

Character, Liberalism, and the Protean Culture of Evidence Law*

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I. INTRODUCTION

It is time to rethink character evidence. Long notorious as the most frequently litigated evidence issue, character doctrine plagues courts, trial lawyers, and law students with its infamously “grotesque” array of

nonsensical rules, whimsical distinctions, and arcane procedures.¹ Most troubling is our confusion over the very notion of character itself.

What is character? Some legal authorities leave the word undefined. Others profess not to know what it means, a troubling concession because character is a core concept of evidence law. Still others ponder whether character carries a “moral” element—“honesty” qualifies but being a “good driver” does not. Many commentators, perhaps most, see character as a psychological conceit, a kind of psychic nugget that drives or determines human conduct. They posit that current evidence law is based on an outmoded school of psychology, so-called “trait theory,” which must be replaced by cutting-edge psychological or neuroscience research.²

The legal profession is not alone in its consternation over character. Historians often speak about a “national character” or a “type” of person,³ sometimes serving up hazy distinctions between an individual’s “private side” and more visible “public side.”⁴ Character, then, offers useful generalizations about human conduct that are widely accepted, readily understood, and yet left conveniently vague in a host of settings.

Simply stated, character, like race, is a social and cultural construct.⁵ The assumption that character is or should be grounded in psychology or any science is unwarranted and inaccurate. Character, as we will see, is a function of our popular culture. Character consists of labels and names—sometimes ugly (e.g., “lazy”)—that are often expressed in the crude vernacular of everyday life. They are also contingent, differing among groups based on region, class, ethnicity, race, and religion. Their crudeness, fluidity, and amorphousness readily explain why evidence law has had such great difficulty defining character and so little regard for its probative value as proof of past events.

1. See *Michelson v. United States*, 335 U.S. 469, 486 (1948), discussed at *infra* text accompanying notes 61–62 and 280–296.

2. See *infra* text accompanying notes 318–325.

3. See David Brooks, *The Rediscovery of Character*, N.Y. TIMES, Mar. 6, 2012, at A27 (emphasizing that character is “formed in groups” and inculcates “self control”); see also J. Birnbaum, J. Elson & L. Morrow, *Busybodies & Crybabies: What’s Happening to the American Character?*, TIME, Aug. 12, 1991, at 14 (cover story).

4. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 37 (1993). These noted historians also puzzle over character’s evolution from a public “reputation” to an individual’s “personality.” *Id.* Historians often portray the nation’s founding through the character of its “fathers,” though the term is left undefined. *E.g.*, JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* (2010); GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006).

5. See JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 307 (2005).

In sum, character is a calculation of social worth and value; it is the sum total of what others think of us, whether expressed as their own opinion or the collective opinions of many (reputation). Once we grasp that character is a social construct, we are in a better position to address some of the problems that plague evidence law. For example, evidence law's purported ban of character evidence is futile and misguided—character is hardwired into our social relations. Moreover, character's bases are changing in important and yet unexplored ways. Social media, for instance, now equals the backyard fence. The law must account for it.

To provide needed clarity in evidence law, a historical, more contextualized understanding of character is essential. To that end, this article develops three themes.

First, it reviews the doctrinal and policy issues that have famously plagued character evidence, with an eye toward their origins. Even today, doctrine formulated in the early nineteenth century is embraced without an adequate understanding of how this context affects evidence law and trials.

Second, it explores evidence law's historical contingency, which is dependent upon prevailing cultural, economic, and social conditions. Modern "character" reflects middle-class values that first emerged in the nineteenth century and that remain a dominant, though contested, feature of American culture. In sum, the very meaning of "character" has dramatically changed over time despite the law's penchant for treating it as a timeless abstraction. Evidence law's roots in lay culture are underappreciated and frequently ignored, especially by those looking to science for answers.

Third, "character" has changed over time because it is often a cultural, social, and ideological battleground. Rents in the social fabric are often expressed in cultural struggles over values and ideas, as best seen in the recent "Occupy" movement.⁶ This social and cultural divide, particularly criticisms of middle-class values, contributes to the law's angst over character's meaning and, perhaps, the law's yearning for a scientific solution. Struggles over character reflect broad, deep, and significant concerns about human autonomy and liberal values, which are underplayed in legal scholarship.⁷ Put differently, character law models a set of liberal values that are stridently contested today.

Part II of this article illustrates the diverse ways character proof arises at trial through three episodes. The first episode involves the use of celebrity character witnesses (e.g., Theodore Roosevelt) to influence a

6. See e.g., OCCUPY WALL ST., <http://occupywallst.org/> (last visited Aug. 21, 2013).

7. See discussion *infra* Part V.

trial's outcome. The second episode draws from *Michelson v. United States*, a 1947 case famous for Justice Robert Jackson's elucidation of all that is "grotesque" about character evidence. The third episode draws from a recent New York murder trial as recounted by one juror, a prominent historian of science who finds the law's disdain for character "quixotic" and "perverse."

Part III explores how modern law treats character proof. Although rules prohibit most uses of character as propensity evidence, they are riddled with exceptions and frequently evaded. Demeanor and "background" evidence effectively permit character proof to operate *sub rosa* at trial.

Part IV is the article's core, exploring the changing social and cultural meaning of "character" over time and its related role in trials. More specifically, it contrasts the dramatic shift in the meaning of character in the eighteenth and nineteenth centuries—from one's place in a rigid social hierarchy to the now familiar middle-class values of "self-culture" and "self-improvement" that served a burgeoning market economy, a fluid society, and a democratic polity. Quintessentially liberal and dominating both scientific and popular thought, the new character model celebrated autonomy and free will. A seismic shift also occurred in the trial. The eighteenth-century trial gave prime importance to character. Yet the modern trial, specifically its evidence rules, purportedly banished character largely in the name of controlling jury factfinding and irrespective of character's significance socially and culturally.

Part V discusses contemporary legal doctrine in a historical context. The Federal Rules of Evidence largely retain the common law's "quixotic" approach that "perversely" prohibits character as propensity evidence while otherwise assuming an identity between legal and popular conceptions of character.⁸ Legal critics, however, are uncertain about character's meaning in the wake of attacks upon middle-class values since the late 1960s and the culture wars of the last two decades. In sum, liberal values long embedded in evidence law are in flux and at times bitterly contested. Science beckons in the absence of social consensus as character (social "types") morphs into "personality" (individuals as "unique" beings). The problem is that the link between character and culture passes unrecognized.

Part VI concludes by discussing the implications of recognizing and embracing character's social and cultural nature for trials and evidence law. "Character" is not a scientific construct, nor should we swap "per-

8. See discussion *infra* Parts III.A., V.A.

sonality” for character.⁹ Above all, the law should not turn its head from the reality that character permeates trials regardless of rules that wish it away. Rules also must accommodate today’s fluctuating values. For example, it is suggested that the foundations for opinion and reputation be given greater rigor, that social media be taken into account when assessing the subject’s character, and that serious thought be given to jettisoning outmoded constructs such as the exquisitely Victorian notion of “truthful character.”

II. CHARACTER PROOF AT TRIAL: 3 EPISODES

How is character used at trial? Why is it offered? Below are three instances, drawn across time, that illuminate the roles character plays at trial.

The first episode involves celebrities used as character witnesses in a highly publicized case. It illustrates how and, perhaps, why character serves as a proxy for social standing—why who you are is as important as what you did. The second episode focuses on one of evidence law’s most famous cases, *Michelson v. United States*, in an effort to better understand the common law’s technical labyrinths in an otherwise run-of-the-mill prosecution. *Michelson* especially reveals the pitfalls of opening doors to character that perhaps should remain closed. The third episode also involves a routine case, this time a homicide, but one in which the parties presented no character evidence as such. It reveals, however, that juries, like judges and lawyers, search for character proof regardless of what evidence is presented to or withheld from them.

A. *Theodore Roosevelt and the Character Witness As Celebrity.*

Financial scandals are familiar occurrences in United States history that inevitably attract public interest. In 1915 scandal rocked the venerable Riggs Bank of Washington, D.C., when bookkeeping irregularities surfaced and authorities suspected self-dealing by insiders. The investigation led to perjury charges against C.C. Glover, the bank’s president, and several other employees.¹⁰ Glover’s business relationships and active involvement in the D.C. community brought him into contact with some of the nation’s most prominent men, connections that proved useful when the case against him went to trial in May 1916.

Because the Government sought to take Glover down in a public prosecution, the defense capitalized on Glover’s long list of prominent

9. See DANIEL WALKER HOWE, MAKING THE AMERICAN SELF 122 (1997).

10. *Colonel Praises Accused Bank Men*, N.Y. TIMES, May 24, 1916. One suspects the prosecutors settled on perjury charges because they could not prove criminal conduct connected to the accounting irregularities.

admirers. United States senators, former ambassadors, church leaders, newspaper executives, and even the head of the Smithsonian Institution testified to Glover's good character.¹¹ Former President William Howard Taft praised Glover while also "caus[ing] laughter," a good omen for Glover.¹²

The character testimony provided by another former President, Theodore Roosevelt, provided the trial's centerpiece. Anticipating Roosevelt's appearance, the *New York Times* ran a story the morning Roosevelt testified.¹³ Crowds "enthusiastically" cheered Roosevelt on the streets as he approached the courthouse.¹⁴ When Colonel Roosevelt entered the courtroom more "shouts . . . echoed far down the corridors of the old building and out to the curb."¹⁵ For good effect, his oldest daughter, the popular and effervescent Alice Longworth, accompanied the Colonel and watched her father's testimony, along with many other "well known Washington society women."¹⁶

Roosevelt's testimony did not disappoint.¹⁷ When called to the stand, the Colonel solemnly "bowed low" to the judge. Asked his occupation, the Colonel responded simply, "Writer," which, according to the *New York Times*, "produced a ripple of merriment over the court room."¹⁸ The laughter represented no disrespect to the court or to the immodest Roosevelt.¹⁹ The jury required no introduction to Colonel Roosevelt, who fought bravely and famously in Cuba in 1898, served as President of the United States from 1901 to 1909, and ran again for the presidency on the Bull Moose ticket in 1912, the most successful third-party showing in American history to this date. And at the time of the trial, Roosevelt publicly contemplated running against President Woodrow Wilson later in 1916 because Wilson refused to fight the Germans in the Great War.²⁰ In sum, the defense had offered as a character witness one of the most significant men in the United States and even the world.

11. *Id.*

12. *Head of Riggs Bank Is Praised by Taft*, N.Y. TIMES, May 16, 1916.

13. *Roosevelt on Stand in Riggs Case Today*, N.Y. TIMES, May 23, 1916.

14. *Colonel Praises Accused Bank Men*, *supra* note 10.

15. *Id.* Glover's lawyer, according to the newspaper account, referred to Roosevelt as "Colonel" during the direct examination. After leaving the presidency in 1909, he preferred to be called "Colonel Roosevelt." EDMUND MORRIS, COLONEL ROOSEVELT 11 (2010) (Roosevelt "cherished" the title "colonel" because it reflected his rank in the Reserve Army and his martial bravery while fighting in Cuba during the Spanish-American War).

16. *Colonel Praises Accused Bank Men*, *supra* note 10. For Alice Longworth's own sensational personality, see MORRIS, *supra* note 15, at 61–62.

17. See *Colonel Praises Accused Bank Men*, *supra* note 10.

18. *Id.* Roosevelt had an excellent sense of humor and was a successful writer. MORRIS, *supra* note 15, at 63–64, 256.

19. On Roosevelt's ego, see MORRIS, *supra* note 15, at 187.

20. For Roosevelt's flirtations with the 1916 election, see *id.* at 456–57.

In assessing Roosevelt's character testimony, it is difficult to separate the witness's outsized personality from the substance of his testimony²¹—which was clearly the whole point of calling him in the first place. Whatever the trial judge's lawful authority, the Colonel assumed command. Using humor to underscore his confidence in Glover, he cracked that he did not know whether Glover voted for Taft or Wilson in 1912 but knew "he was against me."²² The judge, jury, and spectators laughed.²³ Yet, at one point, the plainly irritated judge warned the audience against further laughter after Roosevelt seemed to poke a little fun at the law, if not the judge.²⁴ The exchange came when the government objected that Roosevelt was straying too far from reputation and into his "personal confidence" in Glover. In a soft voice, the judge ruled that the Colonel should confine himself to "his general opinion of the man for the purpose of establishing his reputation and character" In response, Roosevelt "snappingly" chortled: "My general knowledge of Mr. Glover by common repute, by universal repute, was that his business integrity was such that naturally I and my children kept our accounts in his bank."²⁵ Such testimony obliterated any line between Roosevelt's personal opinion of Glover and Glover's ostensible reputation in the community. When the prosecutor moved to strike the Colonel's answer, the judge "mildly" responded that the testimony would stand.²⁶

Clearly, neither the Colonel nor Glover's defense lawyers felt much need to confine the Colonel's character testimony to desiccated observations about Glover's reputation. Roosevelt spoke of Glover as a "public spirited citizen" with whom Roosevelt consulted "at length about Rock Creek Park, the Potomac Park, and the small parks of Washington," among other civic matters. Roosevelt traced his relationship with Glover back to the 1890s and Roosevelt's short time as vice president before the assassination of President William McKinley in 1901.²⁷ "[I]ntimate socially" with Glover, Roosevelt claimed a "thorough knowledge of his business and financial integrity and standing." Asked to describe their social relationship, the Colonel responded:

21. Discussing the Colonel as a possible opponent in 1916, Woodrow Wilson sagely observed that "Roosevelt deals in personalities and does not argue upon facts and conditions." *Id.* at 456 (internal quotation marks omitted). The same might be said about his testimony in Glover's case.

