore, given the facts, it also appears unlikely that the defense could produce evidence rebutting propensity. However, even if they could, the prosecution could prove propensity by showing that locking car doors is clearly defined (specificity), that it is closely similar to locking house doors (similarity), that Patrick locks his car door on numerous occasions (numerosity), and that he did so up to the time of the murder (temporal proximity). Although the similarity evidence is weak, overall this proof would likely meet a preponderance standard. Therefore, a court would find propensity but no morality, and admit the evidence under Rule 406 as evidence of habit. The standard has passed its first test.

For the second diagnostic, it should identify a more difficult trait. One “trait of character” that causes logical problems is alcohol abuse as opposed to alcoholism.²³² Is this a habit, a mental illness, or a character trait? Aristotle originally defined “temperance” as a virtue,²³³ and many courts continue to see temperance, and its opposite, as character traits.²³⁴ However, others have found it to be a habit,²³⁵ and it could also qualify as a medical condition.²³⁶ If the standard can discover whether or not alcoholism is a character trait, then it will be eminently more useful.

Sarah has the trait of being “intemperate when it comes to liquor,” although it is unclear if she suffers from a genetic predisposition, an acquired addiction, or if she simply cannot control her inner cravings. If asked, several of her colleagues would testify that Sarah has a reputation in the community for “drinking herself into a stupor every night at home.” There is a hit-and-run accident, resulting in serious injuries to several passengers. Sarah is arrested and prosecuted. The State would like to admit the reputation evidence as proof of either a medical condition, or, alternatively, a habit to prove Sarah’s propensity for drinking and therefore link her to the crime. Her attorney objects.

Here, a court would insist that Sarah establish the moral disapproval of imbibing alcohol in order to show how she might be prejudiced. Unlike with Patrick, Sarah’s task is simple. Not only is alcohol heavily regulated, but it was also at one time completely illegal. Furthermore, the effects of alcohol use

²³² See PARK, ET AL., *supra* note 36, § 5.04 (“Despite the Advisory Committee’s reference to “temperance” as a character trait, one could argue that intemperate use of alcohol is a medical condition...”).

²³³ See ARISTOTLE B3C9-11.

²³⁴ See, e.g., *Reyes v. Missouri Pac. R. Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (finding that “four convictions over three and one-half years” was not sufficient to meet the threshold for “habit” and therefore was inadmissible); *Quinto v. City and Borough of Juneau*, 664 P.2d 630, 634 (Alaska App. 1983) (finding a “reputation...for being a ‘cautious, sober individual’ as character evidence). See generally *Rowe v. United States*, 167 Ct. Cl. 468 (1964) (affirming undesirable discharge for chronic alcoholism despite Air Force regulation distinguishing between psychiatric disorder and habits or traits of character).

²³⁵ See, e.g., *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985) (upholding district court’s admission of drinking disposition as a habit as a “close call” under an abuse of discretion standard); *State v. Kately*, 637 A.2d 214, 218 (N.J. Sup. 1994) (affirming admission of nightly drinking as habit evidence); cf. *Waller v. Massey-Ferguson, Inc.*, No. 94-60109, 66 F.3d 322 (5th Cir. Aug. 15, 1995) (holding that district court did not abuse its discretion in finding that Waller’s drug abuse was consistent with habit evidence).

²³⁶ See, e.g., Mary-Anne Enoch & David Goldman, *The Genetics of Alcoholism and Alcohol Abuse*, 3 CURRENT PSYCHIATRY REPORTS 144 (2001) (identifying genetic traits predisposing alcoholism in people).

have largely been criminalized, under crimes such as “operating under the influence” and “public intoxication.” Finally, Sarah could provide evidence of community groups and temperance campaigns such as Mothers Against Drunk Driving, newspaper opinion pieces railing against drunken behavior, public polling data,²³⁷ and other signs that alcohol has strong moral connotations in society today.²³⁸ A court would probably be convinced that it is more likely than not that alcohol use is morally suspect.