22. *Colonel Praises Accused Bank Men*, *supra* note 10.

23. *Id.* (warning the audience: "This is a court"). The 1912 election saw Wilson as the Democratic candidate, Taft as the Republican candidate, Roosevelt as the Bull Moose Party (Progressive) candidate, and Eugene Debs as the Socialist candidate.

24. *Id.*

25. *Id.* On Roosevelt's distinctive diction and voice, see MORRIS, *supra* note 15, at 238–39.

26. *Colonel Praises Accused Bank Men*, *supra* note 10.

27. *Id.* Roosevelt was elected vice president in 1900. McKinley died in September 1901.

Mr. Glover was often a guest at our house, including being often a guest while I was at the White House. My children went frequently to his home, especially to his Summer home. They were continually there. I know Mr. Glover very well socially, and especially in connection with his philanthropic work.²⁸

He underscored that their relationship was not political—which provoked his joke about Glover’s vote in 1912—but rather “social, business and in connection with philanthropy.”²⁹ His confidence in Glover’s integrity knew no bounds: “In business matters I kept my account at his bank and one or two, or two or three of my children kept separate accounts there, keeping the accounts there because of his financial integrity.”³⁰

Roosevelt then spoke about the other two defendants in a “somewhat similar encomium.”³¹ These men, he said, “had risen from the lowest places in the bank right to the highest by sheer force of ability, industry, and integrity, and their reputation was a fine symbol of what could be done under American conditions of life”³² Understandably unclear about the fine line between reputation and opinion, he admitted that he knew both “gentlemen personally but slightly.” Roosevelt then asked, “Is that proper, Judge?”³³ And the judge answered affirmatively; by this point, the jury had heard Roosevelt’s opinions anyway. Defense counsel’s final question for Roosevelt asked whether the Colonel appeared in court of his “own volition.”³⁴ Sensing a perfect exit line, the Colonel smiled broadly and said, “And most gladly.” Apparently, the prosecutor attempted no cross-examination of the Colonel.³⁵

The trial lasted several more days before the jury “hastened” to acquit Glover and his two co-defendants.³⁶ It is difficult to know what role the character testimony played in the acquittal. Did it simply underscore doubt arising from the evidence or was it pivotal? Clearly, Roosevelt’s titanic reputation overshadowed Glover’s. The Colonel’s testimony, like that of Taft and other luminaries, did much more than provide information about what kind of men the defendants were; rather, they effectively told the jurors that they had nothing to fear for their own reputa-

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (internal quotation marks omitted).

34. *Id.*

35. *Id.* (making no mention of any cross-examination). One sympathizes with the prosecutor’s reluctance to cross-examine Roosevelt.

36. *Riggs Bank Heads Found Not Guilty*, N.Y. TIMES, May 28, 1916.

tions or self-respect in acquitting Glover of perjury: The jurors stood in good company in thinking the defendants were innocent.

More fundamentally, we see that character, borne of myriad social relationships and expressed in the argot of daily life, resists the law's stilted protocols and shallow distinctions between "reputation" and "opinion." Roosevelt comfortably folded his personal opinions of the defendants into their reputations in the community while sprinkling his opinion with specific examples of good conduct (e.g., Glover's work on parks). Even the judge blurred the two, instructing the Colonel to provide his "general opinion for purpose of establishing reputation and character." The nouns and adjectives that describe character are drawn from familiar social and business relationships. Glover was a man of high "business integrity" and a "public spirited citizen," his codefendants were men of "ability, industry, and integrity." Coming from a man of Roosevelt's accomplishments, who was also famous for defending his own good character, Roosevelt's assurances likely carried great weight with the jury.³⁷

B. The Michelson Case: The Perilous Banality of Character Evidence

Unlike C.C. Glover, most criminal defendants are unable to summon a bevy of former presidents, senators, and the like to testify on their behalf. Illustrating the modest end of the character-evidence spectrum, we have *Michelson v. United States*,³⁸ a run-of-the-mill prosecution that nonetheless yielded what remains a seminal case even after six decades.³⁹ Here, our focus is on how character proof was used at trial; later, we will examine *Michelson's* doctrinal and policy analysis.⁴⁰

The government indicted Michelson for bribing a federal revenue agent in 1946.⁴¹ The agent testified that Michelson offered a bribe in exchange for a break on his taxes. The two met in a New York hotel, where

37. About this same time Roosevelt litigated two cases in defense of his own character. MORRIS, *supra* note 15, at 277–82, 405–24. Glover's trial is not an anomaly. Trials today occasionally feature celebrity character witnesses. In defending himself against charges of governmental corruption, Senator Ted Stevens of Alaska called Colin Powell and Hawaii Senator Daniel Inouye as character witnesses. *Colin Powell Goes to Bat for Stevens*, CBS NEWS (Feb. 2, 2009), http://www.cbsnews.com/2100-201_162-4513344.html.

38. 335 U.S. 469 (1948).

39. *E.g.*, RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 351 (6th ed. 2007) ("the leading Supreme Court precedent").

40. *See infra* text accompanying notes 280–296.

41. Michelson was tried on two related counts, one for "bribing" the agent and another for "offering" the bribe. The court of appeals reversed his conviction on the latter count. *See United States v. Michelson*, 165 F.2d 732, 734 (2d Cir. 1948) (reversing the "offering" count for lack of venue). Only the bribery count was before the Supreme Court. *See Michelson*, 335 U.S. at 470 n.1.

Michelson turned over \$5,000 in a bag.⁴² There was no dispute over the payment, only what induced it.

In his defense, Michelson testified that he was the victim of a shakedown, claiming that he turned over the cash in response to the agent's "demands, threats, solicitations, and inducements."⁴³ On direct examination, Michelson's lawyer had him testify to a 1927 conviction for a misdemeanor involving counterfeit watch dials. Why? Knowing that the prosecution would elicit the 1927 conviction on cross-examination anyway, Michelson's lawyer likely attempted to soften the blow by disclosing it first, thereby eliminating some drama and emphasizing his client's candor.⁴⁴ Nevertheless, on cross-examination, the prosecution forced Michelson to admit that he had answered "no" on a 1930 license application for vending second-hand jewelry that asked if he had ever been "arrested" for a crime.⁴⁵ The prosecution thus suggested that Michelson was candid only when it served his purposes.

To further enhance his credibility, Michelson called five character witnesses "to prove that he enjoyed a good reputation."⁴⁶ Apparently, they lacked Roosevelt's standing and talent for bombast. The appellate opinions reveal nothing about their identity, background, or calling except that two of them had known Michelson for thirty years and others "at least half that long."⁴⁷ The Court further homogenized the character witnesses by providing "representative" passages from their testimony. Three testified that Michelson's reputation "for honesty and truthfulness and for being a law-abiding citizen" was "good" and "very good."⁴⁸ Limited to reputation alone, unlike Colonel Roosevelt in the preceding example, they provided no details about Michelson or his reputation. Two other character witnesses testified "that they had never heard anything against Michelson."⁴⁹

On cross-examination, the prosecution exploited its latitude to bring out specific acts of bad behavior that suggested Michelson's dishonesty,

42. *Michelson*, 165 F.2d at 733–34 (describing the agent's testimony).

43. *Michelson*, 335 U.S. at 471.

44. See J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS & ETHICS* 257–58 (2d ed. 1993) (discussing "inoculation"). Michelson's 1927 conviction was admissible under common-law rules permitting impeachment by prior criminal convictions. See *infra* text accompanying notes 99–109.

45. See *Michelson*, 335 U.S. at 471. The Second Circuit's opinion provides a bit more context. By asking about Michelson's omission, the prosecutor showed that Michelson was not as forthcoming as he professed. See *Michelson*, 165 F.3d at 735.

46. *Michelson*, 335 U.S. at 471.

47. See *id.* At least one character witness was a woman. *Id.* at 472 n.3.

48. *Id.* at 471–72.

49. *Id.* at 472.

untruthfulness, and “non-law-abiding” conduct.⁵⁰ The prosecutor asked four of the character witnesses a stilted question about Michelson’s 1927 conviction, which Michelson himself had laid before the jury:

Did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trademark law in New York City in regard to watches?⁵¹

Two character witnesses had heard of it and two had not, but the net result was that the jury heard about the 1927 conviction four more times. Moreover, the question was couched to emphasize Michelson’s willingness to break laws for his own profit. Yet the prime contention in *Michelson* was this question, asked of four witnesses:

Did you ever hear that on October 11th, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?⁵²

“None of the witnesses,” said the Court, “appears to have heard of this.”⁵³ Put differently, there was no evidence in the trial record of the 1920 arrest because no witness testified to knowing about it or even hearing of it. Nor does it seem that Michelson himself testified about it.⁵⁴

Yet the jury heard the question four times, and the trial judge’s instructions repeatedly emphasized the allegation while ostensibly educating the jury about the questions’ limited purpose. The judge gave three limiting instructions—two in response to objections and the last during the final charge to the jury.⁵⁵ When overruling the first defense objection to the 1920 arrest question, the trial judge lectured the jury:

I instruct the jury what is happening now is this: the defendant has called character witnesses and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness’ standard of opinion of the reputation of the defendant is being tested. Is that clear?⁵⁶

50. Michelson had apparently offered these traits on his own behalf.

51. *Id.* The Court said that the four witnesses were asked “in substance” the question quoted in the text, so the wording may have varied somewhat.

52. It is not clear why only four of the five character witnesses were asked this question, nor is it clear whether they were the same four queried about Michelson’s 1927 conviction.

53. *Michelson*, 335 U.S. at 472.

54. The prosecution had a “paper record” of the arrest, which established its good faith basis for asking the question. Defense counsel did not “challenge” the prosecutor’s good faith. *Id.*

55. *Id.*

56. *Id.* at 473 n.3 (quoting the trial judge’s instruction).

One suspects the jurors obligingly nodded their heads in assent, yet the need for three such instructions only underscores the sophistry at work.⁵⁷ In his final charge, the judge again admonished the jury that questions about the 1920 arrest served only “to test the standards of character evidence” and that there was no “proof . . . before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods” Whatever the niceties of formal evidence, the trial judge effectively confirmed Michelson’s 1920 arrest when he instructed that the jury should not “hold [it] against him” or “assume what the consequences of that arrest were.” Didactically, the judge closed by telling the jury to “just drive it from your mind so far as the defendant [Michelson] is concerned, and take it into consideration only in weighing the evidence of the character witnesses.”⁵⁸

The jury convicted Michelson, but did it heed the judge’s instructions? The court of appeals was under no such illusion. Declaring that “the jury almost surely cannot comprehend the judge’s limiting instruction” that purportedly distinguished “between rumors of such conduct as affecting reputation, and the fact of it,” the Second Circuit asked the Supreme Court to restrict such cross-examination at least to “offenses similar to those for which the defendant is on trial.”⁵⁹ Prosecutors had exploited the rules “for purposes of injuring by indirection a character which they are forbidden directly to attack in that way.”⁶⁰

The Supreme Court refused to modify the common law rules of character evidence at issue in *Michelson*. Although famous for Justice Jackson’s didactic tour of this “grotesque structure,”⁶¹ *Michelson* stands as a vivid example of how able trial lawyers exploit sophistic rules. The case turned on Michelson’s word against that of the revenue agent. If Michelson’s hope was to portray himself as a person worthy of belief or, at minimum, a person who did not merit conviction, the trial record nonetheless cast him in an oily, disreputable light. He offered evidence of his honesty, truthfulness, and law-abidedness, yet the jury heard five references to the 1927 conviction and seven references, counting jury

57. The defense’s second objection, also overruled, prompted a second instruction that the judge delivered extemporaneously, intending a colloquy of sorts with the jury. The judge asked jurors if they understood that “nothing” proved the 1920 arrest; rather, witnesses were only being asked if they had “heard of that.” *Id.*

58. *Id.*

59. *Id.* at 473 n.4 (quoting the Second Circuit). The Second Circuit had further observed that cross-examiners do not care that their questions are answered “negatively,” as the whole point is “covert insinuation” of the unproven bad act. *Id.*; see also *United States v. Michelson*, 165 F.2d 732, 735 n.8 (2d Cir. 1948)

60. *Michelson*, 335 U.S. 469, 486 (1948).

61. *Id.*

instructions, to the 1920 arrest.⁶² Still, it was Michelson who elected to proffer his good character in the first place. When Michelson opened the door, the prosecution obligingly pelted his character with rotten eggs. Simply put, Michelson had no Theodore Roosevelt to stand between him and the Government as a protector.

C. “Quixotic” Rules and Backdoor Character

Did the jury understand and follow the judge’s abstruse lecture on character evidence in *Michelson*? Cases and commentators say no, yet the law nonetheless assumes the jury did so with perfect comprehension and unquestioning fidelity.⁶³ This next episode casts even more doubt on the law’s complacent assumptions, illustrating that juries will look for character regardless of whether formal character proof is offered. In its absence, the jury will use whatever clues about character that may be available, just as lay people do in everyday life.

In 1998 Randolph Cuffee was stabbed to death in his New York City apartment. Police quickly arrested Monte Milcray, who initially denied any involvement before admitting that he had stabbed Cuffee to death, supposedly in self-defense. In his revised story, Milcray claimed he mistook the male Cuffee for a female prostitute who had invited Milcray to her apartment. Once there, Cuffee attempted to sexually assault Milcray. The two struggled, and Milcray stabbed Cuffee numerous times. Milcray fled the apartment, leaving Cuffee to die. At trial, the jury acquitted Milcray of homicide. The jury, it appears, was not convinced of Milcray’s innocence or his credibility; rather, it found that the State had not disproved Milcray’s self-defense claims beyond a reasonable doubt.⁶⁴

The jury foreperson was D. Graham Burnett, whose book *A Trial by Jury* insightfully looks at problems of proof and jury deliberations in a criminal trial.⁶⁵ Burnett, an academic skilled in finding historical truth, specializes in the history of science at Princeton University. Burnett reveals in the messiness of the factual record and the competing, sometimes

62. The five references to the 1927 conviction include Michelson’s direct examination plus the four cross-examinations of his character witnesses. As for the 1920 arrest, four of his character witnesses were also cross-examined about this event, but more damage was probably done by the judge’s three instructions.

63. See *infra* text accompanying notes 119–120, 128.

64. D. GRAHAM BURNETT, *A TRIAL BY JURY* 165 (2001).

65. *Id.* Burnett stood behind the verdict. See D. Graham Burnett, *A Juror’s Role*, U.S. DEP’T OF STATE (July 1, 2009), <http://iipdigital.usembassy.gov/st/english/publication/2009/07/20090706171428ebyeessed09.407771e-02.html#axzz2cjpCsIX8>. For reviews see e.g., Carl T. Bogus, *A Verdict on the System*, THE NATION, Nov. 21, 2001; Jeffrey Rosen, *A Room with a View*, THE NEW REPUBLIC, Nov. 19, 2001, available at <http://www.newrepublic.com/article/politics/room-view>.

inconsistent inferences that one can reasonably draw from the evidence.⁶⁶ On display throughout the book is Burnett's determination to uncover the historical truth behind the homicide.⁶⁷ An acute observer, he kept a journal of the trial, including the jury's three days of deliberations.⁶⁸ During those long, sometimes heated discussions, Burnett wrestles with his academic penchant to keep "the question open," to conduct jury deliberations as a seminar that risked "transform[ing] the actual trial of the veritable Monte Virginia Milcray—a thing with serious tooth in several people's lives—into but a bunch of words."⁶⁹ In the end, however, the jury's acquittal reflected its sensitivity to both the prosecution's burden of proof and the trial system's need for a final decision. Trials are not seminars. Milcray's jury worked hard to understand the tangled facts as best it could, eschewing "shortcuts, no matter how obvious they seem," in favor of the "long route."⁷⁰

Throughout *A Trial by Jury*, Burnett fulminates about the fictions and awkwardness by which the trial process purports to educate the jury about the "facts" of the case. Particularly offensive and unhelpful are the law's restrictions on character evidence. The paucity of information about the main actors, Cuffee and Milcray, exasperated Burnett:

From the start of the trial, this careful court practice—separating the admissible 'facts' of the case from inadmissible information about the 'characters' involved—struck me as more than quixotic; it was downright perverse.⁷¹

Who was Milcray? "That was the inescapable question. Was he a person whose account I could believe?" Had Milcray "been arrested a half a dozen times for shaking down gay men in the West Village?" The jury found it "infuriating[]" that it would hear such evidence—so they thought—only if Milcray testified. Jurors held similar questions about the victim, Cuffee. "Who was he?":

66. For Burnett's background, see *D. Graham Burnett*, PRINCETON U., http://www.princeton.edu/history/people/display_person.xml?netid=dburnett#profile (last visited Aug. 20, 2013).

67. One other juror was also an academic historian. See BURNETT, *supra* note 64, at 16.

68. See, e.g., *id.* at 128. The jury struggled very hard to get at the truth. *Id.* at 112 (recounting the jurors' attempt to reenact the fatal fight between Milcray and Cuffee).

69. *Id.* at 158.

70. *Id.* at 61–62. Burnett colorfully describes this as the jury's preference for "Ockham's knitting needles" over "Ockham's cold razor." Where the razor "cut[s] out everything but the necessary," the knitting needles were a very different "epistemological tool, more labor-intensive, more creative, better able to work with those tangles." *Id.* at 61.

71. *Id.* at 70.

We were being asked to believe that he resorted to physical violence in a ravenous sexual rage. Was he a person of whom such a thing could be thought?⁷²

“Information bearing directly on this question,” observed Burnett, “was essentially prohibited to us, by law.”⁷³ Blissfully unaware of the law’s many rationalizations for the character prohibition, not to mention the rule’s relative youth, Burnett eloquently lambastes it as “counterintuitive” from both the perspective of everyday common sense and historical methodology:

Somehow, in the history of jurisprudence, these issues—who people were, what they had done in the past—had come to be thought of as different in kind from the “facts” of a case, different from blood on the wall and reams of phone-company records. How had this idea gotten going, when it is was so counterintuitive? I was being asked to decide if a crime had occurred—in other words, if *someone* did *something* to *someone else*. How could the nature of either “someone” stand off-limits?⁷⁴

Apparently, the defense did not call character witnesses or otherwise make formal use of character proof. Milcray testified to his scant criminal record, providing some background about his personal history—education, employment, family, etc.⁷⁵ On cross-examination, the prosecutor ineffectually attacked Milcray with an innocuous fib he had told a Marine Corp recruiter about a shoulder injury. Ostensibly, prior lies and deceitful conduct are relevant to a witness’s credibility, yet lay jurors predictably use them to draw broader inferences about the “type” of person. And it is here that demeanor—the person’s presentation—is also used to gauge a person, particularly in the absence of additional “background.” In Burnett’s rendering, Milcray appeared “benign”; a “mild-mannered person—one with no history of violent crime”⁷⁶ As for Cuffee, the jury learned he was likely involved in “pimping” male es-

72. *Id.* at 71. (internal quotation marks omitted). Burnett’s criticisms about character evidence are targeted more at the law’s disdain for common sense reasoning than an academic preference for some reified historical method. For more information on his reference to cultural studies, including “Queer Theory,” see *id.* at 56–57.

73. *Id.* at 71.

74. *Id.* (emphasis in original).

75. *Id.* at 71–72 (although noting that Milcray had been involved in a “nonviolent [sic] robbery” in his early teen years).

76. *Id.* at 72. Demeanor seems central to the finding that Milcray was “apparently so benign – young and slight, well spoken with a handsome dark face.” *Id.* at 73–74. Asserting that “[t]he prosecution’s three key witnesses did test one’s intuitive sense of such things, each presenting a different riff on sexual nonconformity,” Burnett carefully describes the demeanor of these cross-dressers, who testified that Milcray and Cuffee had been “lovers” for some time. *Id.* at 51–52.

corts but little else about his life.⁷⁷ More salient, because of Cuffee's death, the jury could not use his demeanor as some measure of the man and as some clue to what may have occurred.

What role did such character proof play in the verdict? It is hard to know. The jury studiously noted the many inconsistencies and contradictions among the prosecution's witnesses and was particularly troubled by the absence of any motive.⁷⁸ The defense fared little better; Milcray's credibility had also been shredded. The prosecution, however, bore the burden of disproving the self-defense claim beyond a reasonable doubt. Credibility merged imperceptibly into a broader assessment of "who" these people were, as best the jury could determine. For both Milcray and Cuffee, the question was the same: Was he a person of whom such a thing could be thought?

The weight given character evidence—at trial and in everyday life—is illustrated by an incident just hours after the jury acquitted Milcray. A fellow juror excitedly called Burnett at home with news she had just learned from Milcray's lawyer. Prior to trial, the defense discovered a "complaint by a young man who alleged that Cuffee molested him." Specifically, this other "young man alleged Cuffee enticed him to the apartment by posing as a woman and soliciting sex." The judge in Milcray's case, however, refused to admit the evidence because the alleged victim later refused to prosecute, and the incident itself was deemed "more prejudicial than probative."⁷⁹ Burnett dramatically records that this news left him emotionally overwhelmed: "'Oh God,' I mumbled into the phone, my eyes closed tight, the space inside my head large, dizzying. 'Oh my God . . .'"⁸⁰

Weeks later Burnett more calmly reflected on the "power" of this evidence. He wondered whether it was "real"; had Cuffee attacked this other young man? Moreover, even if true, this alleged other attack "ransomed our verdict only by bankrupting its logic." The jury had not believed Milcray's account of the attack, rather, the government failed to persuade it of Milcray's guilt.⁸¹

Burnett, the historian and juror, is in good company when he blasts the prohibition of character evidence as "counterintuitive" as well as "quixotic" and even "perverse." Yet the larger lesson of *A Trial by Jury* is how shallow and futile the rule is. Character estimations loom large in our daily "factfinding" outside the courthouse, and predictably, juries

77. *Id.* at 60.

78. *Id.* at 59–60, 73.

79. *Id.* at 175–76.

80. *Id.*

81. *Id.* at 179–80.

crave such information in the courtroom as well. The expectation of such proof cannot be turned off like a light switch. Absent formal character proof, the factfinder *will* fill in the gaps with whatever is more readily available, especially demeanor.⁸² The emotional wallop packed by Cuffee's alleged assault against another young man is, of course, a good reminder of why the legal system treats such proof so gingerly, but the anecdote also teaches that lay factfinders expect to hear such things and will draw character portraits with or without it. Moreover, Burnett also exposes the law's self-delusion that evidence may be used (and effectively restricted) for limited purposes. Evidence of past criminal convictions, for example, is routinely admitted as relevant to a witness's credibility on the theory that it sheds light on one's "character for truthfulness," yet juries will understandably use it more broadly and irrespective of nice legal distinctions, in trying to make sense of what happened and "who" people are.⁸³

* * *

In these three cases, we see character as something commonplace, peculiarly lay in nature. Roosevelt spoke of men of "ability, discipline, and integrity." Michelson's witnesses asserted he was honest, truthful, and law-abiding. Burnett saw Milcray as "benign" and "even tempered." These impressions are not the stuff of psychology; rather, they are the *lingua franca* drawn from daily life. Character is undefined by law because it is constructed from social relationships, varying in time and among communities, and expressed in diverse vernaculars. The law's attempts to cabin it are, as Burnett trenchantly observes, quixotic and perverse.

III. CHARACTER EVIDENCE AND MODERN DOCTRINE

Modern evidence law largely tracks the doctrine laid down by nineteenth-century common law. As we will see, the social and cultural underpinnings that supported the common-law rules have changed, perhaps significantly enough to warrant reconsideration. This section surveys those modern rules relating to character proof, with special focus on the Federal Rules of Evidence (FREs), which the majority of states follow. It provides the framework for Part IV, discussing how character proof and the modern trial evolved over the last several hundred years.

82. See *infra* Part III.C.4.

83. See James W. McElhaney, *Character Studies: What Jurors Think of Parties Is a Factor in Deciding the Case*, ABA JOURNAL, Mar. 2001, at 72.

A. The Concept of Character Under Modern Rules

Character evidence remains a core construct under modern evidence law, but one that is deliberately left amorphous. Suppressing all creative impulses, the FRE's drafters adopted the common-law approach to character evidence, best seen in *Michelson*, with only a few tweaks. They left the critical term "character" undefined, as had the common law.⁸⁴ The belief, or hope, seemed to be that there existed a consensus, popular and professional, as to what character meant; a terse definition was not needed or, perhaps, risked creating confusion. And while the structure may be "grotesque," the common law rules formed a roof that at least kept the rain out. The drafters, apparently, saw no need to remodel it.⁸⁵

The problem, as we will see, is that when the FREs were adopted in the 1970s, any such consensus was already fraying, if not dissolving quickly.⁸⁶ Complicating matters, the rules followed the common law by making "character," however defined, the pivot point for admissibility.⁸⁷ Yet such rules are unwieldy, if not unworkable, without a meaningful understanding of "character" in the first place. Bluntly stated, what does it mean if we say that evidence may be used to prove X but not Y when we have no good idea what Y is? Similarly, evidence of a person's habit was freely admissible to prove a person's propensity for certain conduct, yet this too turns on our ability to distinguish "habit" (admissible)—which was also left undefined—from "character" (inadmissible).

The drafters apparently omitted definitions of "character" or, for that matter, "habit" because they thought everyone largely understood what those terms meant. Rule 404(a)(2) off-handedly references a character trait for "peacefulness," and Rule 608 speaks of a witness's "character for truthfulness," but these sparse examples are all that we have. The advisory committee's notes are similarly laconic yet also seem comfortably confident that a definitional consensus existed. Relying on Charles McCormick's influential handbook—dating back to the early 1950s—the advisory committee saw the prime challenge as distinguishing habit from character, not so much plumbing the meaning of character itself:

Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a

84. See FED. R. EVID. 404. Rule 404 has been amended several times since it was adopted in the mid-1970s; none of the changes addressed the definition of character.

85. See *infra* text accompanying notes 280–296.

86. See discussion *infra* Part V.B.

87. For example, evidence of other crimes, wrongs, or acts ("other acts" evidence) was admissible to prove any relevant proposition *other than* character and conduct in conformity therewith.

general trait, such as honesty, temperance, or peacefulness. ‘Habit,’ in modern usage, both lay and psychological, is more specific. It describes one’s regular response to a repeated specific situation. If we speak of character for care, we think of the person’s tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person’s regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.⁸⁸

The advisory committee further quoted McCormick’s cryptic observation that “[c]haracter may be thought of as the sum of one’s habits though doubtless it is more than this.”⁸⁹ Crucially, how much “more” was not explained. Rather, the advisory committee spoke matter-of-factly about character traits *for* “chastity,” “competency” as a driver, “violence,” and “honesty,” and even contrasted one’s “good” and “bad” character, all without defining character. Doubts and concerns about character evidence centered on the evidence’s relevance and probative value, not on the conceptual integrity of “character” itself. Foreshadowing later developments, however, the advisory committee adverted to “expanding concepts of ‘character,’ which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing.” The developments plainly troubled the committee, which rejected them.⁹⁰

In sum, the advisory committee approached character as a commonly understood concept in no need of a precise, technical definition: Character was “the kind of person one is.”⁹¹ It was a lay term; it did not draw

88. FED. R. EVID. 406 advisory committee’s note (1972) (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 162, at 340 (1954)).