Sarah would then need to offer a modicum of proof that her trait is not one of propensity. She could possibly claim that she normally drinks at home and therefore the situations are dissimilar. The prosecution would likely respond that the trait is specific (ingesting alcohol in extremis), similar enough (both the alleged and the past conduct involved drinking alcohol and they both happened at night, even if not in the same location), numerous (Sarah drinks often), and temporally relevant (her trait has not disappeared). In addition to these factors, or in place of them, the State might bring evidence of a medical condition or genetic predisposition for alcoholism to prove propensity. These proofs appear to be enough to cross the threshold. With both burdens met, the trait is deemed character, and the court would apply Rule 404.

Of course, a few facts might be changed (such as temporal proximity of the prior behavior to the alleged conduct and the numerosity of incidence) and perhaps the standard would tell us that there is no propensity in Sarah’s alcohol use, resulting in its exclusion as unfairly prejudicial. However, the fact that those few changes could create a different outcome shows the effectiveness of the standard. It is clear and easy to apply, and, at the very least, forces a court to reveal why it has found the trait to implicate character concerns. Not only would this enable appeals courts to better review trial court evidentiary decisions for abuse of discretion, but it would also enable litigants to assess the viability of

²³⁷ Courts should take care to not rely on public polls as a decisive factor, as presumably polls can be crafted to return whatever answer the pollster wants.

²³⁸ To prevent a deluge of evidence every time a party attempts to prove morality, a court might restrict the number of sources to force parties to produce only the most compelling proof.

their proofs before trial, prepare to either offer or attempt to exclude character evidence, and generally reduce the possibility of surprise.²³⁹

As discussed above, under this standard, the character determination does not depend on if Sarah has a genetic predisposition, acquired addiction, or character trait for alcoholism. In any of these three instances, the proposed standard classifies the trait as character.²⁴⁰ The important consideration is not actual voluntariness, but rather what a jury perceives to be voluntary choice. If alcohol abuse has deeply negative moral weight in the community, then it will not matter why Sarah drank to excess; the jury may believe that Sarah is a bad person and so be prejudiced regardless of the truth about her alcoholism.²⁴¹ The goal of the standard is to reduce actual prejudice from the jury's perspective, not to exclude only that evidence that should be prejudicial. Therefore, as long as the propensity and moral prongs are proven by their respective party, the evidence should be handled as if it were character proof. In this way, the standard solves the conundrum that courts have long faced: how to distinguish between mental characteristics and character traits.²⁴²

So the proposed standard once again comes to the "correct" conclusion, in the sense that it has excluded deeply prejudicial evidence with more, and clearer, reasoning from the court than would otherwise have been provided. One final example is in order. Sexuality and sexual orientation are issues of "increasing importance" and there is "no easy or apolitical answer [to]...whether or not [they

²³⁹ See, e.g., *State v. Morishige*, 652 P.2d 1119, 1126 (Haw. 1983) ("[A] defendant cannot be expected to be prepared 'to defend himself against the evidence of collateral crimes'" (quoting *State v. Laukea*, 537 P.2d 724, 729 (Haw. 1975)); PARK, ET AL., *supra* note 36, § 5.04 (stressing the "unfairness of surprise" as a key justification for the character evidence ban).

²⁴⁰ This is no small distinction, for if a trait is a medical condition and not character evidence, then it is not barred by Rule 404 and "directly provable by evidence of symptoms." *Parisie v. Greer*, 705 F.2d 882, 900 (7th Cir. 1983).

²⁴¹ This is not to say that, in the future, the relevant community might not gain an appreciation for alcoholism as a genetic predisposition that carries no moral weight. In that case, the prosecution could present evidence to rebut Sarah's morality prong argument, possibly leading a court to find only the propensity component satisfied and landing the trait in the habit category.

²⁴² See, e.g., *Parisie*, 705 F.2d at 900-02 (analyzing whether homosexuality is a medical condition or a trait of character).

are] part of...character.”²⁴³ Courts are even now wrestling with determining how to classify sexuality.²⁴⁴ A truly difficult test will be if the proposed standard can find a home for a trait of sexuality.

Jamie is a female who has had other female sexual partners in the past, but is currently in a stable heterosexual relationship. If called to testify, members of the community would state that Jamie had a reputation nearly ten years ago for having lesbian partners over to her home at night. In a neighboring town about 15 minutes away, a woman is raped in the middle of the day by an unknown female assailant. After being arrested, Jamie is charged and the prosecution seeks to introduce evidence of her past sexual partners to insinuate that she is the rapist. Her lawyer initiates a timely objection.

The judge would begin by asking Jamie to prove the moral component.²⁴⁵ Jamie could argue that, while homosexuality is not, and has never been illegal, certainly homosexual conduct was a crime in most states until recently. Furthermore, she could offer evidence that homosexual marriages are still prohibited most places, and the military’s ban on openly gay service members was only recently ended. Jamie could also offer evidence of religious groups’ virulent opposition to homosexual activity and life-

²⁴³ WRIGHT § 5233.

²⁴⁴ See, e.g., *United States v. McGee*, No. 93-7503, 29 F.3d 625, *4 (5th Cir. 1994) (analyzing the “reputation for homosexuality”); *United States v. Whalen*, 940 F.2d 1027, 1034 (7th Cir. 1991) (upholding district court’s exclusion of evidence of a homosexual propensity under Rule 404); *Parisie*, 705 F.2d at 900-01 (noting that “[t]here is no consensus even in the medical and psychiatric communities whether homosexuality is a character trait” before ruling evidence of homosexual propensity by the victim admissible under the Sixth Amendment); *Cohn v. Papke*, 655 F.2d 191, 193 (9th Cir. 1981) (holding inadmissible evidence tending to show “it was within Cohn’s character to commit homosexual acts”); *State v. Rivera*, 733 P.2d 1090, 1100 (Ariz. 1987) (“Evidence of homosexuality generally has been treated as character evidence.”); *State v. Treadaway*, 568 P.2d 1061, 1066 (Ariz. 1977) (analyzing a doctor’s medical opinion as to the nonviolent personality of homosexuals as evidence of character); *State v. Rushing*, 541 N.W.2d 155, 163 (Wis. Ct. App. 1995) (Myse, J. concurring) (using “character evidence demonstrating the character trait of homosexuality”). In one odd case, a military court admitted proof of a servicemember’s heterosexual conduct as evidence of good character to rebut charges of homosexual proclivities, finding that “it is sufficient for our purposes merely to state that appellant’s heterosexual behavior has a moral component that could be viewed as either morally praiseworthy or condemnable.” *United States v. Gagan*, 43 M.J. 200, 203 (1995).

²⁴⁵ It seems distasteful to force Jamie to prove the moral conflict over a trait like this, but the burden to prove morality must remain with the objecting party to ensure the proper incentives.

style as third factor proof of strong moral weight to homosexuality. Altogether, it seems very convincing proof that sexuality is associated with morality by a significant portion of the community.

Jamie's burden of production might begin with a showing that she has had heterosexual partners since the time of her last homosexual relationship, to combat the inference of propensity.²⁴⁶ Additionally, by pointing to the dissimilar situations (the alleged conduct happened at midday, while her past conduct was at night; there is no evidence that she ever was violent to her partners; she was with her partners in her own house, not another city 15 minutes away), the lack of specificity (the "trait" of homosexuality is defined very broadly), the temporal gap (her last homosexual partner was ten years ago). The prosecution might respond by contending that the "trait" of homosexuality is specific enough (tendency to have relations with a same-sex partner), that her behavior happened on numerous occasions (assuming the witnesses can say this), and that her trait is inherently likely to repeat (as a sexual propensities are relatively strong).²⁴⁷ This is a close call given the totality of the evidence, but the balance of factors appears to weigh against a finding of propensity in this case.²⁴⁸ Here, the court would find morality but not propensity and exclude the proof as unfairly prejudicial.²⁴⁹