89. *Id.*

90. FED. R. EVID. 404(a) advisory committee’s note (1972) (proponents of psychological testing failed to meet their “burden of persuasion”). In justifying its decision to permit proof of character by lay opinion as well as reputation testimony, the committee underscored the commonplace of character, describing it as “the kind of person one is”:

Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

Id. As we will see, later critics blasted the advisory committee’s failure to embrace modern psychology. See generally Lawson, *infra* note 312.

91. FED. R. EVID. 405 advisory committee’s note (1972).

from psychiatry or psychology (except for determinations of “mental capacity”).⁹² Rather, it rested on prevailing social and cultural assumptions.

B. Character and the Propensity Rule

Quixotic though it may be, the FREs regulate character evidence, as had the common law, by essentially limiting its use. Later amendments chipped at the edges, yet made no substantial changes except for Rules 413–415, which are limited to sex offense litigation. A brief overview of the current rules reveals the ambiguities and tensions inherent in character evidence.

Rule 404(a) holds the keys to character evidence. A person’s character, or a trait of character, “is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”⁹³ In some relatively rare instances, character is a substantive issue in the lawsuit, and thus, proof of character must be offered.⁹⁴ For example, evidence that A is a “bad driver” may be admissible on a claim of negligent entrustment to prove that X should not have let A—the “bad driver”—use his car, but it may *not* be used to prove that A drove badly and caused the accident.

The general ban on using a person’s character to prove conduct in conformity is subject to three exceptions, two of which apply only in criminal prosecutions. First, a criminal defendant may elect to offer proof of his “good” character to prove he did not commit the crime or is otherwise unworthy of conviction, which is the role played by Roosevelt in the Glover case and the character witnesses called in *Michelson*.⁹⁵ Second, the criminal defendant may elect to prove a crime *victim*’s “bad” character when pertinent to prove the victim’s actions in conformity with that trait.⁹⁶ As later amended, Rule 404 raises the stakes for a defendant who elects to attack a victim’s character trait: the prosecution may attack the very same trait of the *defendant*.⁹⁷

92. See *supra* text accompanying notes 86–90.

93. FED. R. EVID. 404(a). The rule was re-styled in 2011 with no substantive change intended. Left unexamined is any distinction between “character” and a “trait.”

94. See FED. R. EVID. 404(a) advisory committee’s note (1972) (discussing “character in issue”).

95. FED. R. EVID. 404(a)(2)(A). Naturally, the defendant will portray himself in a positive light.

96. FED. R. EVID. 404(a)(2)(B). Naturally, the defendant will have little good to say about the victim.

97. FED. R. EVID. 404(a)(2)(A). The policy rationale is explained in Rule 404 advisory committee’s note (2000 amendment) (“[T]he amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.”). Character also rears its head in self-defense cases. See Christopher W. Behan, *When Turnabout Is*

When character is admissible under the first two propensity exceptions and, more rarely, where character is “at issue,” Rule 405 governs the methods of proof. Character witnesses may testify to the subject’s reputation in the community or their lay opinion about the subject if based on sufficient personal knowledge. Specific instances of conduct are tightly controlled because “[they] possess[] the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.”⁹⁸ The proponent of character proof (the direct examiner) may offer specific instances only when character is a substantive issue in the lawsuit. Otherwise, only the cross-examiner may inquire about them when testing witnesses who offer reputation testimony or their personal opinion.

The third exception applies in both civil and criminal litigation. It posits that all witnesses possess something called a “character for truthfulness” which may be attacked or supported in ways regulated by Rule 608 and Rule 609. In theory, the evidence is relevant only to credibility and specifically whether that witness is lying.⁹⁹ The evidence takes three different forms which are, in turn, treated differently under the rules: character witnesses, specific instances of untruthful conduct, and prior criminal convictions.

Character witnesses may testify that in their opinion or by reputation among persons in a community, that some *other* witness has an untruthful character. Rule 608 is, however, curiously unbalanced. Attacks on a witnesses’ untruthful character may be made as a matter of course; evidence law privileges the negative. On the positive side, proof that a witness has a “truthful” character may be made only after he or she has been attacked as an untruthful person.¹⁰⁰ The doctrinal assumption is that all witnesses possess the modicum of truthful character demanded by the law. Finally, it must be stressed that the impeaching attack must narrowly center on the amorphous trait of “truthful” character—it is not sufficient that the witnesses is accused of lying in the case, she must be a “liar.”¹⁰¹

A prime way of attacking a witness’s truthful character is by asking about specific instances of untruthful conduct. Rule 608 provides that *any* witness may be questioned about specific instances of untruths, such

Fair Play: Character Evidence and Self-Defense in Homicide and Assault Cases, 86 OR. L. REV. 733 (2007).

98. FED. R. EVID. 405 advisory committee’s note (1972).

99. A witness is credible if her testimony is correct. It may be incorrect because she is lying or honestly mistaken.

100. FED. R. EVID. 608(a).

101. This is clearly stated in the current version of FED. R. EVID. 608(a) (revision effective Dec. 1, 2011).

as lying on an employment application.¹⁰² Recall that the prosecutor in *Michelson* cross-examined the defendant about his deliberate failure to disclose a prior criminal conviction on a license application.¹⁰³ How is this relevant? In theory, if the witness lied before, he's more likely to lie when testifying. Of course, proof that any witness, or any human being for that matter, has at some point lied before is hardly newsworthy.¹⁰⁴ The jury in Milcray's murder prosecution was seemingly unimpressed that Milcray had fibbed about a prior injury when enlisting in the military.¹⁰⁵ Perhaps recognizing the frailty of this sort of proof, the law of evidence allows any witness to be cross-examined about specific instances of untruthful conduct while also forbidding proof of the instances by extrinsic evidence (i.e., other witnesses).¹⁰⁶ Put differently, the cross-examiner must accept the witness's answer: If the witness denies the specific instance, the cross-examiner cannot call another person who will contradict the witness's answer.

The law of evidence also permits the use of prior criminal convictions to prove a witness's untruthful character. This technically complex form of evidence varies by jurisdiction. Some courts permit disclosure of the offense (e.g., manslaughter), the date, the sentence, and occasionally details of the crime, as is authorized by Rule 609.¹⁰⁷ Other courts restrict proof to the "mere fact" and number of convictions.¹⁰⁸ Regardless of form, the idea is that prior criminal convictions indicate a disregard for the truth and a willingness to lie when convenient, even under oath. As with so much of evidence law, there is no empirical basis for such assumptions, nor is it grounded in psychological theory. Rather, the practice arose in a Victorian social and cultural setting that prized good character and equated a criminal record with a bad character. Justice Oliver Wendell Holmes, writing in the late nineteenth century, colorfully and

102. FED. R. EVID. 608(b). Character witnesses may also be questioned about the subject witness's lapses in truthfulness.

103. See *supra* note 45 and accompanying text.

104. See *Wilson v. City of Chicago*, 6 F.3d 1233, 1239 (7th Cir. 1993) (Posner, C.J.) ("Which of us has never lied?").

105. See *supra* note 76 and accompanying text. Milcray's fib had little effect on the jury, perhaps because it had already heard far more compelling evidence that Milcray was lying anyway, especially his blatantly inconsistent statements to police. In the final analysis the jury decided that the prosecution failed in its burden of proof regardless of Milcray's lies.

106. FED. R. EVID. 608(b). The cross-examiner must have a good faith basis for inquiring into a specific instance. Extrinsic evidence of such conduct is inadmissible regardless of how brazenly the witness may deny it.

107. FED. R. EVID. 609. See 4 MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 609:3 (7th ed. 2012).

108. 4 M. GRAHAM, *supra* note 107, § 609:6, at 573.

quaintly identified a convicted criminal's "readiness to do evil," including lying in court, as the rule's justification.¹⁰⁹

C. Evading the Propensity Rule

Rule 404(a) precludes the use of character as circumstantial evidence of conduct, yet the ban is honored only in the breach: The rule is subject to sundry broad exceptions and distinctions that collectively allow wholesale evasions. Such breaches are facilitated by various rules of limited admissibility that foster chimerical distinctions among evidentiary uses and further blur the meaning of character itself. For canny trial lawyers, the propensity rule is largely an exercise in evasion.

In this section, we will examine two rules that are officially-sanctioned exceptions to the character/propensity ban, namely, "other act" evidence and Rules 413–415. Still further-reaching and ultimately more corrosive than these exceptions are long-standing approaches to "background" and "demeanor" that amount to "stealth" character proof, despite all denials to the contrary.

1. "Other Act" Evidence

Ever since the law banned character evidence in the nineteenth century, courts have permitted proof of "other acts" when relevant to *something other* than character and propensity.¹¹⁰ Unsurprisingly, the rule sparked doctrinal battles from the start and remains the most litigated issue in modern evidence law.¹¹¹ This litigiousness bears witness to both the fuzziness and power of character evidence.

Rule 404(b) embodies the doctrine's modern form. Evidence of other crimes, wrongs, or acts is not admissible to prove the subject's character for purposes of showing that he acted in accordance with "the character" on a particular occasion. The evidence may, however, be used to prove other propositions, such as motive, opportunity, preparation, plan, identity, and the like.¹¹² The rule represents the so-called inclusionary approach: The other act is admissible so long as it is relevant to any proposition other than character or propensity.¹¹³ In theory, the inclusionary approach spares the proponent having to jam evidence into a short list of prescribed uses, as demanded by the alternative "exclusion-

109. *Gertz v. Fitchburg R.R. Co.*, 137 Mass. 77, 78 (1884) (Holmes, J.).

110. See Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1001–02 (1937–38).

111. E.g., Kenneth J. Melilli, *The Character Evidence Rules Revisited*, 1998 B.Y.U. L. REV. 1547, 1556 (1998).

112. FED. R. EVID. 404(b).

113. 1 MCCORMICK ON EVIDENCE §§ 190, 196–200 (Kenneth S. Broun, ed., 6th ed. 2006).

ary” approach.¹¹⁴ Other act evidence is used in criminal and civil cases by both sides.¹¹⁵ In Milcray’s prosecution, for example, we saw that the defense unsuccessfully offered evidence that the victim, Cuffee, had allegedly assaulted another young man sometime before his attack on Milcray.¹¹⁶

When the other act proof offered under 404(b) packs considerable probative wallop, such as a prior similar crime by a criminal defendant or similar accidents in a civil case, the proponent has considerable incentive to search out an ostensibly permissible purpose—and the search is not that difficult. Counsel’s ingenuity, coupled with the rule’s elasticity, produces readily available theories of admissibility. Admissibility is entrusted to the trial judge’s discretion, which is deferentially reviewed on appeal.¹¹⁷

Two problems quickly become apparent when other act evidence is admitted. First, limited admissibility requires faith in the efficacy of limiting instructions. Yet skepticism regarding limiting instructions is well-placed. Over sixty years ago, the *Michelson* Court commented on the general limpness of limiting instructions, a critique that has continued and deepened in the decades that followed.¹¹⁸ Second and related, the problem is especially acute with other act evidence, which is conceived as a binary problem: The evidence may be used for a permissible purpose (e.g., motive) but not as proof of character/propensity. Yet because other act evidence is relevant to both propositions, juries naturally look to both despite their best efforts to heed a judge’s instruction. Further, inferences from conduct to character are often more alluring than those to puzzlingly narrow legal constructs like intent and are nearly inevitable when there is no discernible distinction between permissible and impermissible uses, such as other acts to prove identity.¹¹⁹

In sum, lawyers are highly motivated to put other act proof before the jury under nearly any pretext. Whatever the law may think of it, the propensity inference is alluring and familiar to lay jurors, carrying considerable probative value regardless of limiting instructions. Juries crave the context provided by character proof, as historian Burnett observed. They will use other act evidence in the courtroom in much the same way

114. Although scholars have made much of the distinction between the exclusionary and inclusionary approaches, it is not clear that in practice the difference is all that great.

115. 1 MCCORMICK ON EVIDENCE, *supra* note 113, at § 200.

116. *See supra* text accompanying notes 79–80.

117. *E.g.*, *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012).

118. *Michelson v. United States*, 335 U.S. 469, 484–85 (1948); *see also* Melilli, *supra* note 111, at 1576 (branding such instructions “preposterous”).

119. *See, e.g.*, *Miller*, 673 F.3d at 694–700 (grappling with other acts offered to prove intent and knowledge); *see also* 3 M. GRAHAM, *supra* note 107, § 404.5 at 120 (collecting cases).

jurors use it in their everyday life. The key is to remember that other acts are relevant to both character and the purported “other” purpose; limiting instructions are useless.

2. Sexual Misconduct and Rules 413–415

For cynics who view the other act rule as a seamy, oblique sell-out of the ban against character as proof of propensity, Rules 413 to 415 are at least refreshingly candid.¹²⁰ When a defendant is charged with a crime of “sexual assault,” Rule 413 admits evidence of the defendant’s commission of other sexual assaults, which “may be considered for its bearing on any matter to which it is relevant.”¹²¹ This includes the defendant’s “propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused.”¹²² Later cases clarified that admissibility is not mandatory; such evidence remains subject to Rule 403 and other rules of evidence, including hearsay rules.¹²³ Nonetheless, in arguing in favor of admissibility, the government may use a straightforward propensity inference, in contrast to Rule 404(b)’s propensity prohibition.

Rule 413 is complemented by Rule 414, governing similar crimes evidence in “child molestation cases,” and Rule 415, which applies in civil cases involving damages claims predicated upon sexual assaults or child molestation.¹²⁴ These three rules have been roundly criticized not only for eviscerating the ban against character/propensity proof in a narrow band of cases but also for resting on flimsy empirical bases. Sponsors of legislation supporting the rules, it seems, seized upon psychological research that did not fully justify the rules.¹²⁵

Yet aside from psychological studies, one must grapple with popular beliefs that certain “types” of people are prone to repeat certain kinds of conduct. The belief is manifest in sex offender registries and frequent protests over where to house sexual “predators.”¹²⁶ In the Milcray murder prosecution, a jury that included two historians wondered whether Milcray committed similar violent offenses and thought it silly that the

120. See Edward J. Imwinkelried, *Reshaping the Grotesque Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Literature*, 36 SW. U. L. REV. 743–45 (2008).

121. FED. R. EVID. 413(a).

122. Statement of Representative Susan Molinari, the legislation’s co-sponsor (quoted in 3 M. GRAHAM, *supra* note 107, § 413.1, at 1104–05) (internal quotation marks omitted).

123. 3 M. GRAHAM, *supra* note 107, § 413.1, at 1104–05.

124. See *id.* §§ 414.1, 415.1.

125. See Imwinkelried, *supra* note 120, at 759–60.

126. E.g., Brandon Stahl & Maya Rao, *A Backlash Against Minnesota’s Growing Ranks of Level Three Sex Offenders*, MINNEAPOLIS STAR TRIB. (Apr. 15, 2013), <http://www.startribune.com/local/minneapolis/202872731.html>.

law denied them such proof.¹²⁷ Indeed, the popular allure of such proof means that it is usually proffered under Rule 404(b) in jurisdictions that lack more direct doctrinal exceptions like Rules 413 to 415.¹²⁸

3. “Background” of a Witness: Character-“Lite”

By convention, courts routinely allow testimony about a witness’s “background.” When a witness is called to the stand, the direct examiner customarily asks the witness’s name and then elicits some contextual information about who—literally—the witness is. This often includes age, education, occupation, service in the armed forces, family life, and assorted homely tidbits. Such testimony accomplishes two things. First, it usually relaxes the witness by allowing him or her to talk about uncontested facts that are comfortable and familiar. Second, it gives the trier of fact some idea about the person on the stand.

In theory, at least, such background stands apart from character, which is inadmissible unless it falls within the narrowly tailored exceptions in Rule 404(a). Law school textbooks feature problems designed to distinguish admissible witness “background” from inadmissible “character.”¹²⁹ The distinction, while well recognized in law, is illusory. Background may be better thought of as “character-lite.” The whole point is to provide a snapshot of the kind of person the witness is. A leading trial advocacy text emphasizes the importance of background when jurors ask the critical question, “Can I believe him?”:

Witnesses who lead responsible stable lives; who are members of the community; who have resided in it for a substantial period; and who have served their community or country are more believable. Such witnesses meet jurors’ comfort level because they are “just like us.” Common background information usually includes residence, family, education, job, and perhaps military and public service.¹³⁰

“Jurors,” we are told, “want to know if the witness is a reliable member of the community or society and has attained notable goals, worked hard,

127. BURNETT, *supra* note 64, at 70–71. Several jurors, including Burnett, later took cold comfort in learning that the victim may have assaulted another young man on another occasion.

128. See 1 MCCORMICK ON EVIDENCE, *supra* note 113, at § 190 (“Unlike the other purposes for other-crimes evidence, the sex crimes exception flaunts the general prohibition of evidence whose only purpose is to invite the inference that a defendant who committed a previous crime is disposed toward committing, and therefore is more likely to have committed the one at bar.”).

129. *E.g.*, CARLSON ET AL., *supra* note 39, at 356–57.

130. THOMAS A. MAUET, TRIALS 125 (2d ed. 2009).

and overcome adversity along the way. Those are the people we admire, and the ones we believe when they become witnesses during trial.”¹³¹

Background, then, is character evidence by another name, and by permitting specifics about a person’s education, life story, etc., evidence law provides the trier of fact with more detail than the dry reputation and opinion testimony of character witnesses. It is essential. When the witness is also a party to the lawsuit or the prosecution, his or her background may go beyond credibility and provide clues (via propensity) as to factual issues.¹³² Missing from the testimony are the value-laden nouns—honest, hardworking, disciplined, good, etc.—by which character proof is most often identified, yet as the example of Burnett and his fellow jurors teaches, juries quickly, naturally fill in these blanks. Burnett and his fellow jurors needed to know “who people were, what they had done in the past.” The accused killer’s unassuming appearance (demeanor) plus his lack of any significant criminal record, employment history, and personal life raised the image of a “benign” young man.¹³³ In some, admittedly rare, circumstances, the jury requires no background testimony because the person is commonly known, as is true of a Theodore Roosevelt. Yet the Roosevelts—people with celebrity stature—only remind us of how powerful background can be.

In sum, credibility determinations demand that we know something about the witness who testifies. The demand is accommodated by the simple, arguably devious, device of labeling as “background” what would otherwise be impermissible character evidence. The doctrinal accommodation only underscores the futility of the character/propensity ban in the first place.

4. Demeanor: Character and Appearance

We believe that demeanor is critical to credibility, even if we are unsure exactly what to make of it.¹³⁴ The term “demeanor” broadly applies to a person’s outward appearance, including dress, manner of speaking, gestures, and the like. Burnett’s account of Milcray’s trial is

131. *Id.* at 126; see also TANFORD, *supra* note 44, at 256.

132. A witness’s background may be relevant both to credibility and to substantive issues (damages) in the lawsuit. TANFORD, *supra* note 44, at 229–30, 256–57.

133. See *supra* text accompanying note 76.

134. See MAUET, *supra* note 130, at 151–52 (emphasizing the importance of witness demeanor: “For jurors, how the witness sounds and looks when he testifies is at least as important as what the witness actually says.”); TANFORD, *supra* note 44, at 261–62 (stressing practice examinations, constructive criticism of witnesses’ “bad habits” (e.g., mumbling), and instructions on how a witness should dress for trial). For social science studies that link a criminal defendant’s appearance and perceptions of his character, see MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 153–60 (1978).

sprinkled with acute observations of witnesses' demeanor, especially the prosecution's "gender-bender" witnesses.¹³⁵ Demeanor is most often associated with witnesses, but the demeanor of lawyers is also important. Trial advocacy texts stress proper deportment for lawyers.¹³⁶ Likewise, a party's demeanor, especially that of a criminal defendant, is closely scrutinized even when he or she is not testifying. Burnett and his fellow jurors, for example, were sizing up Milcray even before he took the stand.¹³⁷ Despite unanimity on the significance of demeanor, venerable authority holds that it is not evidence, at least not in the same way as testimony.¹³⁸ Nonetheless, jury instructions often direct juries to consider demeanor when assessing credibility.¹³⁹

Demeanor's significance, however, extends beyond credibility determinations (Whom do we believe at trial?). As important, it serves also as proof of one's character.¹⁴⁰ Clothing, manner of speech, physical appearance, gestures, and the like affect how people are perceived by others, as anyone who has ever applied for a job knows well. Theodore Roosevelt's character encomiums, delivered in a sincere, respectful yet light-hearted manner by a man whose own towering reputation overawed all others, were apparently well received by the jury and the audience. Milcray's demeanor, combined with his "background" testimony, as we have seen, led Burnett to conclude he was "benign," "an apparently mild-mannered person—one with no history of violent crime."¹⁴¹

Demeanor is little discussed in the case law largely because the written record captures only the words spoken in court and the exhibits formally offered as proof, not appearances and impressions that leave no traces in the transcript. Yet as Burnett's account underscores, demeanor plays an important role in helping us understand "who" people are in the courtroom.¹⁴²

135. See BURNETT, *supra* note 64, at 51–55. One transgender witness, "Hector-Laverne," is described as "fidgety in his silky black tee shirt" and altogether "excitable, too quick to attempt clarification." *Id.* at 55.

136. For wise advice on proper demeanor for attorneys, see TANFORD, *supra* note 44, at 272–73.

137. See BURNETT, *supra* note 64, at 70.

138. *E.g.*, TANFORD, *supra* note 44, at 258; see also Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991).

139. PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 3.01 (Credibility of Witnesses) (2012 ed.), available at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf.

140. See SAKS AND HASTIE, *supra* note 134.

141. BURNETT, *supra* note 64, at 72, 73–74.

142. See *supra* text accompanying note 76.

IV. CHARACTER PROOF IN HISTORY

The modern rules reflect the futility of banning character proof. Exceptions and evasions provide broad avenues around this “quixotic” proscription with the net result that character seeps into trials regardless. This section examines the origins of the modern rules and how this disjunct emerged between law and popular thinking.¹⁴³ The story is complex, but its outlines are reasonably clear.

The social and cultural understanding of character has radically changed over time. In the eighteenth century, character marked one’s place in a hierarchically conceived society that was mostly agrarian and pre-industrial. The old-style trial reflected prevailing social values, including the centrality of character. The 1800s democratized character for a liberal market society and an increasingly industrial urban economy. Character now reflected traits deemed helpful, if not essential, for success in this very different social and economic order. Yet while the Victorians worshipped character development outside the courtroom, they attempted to restrict its use in a newly fashioned vision of the trial as a scientific search for historical truth.

The familiar middle-class values contained in this Victorian construction of character held together well into the twentieth century. Roosevelt’s testimony in the Glover case and Justice Jackson’s discussion in *Michelson* reflect not only these values but also the difficulty of managing them in the courtroom. Despite the tension, however, law and popular culture appeared to share an understanding of character. That shared understanding, as we will see, has withered since the 1960s.

A. Character, Deference, and the Old-Style Trial (1700–1800)

1. Character and the Eighteenth-Century Social Order

The eighteenth century understood and used character very differently socially, culturally, and legally than we do today. Trials and character reflected the society they served. A brief survey of this period will help us better understand why the nineteenth century turned all this on its head.

Of primary significance is the economic and social setting. Eighteenth-century North America was an overwhelmingly agricultural, pre-industrial, and pre-urban society. In the 1770s, the non-Indian population of whites and blacks numbered only about two million persons thinly scattered along the coast from Georgia to Maine. Philadelphia boasted a population of 28,000. Commercial agriculture—tobacco in the South,

143. See *infra* Part V.A.

wheat in the middle colonies—and trade were prevalent but so was subsistence farming.¹⁴⁴ Eighteenth-century social assumptions befitted this world. Society was organic and ordered. The great Calvinist theologian Jonathan Edwards declared that “all have ‘their appointed office, place and station, according to their several capacities and talents, and everyone keeps his place, and continues in his proper business.’”¹⁴⁵

Historian Gordon Wood observed that this social hierarchy “was part of the natural order of things, part of that great chain of existence that ordered the entire universe”¹⁴⁶ Although the “chain” metaphor dominates, the links of this chain were hardly equal. The social structure more accurately reflected a pyramid dominated by a wealthy, privileged elite at the top with a far broader base of “simple folk” at the bottom.¹⁴⁷ Movement among ranks was necessary at times for people to assume their proper station, “but such mobile persons had to possess and demonstrate the qualifications of the rank or positions into which they moved.”¹⁴⁸ Order was sustained through deference and sometimes dependency—the mutual obligations, respect, and courtesy that the various ranks owed one another.¹⁴⁹

The ranking within this deferential society is well illustrated by the oft-told tale of Reverend Devereux Jarratt, the son of a farmer-artisan in colonial Virginia. A “periwig,” Jarratt recalled, “was a distinguishing badge of the *gentle folk*” in the 1730s. When as a boy Jarratt “saw a man riding the road, near our house, with a wig on, it would so alarm my fears . . . that, I dare say, I would run off, as for my life.”¹⁵⁰ It is unclear how many others shared Jarratt’s anxieties, but the story reveals a great deal about social expectations based on rank.

Although North America lacked a landed aristocracy (nobles) of the British sort, its ersatz elites nonetheless sought to set themselves above

144. ALAN BRINKLEY, *THE UNFINISHED NATION* ch. 3 (1993) [hereinafter BRINKLEY, *UNFINISHED NATION*].

145. GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 19 (1992).

146. *Id.*

147. ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE 1760–1800*, at 3 (1990).

148. WOOD, *supra* note 145, at 19. Distinctions among social ranks differed from later notions of class, which are more narrowly based on income and occupation. *See id.* at 21–23.

149. *See* SHALHOPE, *supra* note 147, at 8 (describing “deference” in terms of the mutual respect owed among ranks and “dependence” as the power one individual held over another). Historians vigorously debate the extent to which deference permeated society and whether it was more an ideal than actual practice. *E.g.*, Gregory Nobles, *A Class Act: Redefining Deference in Early American History*, in 3 *EARLY AMERICAN STUDIES* 286, 290 (2005).

150. RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740–1790*, at 43 (1982) (emphasis in original) (internal quotation marks omitted).

the “common people” by aspiring to gentility, the status of gentlemen.¹⁵¹ Society expected conduct consistent with one’s rank, which took a wide variety of forms. Dress served as vivid indicia, as we saw in Jarratt’s panicked flight upon spying a wig. Handwriting also revealed social standing and even authority. The well-born had long used an “Italian hand” to set themselves apart.¹⁵² Later, homes and furnishings would provide still other markers of social standing.¹⁵³

The demands of deference also dictated how people, especially the gentry, were to behave in all walks of life. Keeping one’s word, for example, was paramount.¹⁵⁴ George Washington famously studied the proper rules of “civility and decent behavior,” copying a list of 110 precepts.¹⁵⁵ As the nation’s first president, Washington selected men of “the first characters” to fill important roles in the federal government. By choosing Thomas Jefferson as his Secretary of State and Alexander Hamilton as the Secretary of the Treasury, Washington drew on their impressive abilities and accomplishments, as well as their established reputations, to build the federal government’s legitimacy.¹⁵⁶

Reputation was, even in the eighteenth century, a means of proving character, but it represented something more because “character” was “something objectively visible”¹⁵⁷ Reputation meant that others in the community spoke about the subject’s conduct; to be “talked about” was essential. In colonial America, a good reputation served as a badge of distinction for those, like Washington, who aspired to the status of gentlemen and who were keenly aware that “character was not just who you were but also what others thought you were.”¹⁵⁸ A reputation equated to one’s honor and was sedulously protected, especially by the gentry, sometimes by lawsuits and dueling.¹⁵⁹ Privacy hardly existed at all in the small, localized communities of the eighteenth century: “[P]eople in this

151. WOOD, *supra* note 145, at 26 (the status of “gentleman” constituted a “middle rank betwixt the nobles and common people”).

152. TAMARA THORNTON, *HANDWRITING IN AMERICA* 18–22 (1996) (noting that the “Italian hand” varied among men and women and that later “stripped down versions” were promoted by merchants and financiers). Good handwriting and the ability to spell correctly were considered important for public office. *See* LEONARD D. WHITE, *THE FEDERALISTS* 315 (1948).

153. RICHARD L. BUSHMAN, *THE REFINEMENT OF AMERICA* ch. 4 (1992).

154. WOOD, *supra* note 145, at 41.

155. JOSEPH J. ELLIS, *HIS EXCELLENCY GEORGE WASHINGTON* 9 (2004).

156. WHITE, *supra* note 152, at 258. For Washington, explains White, “fitness of character” had less to do with technical competence for the office than it did with “personal integrity” and one’s “standing in the community.” *Id.* at 259.

157. ELKINS & MCKITRICK, *supra* note 4, at 37.

158. ELLIS, *supra* note 155, at 9. The first rule of civility copied by Washington read: “Every action done in company ought to be done with some sign of respect to those that are present.” *Id.* (internal quotation marks omitted).

159. WOOD, *supra* note 145, at 38–40, 60.

society noticed everything”¹⁶⁰ Moreover, it was a society predicated on face-to-face contact where “one’s good name seems as precious as life itself.”¹⁶¹ Benjamin Franklin preached the importance of securing one’s “Credit and Character as a Tradesman” by being industrious and frugal in “*Reality*” and “by avoiding ‘all *Appearances* of the Contrary.’”¹⁶² Letters of introduction served as written testaments to one’s good character.¹⁶³ Commercial relationships often turned on one’s reputation.¹⁶⁴ In sum, others wanted to know where a person stood in the social ordering and, as important, what other people thought of him or her.

Deference within and across social classes promoted social cohesion by minimizing social friction. Political and legal authority was built upon the social authority inherent in this hierarchical worldview.¹⁶⁵ And in eighteenth-century trials, the workings of deference were laid bare.

2. The Old-Style Trial

The extent to which deference pervaded day-to-day social relationships is problematic, particularly in North America, but it clearly permeated eighteenth-century politics, law, and, most certainly, trials. Deference describes a world of face-to-face contact where social rank and reputation carried not just authority but reciprocal rights, obligations, and mutual respect, regardless of one’s standing. It promoted social cohesion by minimizing social friction. To enhance their legitimacy, law and politics institutionalized deference in the eighteenth century.¹⁶⁶

160. *Id.* at 59.

161. *Id.* at 60.

162. *Id.* at 59 (emphasis and capitalization in original) (citation omitted).

163. *Id.* at 60.

164. THOMAS M. DOERFLINGER, *A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA* 143–45 (1986).

165. See WOOD, *supra* note 145, at 86.

166. Deference’s role in trials is better appreciated by briefly considering its role in politics. In eighteenth-century Virginia, voting was done *viva voce*, that is, openly, orally, and often face-to-face with the candidates themselves who sat at a table in the courthouse. Voters approached the table, announced their vote and a gratified candidate would thank the voter. Clerks recorded the oral votes. Support by local worthies was helpful, if not determinative. Before the Revolution, a young George Washington stood for election to Virginia’s colonial assembly. Although militia duties precluded his personal presence, Washington made sure that voters understood the strength and depth of this support. The first voter to approach the table was Lord Fairfax, the wealthiest, most powerful man in Fairfax County, who announced his vote for Washington. The second voter was the rector of the county’s Anglican church. Next came the colonels of the county militia. When the poll closed, Washington had captured 80 percent of the vote. Leaving nothing to chance, Washington made sure that the wheels of deference were duly lubricated with alcohol. Washington denied that he used alcohol to purchase votes, observing that all persons were served regardless of their vote. RICHARD R. BEEMAN, *THE VARIETIES OF POLITICAL EXPERIENCE IN EIGHTEENTH-CENTURY AMERICA* 439–41 (2004). When John Marshall ran for Congress in the 1790s voting was still done *viva voce* in Virginia. ISAAC, *supra* note 150, at 111.

Eighteenth-century trials were conducted *viva voce* (face-to-face), as they are today, but their form and function differed dramatically from those of their progeny. Character, as we will see, played a pivotal role. Much of what we know about these trials centers on British criminal cases.¹⁶⁷ The court assumed that the accused was guilty; the accused bore the burden of proving their innocence or at least surfacing a reasonable doubt.¹⁶⁸ Trials were conducted largely by judges, who questioned witnesses and summarized evidence and law for the jury. Aptly described as a “rambling altercation” between accused and accuser, the old-style trial featured no nice distinctions between the prosecution and defense case-in-chief.¹⁶⁹ Rules of evidence, including hearsay doctrine, were evolving but would not mature until the 1800s.¹⁷⁰ Lawyers were only beginning to appear on behalf of parties, especially defendants. After 1750, trials begin to assume a more modern form by which the trial tested the strength of the prosecution’s evidence, which now bore the burden of proving the charge.¹⁷¹ Yet these shifts would take decades to evolve.

The old-style trial’s essence is perhaps best captured by the speed of the proceeding, including the decision-making. Most criminal trials lasted just a “few minutes.”¹⁷² The judges examined the victim and any other witnesses; the defendant usually had no lawyer. To enhance the pace, juries sometimes heard multiple cases before retiring to deliberate on the entire series. When jurors complained of difficulty in keeping the evidence straight, judges permitted them to deliberate after each case was presented. This led to faster trials because rather than leaving the courtroom, a quick “huddle” among jurors produced a verdict, usually one advocated by the foreperson, a seasoned juror. To facilitate this huddle, courtrooms were redesigned to feature the jury box, which brought hastily assembled jurors, previously scattered around the courtroom, into close proximity to quickly exchange comments and eye contact.¹⁷³

The old-style trial, then, was hardly designed for a careful and methodical, not to mention lengthy and expensive, search for historical truth. Rather, it promoted efficient decision-making at a time before plea-bargaining, when judges actively encouraged defendants to take their

167. See generally J.M. BEATTIE, *CRIMES AND THE COURTS OF ENGLAND, 1660–1800* (1986); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

168. BEATTIE, *supra* note 167, at 341.

169. See DAVID J. A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865*, at 30 (1998) (summarizing the secondary literature).

170. BEATTIE, *supra* note 167, at 364.

171. *Id.* at 375.

172. *Id.* at 376.

173. *Id.* at 395–99. The jury’s huddle, which Beattie describes as a “rapid survey” to see if the other jurors agreed with the foreman, usually lasted no more than several minutes. *Id.* at 397.

cases to trial and not to plead guilty.¹⁷⁴ Why? The eighteenth-century criminal trial invested vast discretion in judges and juries. Discretion was “shot through” this system because guilty verdicts normally meant a death sentence, and social harmony and order depended upon the sparing use of the hangman’s noose. Put differently, it was imperative that most defendants be acquitted and only a few executed. The trial served to identify those whose death was not only “just desserts” but was also necessary to deter other offenders.¹⁷⁵ Punishing every offender for their transgressions was never the point.

As an aid to such discretionary responsibility in a deferential society, character played a central role in eighteenth-century criminal trials.¹⁷⁶ Juries carefully considered character when deciding guilt and judges considered it when sentencing the offender.¹⁷⁷ Character loomed as important in eighteenth-century courtrooms as it did when historian Burnett and his fellow twenty-first century jurors struggled to learn “who” the victim and the accused were:

Crimes came forward for consideration as the deeds of actual men and women who obviously differed hugely; some of them young, some old; some apparent first-timers, some clearly experienced; some timid, some defiant. The jury and the judge regarded this as important information that ought to play a crucial role in their decisions. *Who the prisoner was – his character and reputation – was as critical a question as what he had done (and even in some cases*

174. *See id.* at 337, 446.

175. *Id.* at 406, 420–22.

176. *Id.* at 406 (“In the courtroom itself the trial jurors and the judges and magistrates were also keenly aware of the character of the prisoner and the prosecutor, and of the wider social needs to be served by their verdict and by the penalties that would follow.”). Taking a different view, Langbein contends that a rule excluding character evidence was in place by the late seventeenth-century but was indifferently enforced by the courts until about the mid-eighteenth century. LANGBEIN, *supra* note 167, at 195–96, 202. He acknowledges, however, that there were “two exceptions” to the character ban: first, defendants frequently elected to prove their good character, which gave way to the rebuttal exception; second, there was a “puzzling exception” that allowed character evidence that had been brought to a magistrate’s attention at a pretrial proceeding. *Id.* at 202. It is submitted that these “exceptions” were, more accurately, the standard practice. Langbein essentially admits this when he observes that “[b]ecause there was such pressure on defendants to adduce evidence of good character, the rebuttal exception materially diminished the reach of the character rule.” *Id.* at 196. While some judges warned about character proof, the rule that purportedly banned it awaited the more extensive involvement of lawyers and the emergence of the modern trial in the nineteenth century. For a critique of Langbein’s Whiggish approach, which sees too much of the present in the past, see CAIRNS, *supra* note 169, at 36 (“[Langbein’s] repeated modern comparisons mean the origins of today’s rules of evidence and procedure dominate his analysis, at the expense of historical perceptions of the trial. He compounds presentism with moralism, for there is a recurring assumption in his work of the inferiority of eighteenth century procedure, which is condemned for falling short of the standards of the late twentieth century.” (citation omitted)).

177. BEATTIE, *supra* note 167, at 429 (“The character of the defendant as well as of the offense were of prime importance.”).

whether he had done it), and it was centrally the business of the trial to find the answer. The discretionary options available to both the juries and the judges were exercised with that question and with those answers very much in mind.¹⁷⁸

Thus, just as vehemently as the modern trial insists that character be formally excised from consideration, the old-style trial embraced and welcomed various forms of character. “What happened” was inseparably blended with the kind of people involved and what others thought of them. The old-style trial’s leading historian, J.M. Beattie, observes that jurors and judges “paid attention not just to the facts alleged and the defense offered. They were in addition anxious to discover something about the men and women on each side.”¹⁷⁹ Beattie places character at the center of trial:

The character of the prisoner (in the sense of both his disposition and his reputation) was especially important information and was often crucial to the outcome of the trial.¹⁸⁰

For this reason, courts actively “encouraged prisoners to bring character witnesses to speak on their behalf” about their “habits of life: did he work regularly; did he support his family; was he sober and honest in his dealings with others; did he, in other words, have an established place in the community, and was he known to his respectable neighbors as a man who could be trusted?”¹⁸¹ Beattie bluntly concludes that “[a] man who could produce no witnesses was likely to have a difficult time in court.”¹⁸² “Disposition” and “reputation,” although different, were both important. Proof that the defendant was a good person or that he was thought well of in the community might lead to an outright acquittal, a conviction on a lesser (noncapital) offense, or the judge’s recommendation for a king’s pardon.¹⁸³

Because juries likely knew little, if anything, about the victim or the accused, character witnesses were essential, occasionally providing “the decisive evidence leading to acquittals.”¹⁸⁴ Beattie observes that some trials “involved as much a weighing up and balancing of the reputation and social worth of the principals on each side as of the evidence.”¹⁸⁵ In

178. *Id.* at 436 (emphasis added). For Burnett’s strikingly similar statement about modern trials, see *supra* text accompanying note 74.

179. BEATTIE, *supra* note 167, at 440.

180. *Id.*

181. *Id.* Conversely, it bode ill for the prisoner if he was a “troublemaker and an idler.” *Id.*

182. *Id.*

183. *Id.* at 443.

184. *Id.* at 441.

185. *Id.* at 442.

one case, the judge called upon the defendant to produce “better character witnesses,” not a “better factual defense.”¹⁸⁶ The more “respectable the witnesses, the more effectively the prisoner’s character could be established.”¹⁸⁷ Failing to produce witnesses might prove “disastrous,” as defendants well knew when they explained to the court why potential witnesses could not appear because of distance or poverty.¹⁸⁸ Absent character witnesses, judges and juries looked to how people dressed, spoke, and acted in court; demeanor, then, was a proxy for character.¹⁸⁹

In sum, the character of the accused or the victim, both in the sense of disposition and reputation, was of “fundamental importance” to juries and judges as they exercised their discretion.¹⁹⁰ Modern evidence law fixates on character’s shortcomings as circumstantial evidence of what someone did (propensity), but eighteenth-century courts used character more expansively. Who was the accused? Was he an “old offender” who deserved death? What did the community think of him or her? Was he sober and industrious or of an “indifferent character”? Similar questions were raised about victims. Although character might shed some light on the crime itself, its chief value rested on knowing something of the people themselves and helping juries and judges decide who must be punished for their failings. In this sense, old-style trials elevated character as a central element of determining guilt or innocence and, by extension, preserving the law’s role in social cohesion.¹⁹¹ What is most remarkable is how quickly all of this changed in the nineteenth century.