This case illustrates two advantages of the proposed standard: it refocuses the political question and it changes with the times. First, the judge is relieved of much of the onus of a political choice

²⁴⁶ These evidentiary showings would be outside the presence of the jury, so this rebuttal character evidence would not "open the door" to affirmative attacks on Jamie's character under Rule 404(a). Additionally, to prevent the standard from attracting its own moral connotations, it is helpful to think of Jamie's proffer of her heterosexual relationship in this case not as "good" character evidence, but rather simply as "rebuttal" evidence.

²⁴⁷ See Carter, *supra* note 213, at 231-32.

²⁴⁸ While this fact-pattern resulted in no propensity, another critique of "sexuality as character trait" could be that sexuality cannot be a trait of character: traits can change, but sexuality is immutable. However, the immutability of sexuality is still a matter for debate. See Pepper Schwartz, *The Science of Sexuality Still Needs Social Science*, THE SCIENTIST, Feb. 6, 1995, at 12. See generally Momin Rahman & Stevi Jackson, *Liberty, Equality and Sexuality: Essentialism and the Discourse of Rights*, 6 J. OF GENDER STUDIES 117 (1997); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

²⁴⁹ Indeed, exclusion of evidence of homosexual propensity may occur regardless of if it is deemed character or not. See, e.g., *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988) ("Evidence of homosexuality is extremely prejudicial."); *State v. Lovin*, 454 S.E.2d 229, 236 (N.C. 1995) (holding evidence of homosexual proclivity inadmissible under state equivalent to Rule 403).

because he or she will decide the question based on society's views of the subject, not his or her own. Although there remains the opportunity to import personal beliefs into the analysis (as with any judicially-administered test), the standard at least permits parties to argue their respective sides in court and allows judges to address the question straightforwardly under the morality component and list factors in a reasoned judgment.

Second, the standard houses a built-in sunset clause. As discrimination toward homosexuals fades into the past and society becomes more accepting of same-sex orientations, the standard can incorporate new views on morality into the moral component. Eventually, moral opprobrium may reduce to the point where sexuality becomes simply a "personality trait" not subject to the character evidence prohibition. Of course, it may work the other direction, too. If a previously morally-neutral trait gains bad moral overtones, then a court would be more likely to exclude it as the negative connotation grew.

Conclusion

The purpose of this Paper was to conceptualize character and propose how courts could face the unenviable task of determining character evidence. In order to do so, this Paper first reviewed how the Federal Rules of Evidence function in relation to character proof. Because the law of evidence is at the crossroads of psychology, philosophy, and the law, the Paper then surveyed relevant scholarship to establish the two components of character evidence: propensity and morality. After identifying what character is not in order to establish a conceptual space, it then proposed a manageable, clear standard for courts to apply when determining if a trait is, or is not, character.

Character is still an elusive concept and difficult to precisely define; the standard proposed by this Paper has not changed that. However, by separating objective propensity from subjective morality and the relevance from the prejudice, the standard will disentangle courts' currently muddled character

evidence analysis and disenthral judges from their attempts to apply confusing and vague definitions in a meaningless way. It will permit them to *determine* character rather than attempt—and too often fail—to *define* it. Enumerating specific factors and weighing them according to proof provided by each party will permit courts to make reasoned and logical decisions about what a jury should hear and what it should not, while still taking into consideration both the objective logical relevance and the subjective morality of society. This new standard will be one small, but important, step toward bring some rationality to the “grotesque structure” of character evidence.²⁵⁰ Hopefully, by application of this standard or one like it, judges like Chief Justice Montgomery will finally be able to determine “what [character] includes and what it does not.”²⁵¹

²⁵⁰ *Michelson*, 335 U.S. at 486.

²⁵¹ *Williams*, 117 N.M. at 563 (Montgomery, C.J. concurring).