B. Character, Nineteenth-Century Liberalism, and the Modern Trial

1. Character and “Self-Culture”

For Theodore Roosevelt, being called a “gentleman” was the highest compliment one could achieve.¹⁹² Yet the word “gentleman” meant something very different to Roosevelt than it did to a twitchy Devereaux Jarratt 150 years earlier. The nineteenth century marked a sea change in character that reflected remarkable and enduring shifts in the American economy, society, politics, and culture. Character was refashioned from one’s post in a stratified, stable, and largely agricultural society to one’s prospects in a dynamic industrial economy that prized human autonomy,

186. *Id.* at 442. The trial’s goal was to identify the “old offenders” who repeatedly violated the law. *Id.* at 443, 445.

187. *Id.* at 447–48.

188. *Id.*

189. *Id.* at 443, 447.

190. *Id.* at 449.

191. *Id.* at 448–49.

192. MORRIS, *supra* note 15, at 43.

competition among individuals, and individual success. This liberalism suffused the economy and society while profoundly affecting politics and law.¹⁹³

The American market economy exploded in the nineteenth century, dominated by its industrial sector. Wall Street fed the new industrial economy's voracious financial needs while industry's organizational demands triggered the rise of the modern corporation. Commercial agriculture remained an economic mainstay, but industrial modernization meant more people worked as wage laborers in factories.¹⁹⁴ The developing economy catalyzed profound social changes. The population swelled from 5.3 million in 1800 to 91.9 million by 1910, creating a huge internal market for goods and services. The nation's ethnic composition also changed. After the Civil War, immigrants from southeastern Europe, chiefly Italy, Poland, and Russia, blended uneasily with the nation's largely Anglo-Saxon stock. Cities grew in number and size. New York's population consisted of 80% immigrants in 1890. By 1920, more Americans lived in urban than rural areas. Increasing numbers of Americans worked in factories as unskilled wage labor while others joined the expanding middle class as business managers, doctors, or lawyers. Society was more fluid and dynamic than ever before.¹⁹⁵ People hoped to move up the social and economic ladder to improve their prospects.

Character was turned on its head in this new order. No longer did it reflect one's assigned place in a static social order: "character" now summed up one's prospects for success. Sparks first thrown by the eighteenth-century Enlightenment and the Revolution burned brightly in an age where self-improvement became the polestar. In politics, too, it was the age of the "common man" where, at least for white males, legal barriers to voting and office holding melted away. People themselves selected how high they might rise based on their own talents, capacities, and ambition.

Character was transformed from an innate attribute, like hair color, to a set of standards to which one aspired. The subject is complex, but some generalizations are helpful.¹⁹⁶ "Common folk, doomed since the dawn of time to a life of brutish toil, could be schooled to a new plane of usefulness and happiness."¹⁹⁷ Prisons were designed to reform criminals'

193. Like character, liberalism has changed over time. See Gary Gerstle, *The Protean Character of American Liberalism*, 99 AM. HIST. REV. 1043, 1045 (1994).

194. See BRINKLEY, UNFINISHED NATION, *supra* note 144, at ch. 17.

195. See *id.* at ch. 18.

196. DANIEL FELLER, THE JACKSONIAN PROMISE 78, 138 (1995); Daniel Walker Howe, *Victorian Culture in America*, in VICTORIAN AMERICA 12 (Daniel Walker Howe ed., 1976).

197. FELLER, *supra* note 196, at 139.

deficient characters.¹⁹⁸ Schools, labor groups, churches, and insane asylums, for example, adopted an “environmentalist approach to character” that “wanted literally to re-form people.”¹⁹⁹ Business dealings turned on assessments of parties’ character, especially regarding creditworthiness.²⁰⁰

Character formation assumed some urgency in an open society that celebrated enlightened self-interest; the challenge then, as now, was to balance one’s individual cravings, especially for material success, with the public good.²⁰¹ In such a society, “self-discipline was the crucial catalyst of improvement—the key to reaching responsible citizenship, financial security, social respectability, mental and moral fulfillment, and thus true happiness.”²⁰² For example, Horatio Alger’s book *Ragged Dick* celebrated ascent through hard work, education, discipline, and a little luck.²⁰³ The main character, Ragged Dick, went from being a boot black to a good job in a counting house because he learned how to read, do arithmetic, write legibly, pronounce words correctly, and dress for the business world.²⁰⁴ In elevating one’s character, one assumed the trappings of the polite (gentle) culture that literally characterized the emergent middle class.²⁰⁵ By the late nineteenth-century a host of character-building institutions, such as the YMCA and the Boy Scouts, stressed traits that equipped a person for individual success yet also taught responsibility and selflessness.²⁰⁶ And if such organizations catered to

198. *Id.* at 139–42; see also DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* ch. 4 (1971).

199. FELLER, *supra* note 196, at 142–43.

200. See Richard White, *Information, Markets, and Corruption in the Gilded Age*, 90 J. AMER. HISTORY 19, 24–25 (2003) (“being a bad man did not mean being without character”). On the importance of character in business, see generally JUDY HILKEY, *CHARACTER IS CAPITAL: SUCCESS MANUALS AND MANHOOD IN GILDED AGE AMERICA* (1997).

201. FELLER, *supra* note 196, at 145.

202. *Id.* at 146. Historians are not blind to the darker side of this ideology, which held individuals responsible as authors of their own failings and excused others from extending a helping hand in the name of the greater good. See *id.* at 143.

203. HORATIO ALGER, JR., *RAGGED DICK AND STRUGGLING UPWARD* 55, 65, 77 (Penguin Books 1986) (1868).

204. ALGER, *supra* note 203, at 77, 129–30.

205. HOWE, *MAKING THE AMERICAN SELF*, *supra* note 9, at 113–14 (discussing the social ethics of this impulse toward self-discipline and how it contrasted with older “hierarchical behavioral codes of traditional European society,” which were exclusive rather than inclusive).

206. See DAVID I. MACLEOD, *BUILDING CHARACTER IN THE AMERICAN BOY: THE BOY SCOUTS, YMCA, AND THEIR FORERUNNERS, 1870–1920*, at 29 (1983), observing that “[c]haracter builders set broad goals” for the America boy:

[T]he Scout law obligated him to be trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. The YMCA was equally ambitious, seeking to improve “the spiritual, mental, social, and physical condition” of men and boys.

Id. (citation omitted).

whites, Booker T. Washington preached the same message of “high character” to blacks in the 1890s.²⁰⁷

Historian Paul Boyer has skillfully shown how various charity organizations during the Gilded Age, including settlement houses, worked to reform the character of the urban poor, particularly the new immigrants from southern and eastern Europe who flooded the nation’s cities. The “charity organization movement,” according to Boyer, assumed that “the roots of urban poverty lay in the moral deficiencies and character flaws of the poor”; the eradication of slums could not occur unless the poor corrected these “deficiencies.”²⁰⁸ However, the slums remained. Personal flaws, charity workers came to see, were not always the “root” cause of grinding poverty, as the horrific Depression of 1893 demonstrated, yet they seemed to be symptomatic nonetheless. Charity organizations then shifted their focus to environmental factors, both moral and industrial, in the hope of reforming slum-dwellers.²⁰⁹

Nineteenth-century intellectuals articulated an ideology of self-improvement or, more aptly, “self-cultivation” that both reflected and served the new social, cultural, and economic reality.²¹⁰ Personal autonomy became an imperative while Scottish commonsense thinking, along with faculty psychology, assisted the “adaptation to commercial values.”²¹¹ “Victorian character formation,” according to historian Daniel Walker Howe, grew from evangelical religion and the older tradition of civic humanism, yet “the nineteenth-century form was more concerned with positive self-development and less exclusively preoccupied with self-repression.”²¹² The “model character” in Antebellum America, observed Howe, “was largely independent of occupation; more or less the same character was thought ideal for any man, regardless of occupation.”²¹³ The model of a “balanced character,” once restricted to elites, was democratized and (eventually) promoted among all layers of socie-

207. BOOKER T. WASHINGTON, *UP FROM SLAVERY* 235–36 (Doubleday & Co., Inc. 1901) (1900), available at <http://docsouth.unc.edu/fpn/washington/washing.html>.

208. PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920*, at 144 (1978).

209. *Id.* at 158.

210. HOWE, *MAKING THE AMERICAN SELF*, *supra* note 9, at 108, 130 (“self-culture”). Elsewhere Howe has written that “humanistic self-cultivation” was “profoundly didactic” and “future-orient[ed].” Howe, *Victorian Culture in America*, *supra* note 196, at 18–19, 22.

211. HOWE, *MAKING THE AMERICAN SELF*, *supra* note 9, at 111 (also observing that “the expansion of the market economy widened the scope for personal autonomy on a scale previously unparalleled: choice of goods and services to consume, choice of occupations to follow, choice of life styles and identities”).

212. *Id.* at 122.

213. *Id.* at 125 (observing that this vision was mostly limited to white males).

ty.²¹⁴ Pervasive in its appeal, “balanced character” suffused “countless sources, private as well as public: literary, social, educational, religious, and political.”²¹⁵

This model of human nature received its fullest, most sophisticated explication from the “Scottish-American moral philosophers,” who “synthesized evangelical Christianity with the science, the political liberalism, and the polite standards of the Enlightenment.”²¹⁶ Educators at Princeton and Yale developed a “comprehensive philosophical system” that embraced ethics, epistemology, religion, and metaphysics:

The resolute confidence of the Scottish philosophical tradition that morality was grounded in universal common sense provided a firm basis upon which nineteenth-century people could pursue their cultivation of the qualities of character.²¹⁷

Proponents termed their brand of faculty psychology “moral science” to distinguish it from philosophies of right and wrong. Precise taxonomies varied, but the moral scientists of the nineteenth century usually identified three broad categories of faculties: the moral, the rational, and the passionate.²¹⁸ Their ideal postulated a hierarchy in which the moral sense guided one’s rational self-interest while also keeping one’s passions (emotions) in check. The difficulty, they realized, was that one’s prudential self-interest was buffeted between the stronger passions and the weaker moral sense. For this reason, “[t]he ultimate goal of the process of ‘self-improvement’ was to correct this problem and strengthen the higher faculties within the character, rendering morality superior to self-interest and reason superior to passion.”²¹⁹ Thus, nineteenth-century education in all walks focused on the cultivation of the faculties.

William Ellery Channing’s (1780–1842) essay *Self-Culture* both popularized and captured the essence of self-improvement. Channing found the “true greatness of human life” in our inward struggles to contain our passions and self-interest.²²⁰ People have the “noble power” to not only watch their passions in play but to control and guide them, a

214. *Id.* at 128. Howe pithily concludes that “[w]hat had once been the exclusive badge of the courtier, and was then made available in the eighteenth century to upper-middle-class ladies and gentlemen, was now freely offered, like Methodist grace, to all who would accept it.” *Id.* at 128. Even nineteenth-century socialists were character builders. *Id.* at 125.

215. *Id.* at 128.

216. *Id.* at 129.

217. *Id.* at 129 (emphasizing that this tradition found voice in popular thinking as well as in academic circles).

218. *Id.* at 130.

219. *Id.* at 130.

220. *Id.* at 132.

capacity far more significant than “our power over outward nature.”²²¹ Drawing from agriculture, he urged people to “cultivate” their moral sense, “improving” their faculties much as a good farmer improves his land and livestock.²²² Channing placed “moral sense” in the preeminent position among man’s sundry faculties.²²³ Historian Daniel Walker Howe concludes that Channing’s *Self-Culture* ranks “as a minor classic of American culture and the Protestant ethic, bridging the worlds of Benjamin Franklin and Horatio Alger, popularizing faculty psychology, and synthesizing the Enlightenment with Christianity.”²²⁴

Abraham Lincoln may have been the most effective advocate of a popularized version of self-culture. Like Channing, Lincoln seized upon cultivation’s dual meaning in an 1859 speech at the Wisconsin State Fair, where he implored the audience to cultivate their minds and faculties as well as their farmland. Education, Lincoln observed, yields “an exhaustless source of profitable enjoyment” even for farmers:

A capacity, and taste, for reading, gives access to whatever has already been discovered by others. It is the key, or one of the keys, to the already solved problems. And not only so. It gives a relish, and facility, for successfully pursuing the [yet] unsolved ones.²²⁵

In sum, character in the nineteenth century had come to mean something very different than it did a century earlier. The balanced-character ideal embodied a set of values that would soon be synonymous with the American middle and working classes, permeating popular as well as more esoteric thinking.²²⁶ While Channing emphasized the moral and religious faculties, many others stressed cultivation of one’s rational self-interest in the name of financial, social, and even political success. It is hardly surprising that these same seeds of self-culture and the balanced-character ideal thrived in the freshly ploughed fields of law and the legal profession. Evidence law adopted much of the epistemology of

221. *Id.*

222. *Id.* at 132–33.

223. *Id.* at 133–34. The seven faculties are the moral sense, religious principles, rational self-interest, “social affections,” practicality, the perception of “Beauty,” and “the power of Utterance.” *Id.* Channing lectured that these seven faculties were relevant to the common man, not just an elite. *Id.* at 134.

224. *Id.* at 135.

225. Abraham Lincoln, Address Before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin, quoted in Joseph D. Kearney, *Legacies of Lincoln Symposium, Foreword: Laying the Foundation*, 93 MARQ. L. REV. 1257, 1261 (2010); see also HOWE, MAKING THE AMERICAN SELF, *supra* note 9, at 145–46.

226. See Howe, *Victorian Culture in America*, *supra* note 196, at 21–22, 25. To be sure this “ideal” took on a variety of patterns and differed across social groups. *Id.* at 10, 13.

Scottish common sense and the balanced-character model when rationalizing and articulating the rules governing the modern trial.²²⁷

2. The Modern Trial and Character Evidence

In light of the nineteenth century's preoccupation with character and penchant for re-forming people, it seems anomalous that the emergent law of evidence would largely exclude proof of character. The explanation rests in an understanding of the modern trial and its goal to search for—and find—the truth in a highly stylized, increasingly technical proceeding that curbed juries' discretion.²²⁸

Simon Greenleaf championed all of this. A staunch Whig, respected lawyer, and evangelical Christian, Greenleaf embraced his age's enlightened faith in the reformation of individual character through his work in voluntary associations related to religion and education.²²⁹ After building his legal reputation on the Maine frontier, Greenleaf joined the fledgling Harvard Law School faculty in the 1830s and in 1842, published the first American treatise on evidence law, which remained influential into the twentieth century.²³⁰ His work seamlessly melded his faith in law, evangelical Christianity, and Scottish common sense. The law of evidence, Greenleaf believed, was nothing less than a science of proof that in skilled hands (his) could reveal the truth both inside and outside the courtroom. In an 1846 tract entitled *An Examination of the Testimony of the Four Evangelists*, Greenleaf applied evidence law to prove that Matthew, Mark, Luke, and John's gospels spoke the truth.²³¹ His goal was not to convert unbelievers to Christianity, but to persuade his readers, especially intellectuals, that law was a science. Specifically, Greenleaf showcased evidence law as a science of historical truth predicated upon common sense epistemology, which, as we have seen, dominated not only popular culture but also nineteenth-century scientific thinking.²³²

Greenleaf's evidence law propelled the modern trial, which differed dramatically from its eighteenth-century progenitors. Judges controlled jury decision-making by applying increasingly elaborate rules of evi-

227. See HOWE, MAKING THE AMERICAN SELF, *supra* note 9, at 129.

228. Historians are only beginning to research the modern trial's emergence. See Martin J. Wiener, *Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England*, 17 LAW & HIST. REV. 467 (1999). Noting that the study of trials has "lagged," Wiener observes that contemporary culture has affected the trial. *Id.* at 470, 482, 506.

229. See Daniel D. Blinka, *The Roots of the Modern Trial: Greenleaf's Testimony to the Harmony of Christianity, Science, and Law in Antebellum America*, 27 J. OF THE EARLY REPUBLIC 293, 302 (2007).

230. *Id.* at 299–302.

231. *Id.* at 303–06.

232. *Id.* at 315–20.

dence and trial procedure as advocated by technically trained lawyers.²³³ The trial would be a search for the historical truth, albeit one closely supervised by the judge employing evidence rules.²³⁴ Greenleaf's 1842 evidence treatise borrowed heavily, yet reluctantly, from Thomas Starkie's leading British treatise (*Starkie*), which he found insufficiently rigorous.²³⁵

Unlike the older-style trial that placed a premium on a person's character, the modern trial purportedly banished character inquiries from the courtroom. *Starkie* dismissed character evidence as "the last remnant of compurgation."²³⁶ A person's "general character" was held inadmissible in both civil and criminal cases, subject to certain exceptions.²³⁷ Although a criminal defendant could offer evidence of his good character, it was subject to "little weight" unless the case was close.²³⁸ In civil cases, character was wholly inadmissible unless the pleadings raised it as a substantive issue (e.g., slander actions).²³⁹ In short, here we find the genesis of our current rules.

Character proof could also be used for impeachment, a seemingly limited exception that may have nonetheless swallowed the exclusionary rule.²⁴⁰ Greenleaf pointed to a disagreement among American courts as to whether "general reputation or character of the witness should be restricted to his reputation for truth and veracity, or may be made in general terms, involving his entire moral character and estimation in society."²⁴¹ There is a clear affinity between the "moral sense" of the Common Sense school and the law's "entire moral character," yet it remained unexplored by nineteenth-century treatise writers, including the careful

233. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 166, 170–71 (1975).

234. See 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 1, at 3 (Boston, Little & Brown; London, A. Maxwell & Son eds., 2d ed. 1844); see also NELSON, *supra* note 233, at 170.

235. Blinka, *supra* note 229, at 325–26. Greenleaf harbored greater aspiration for evidence law as a science than did *Starkie*. See 1 THOMAS STARKIE, *A PRACTICAL TREATISE ON THE LAW OF EVIDENCE* 35–36 (Philadelphia, P.H. Nicklin & T. Johnson, 4th Am. ed. 1832) (criticizing character as proof of conduct). The fourth American edition of *Starkie* treats character more extensively in 2 *id.*, at 364–75.

236. THOMAS STARKIE, *A PRACTICAL TREATISE ON THE LAW OF EVIDENCE* 72, n.h. (Philadelphia, T. & J.W. Johnson, 8th Am. ed. 1860). "Compurgation" was trial by oath takers.

237. *Id.* at 72–73, n.h. The nineteenth-century treatises consistently attacked character evidence. See 1 GREENLEAF, *supra* note 234, at 70–72; 1 FRANCIS WHARTON, *A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES* 61 (1877).

238. STARKIE, *supra* note 236, at 72 n.1.

239. *Id.*; see also, 1 WHARTON, *supra* note 237.

240. See 1 GREENLEAF, *supra* note 234, at 66, 531–33; STARKIE, *supra* note 236, at 207.

241. 1 GREENLEAF, *supra* note 234, at 541–42 n.3. In rape cases the prevailing distrust of victims permitted inquiry into her "good fame" and character for "chastity." 3 GREENLEAF, *supra* note 234, at 194–95.

Greenleaf.²⁴² The omission may have occurred in part because the affinity seemed so obvious, but also because the law's assumption of good character, coupled with the general exclusion of character proof, made any distinction less urgent and important.

Further limitations related to the form that character evidence might take even when admissible. "Character" became convertible with reputation in the community. Reputation "mean[t] the estimate attached to the individual by the community." A witness's "private opinion" was excluded, as were "facts" (i.e., specific instances) of conduct.²⁴³ Yet because "the best character is generally that which is the least talked about," parties were permitted to offer "negative evidence" to the effect that witnesses had not heard anything bad about the subject.²⁴⁴

Nineteenth-century law's general disdain for character proof is seemingly paradoxical. Why the turn against character proof by a society so enamored by character generally? Treatise writers and courts of that era provide little insight; glib references to an assumption of good character are accompanied by questions about its probative value as proof.²⁴⁵

A better answer rests with the changed nature of character itself. The balanced-character ideal was eminently liberal, optimistic, and didactic: People must strive to improve their malleable moral character to better themselves economically and socially. Character was not an inborn mainspring that determined conduct; rather, it encompassed values to which people aspired with full knowledge that most fell short. Reform associations hoped to better people through education, religion, temperance, and the like. Character was malleable, which in turn meant it was fluid, dynamic, and unstable, so very unlike its eighteenth-century conception as something inborn and largely unchanging.²⁴⁶ The dynamism of the balanced-character ideal helped drive the cataclysmic changes in social, economic, and cultural life, yet this same dynamism rendered character less useful to prove "facts" in a courtroom.

The fluidity of individual character also created problems of proof. Was this person really honest? Diligent? Trustworthy? And if so, at what point in time? Moreover, Victorians feared deception and cunning, the imposter who presented himself as something other than who he really was.²⁴⁷ Phrenology offered itself as a science of character detection based

242. 1 WHARTON, *supra* note 237, at 63 ("[T]he law presumes a party's character to be good, and . . . it is superfluous for him to prove that which is presumed.")

243. *Id.* § 49, at 63–64; *see also* 1 GREENLEAF, *supra* note 234, at 539–41; STARKIE, *supra* note 236, at 207.

244. 1 WHARTON, *supra* note 237, § 461 at 64 (quoting case law).

245. *Id.*

246. *See* discussion *supra* Part IV.A.

247. THORNTON, *supra* note 152, at 94.

on unmalleable physical features, but neither the courts nor the public succumbed to its allure.²⁴⁸ The law's insistence on community reputation as a means of proof provided some assurance that the person's character could be fixed in time and place, yet *Starkie's* allusion to compurgation, mentioned earlier, signaled distrust and skepticism.

Character was also intimately associated with the old-style trial, in which juries had virtually free sway in deciding cases so that they could mitigate the harshness of eighteenth-century criminal law. Such unbridled discretion became untenable by the mid-nineteenth century. Rules of evidence placed tighter controls on jury decision-making in criminal and civil trials by limiting the information the jury received about the parties and events.²⁴⁹ The modern trial's search for truth focused on the events being litigated, not the kinds of people involved. The jury's role was to determine the facts based on whatever evidence the judge permitted the jury to hear, applying the law as instructed by the judge. In criminal cases, an accused's character would be a factor for the judge to consider when sentencing.

Finally, it may be that the purported exclusion of character evidence may have been more apparent than real. Put differently, did the exceptions to character exclusion swallow the proverbial rule? Although the exceptions to the character ban are far fewer in number than those riddling the hearsay rule, the impeachment exception is a veritable black hole drawing within its vortex prior criminal convictions, specific instances of deceit and untruths, reputation for "truth and veracity," and, in some jurisdictions, the witness's "entire moral character."²⁵⁰ Character, then, became a centerpiece of a witness's credibility, serving as a cultural lie detector test.

C. "Good Living Consistently Pursued" into the Twentieth Century

The common law of character evidence dominated evidence law for much of the twentieth century, as illustrated by the work of Mason Ladd and the Supreme Court's opinion in *Michelson*. Lost, however, was the nineteenth-century harmony among law, popular culture, and science.

As a scientific construct, character had fallen from favor. The faculty psychology that underwrote character's intellectual stature faded in academic circles by the end of the nineteenth century. The emergence of modern social sciences, especially sociology and psychology, pushed aside the quaint eighteenth-century assumptions of the Common Sense

248. Phrenology was ultimately inconsistent with the belief that character could be reformed. See *id.* at 85–86.

249. See NELSON, *supra* note 233, at 169.

250. 1 GREENLEAF, *supra* note 234, § 461, at 541 n.3.

School in favor of more empirical methods that nonetheless failed to establish their own paradigm.²⁵¹ Trait psychology, one of many contending strains at the time, retained vestiges of faculty psychology but also faded by the 1950s. The story is complex, but it suffices to say that character now lacked respectability or at least a solid footing among the modern sciences.²⁵²

Although social scientists and the mental health profession scoffed, character retained its high standing in popular culture and law. Character factories like the Scouts and the YMCA remained popular.²⁵³ Sinclair Lewis's criticisms of "Babbitism" only underscored the dominance of the balanced-character ideal and middle-class values in the 1920s.²⁵⁴ The legal profession embraced (as it still does) a requirement of "good moral character" as a condition of bar admission.²⁵⁵

Writing in the late 1930s, Mason Ladd, an important figure in twentieth-century evidence scholarship and legal education, exemplifies character's revered place in law and society.²⁵⁶ Ladd's 1939 article *Techniques and Theory of Character Testimony*²⁵⁷ influenced the later drafting of Rules 404 and 405.²⁵⁸ Focusing on the methods of proving character while thoughtfully assessing its social role, Ladd laid bare the "odd result" that the form of permissible proof varies depending on how the party is using character proof.²⁵⁹ Ladd's *bête noire* was the law's preference for reputation testimony over the character witness's personal opinion. When used as propensity evidence to establish the "non-probability that the accused committed" the crime, the defendant's character could be proved through personal opinion testimony (e.g., "I believe the defendant to be a law-abiding person.") as well as by reputation. But when used as proof of another witness's "credibility" (truthful character), only proof by reputation was permitted (e.g., "She has a reputation among our neighbors as a truthful person.").²⁶⁰ This distinction, Ladd contended,

251. See DANIEL N. ROBINSON, AN INTELLECTUAL HISTORY OF PSYCHOLOGY 185 (3d ed. 1995).

252. See *infra* text accompanying notes 313–319.

253. MACLEOD, *supra* note 206, at 292–300.

254. For Babbitism, see PAUL S. BOYER, THE OXFORD COMPANION TO UNITED STATES HISTORY 439 (2001).

255. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS chart 2 and suppl. (2012), available at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

256. Ronald L. Carlson, *Mason Ladd—In Memoriam*, 66 IOWA L. REV. 685 (1981).

257. Mason Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

258. Edward W. Cleary, *Mason Ladd—In Memoriam*, 66 IOWA L. REV. 701, 702–08 (1981).

259. Ladd, *supra* note 257, at 500.

260. *Id.*

was irrational.²⁶¹ Character should be provable by a personal opinion as well as reputation whenever character itself is admissible.²⁶²

Reputation and personal opinion, Ladd argued, are but alternative methods of proving character. Personal opinion was at once more probative than community gossip (reputation) and had been permitted at common law until an aberrant yet influential case elevated reputation while demoting opinion proof.²⁶³ More troublingly, the law had also blurred the distinction between “character” and “reputation,” often using the terms “interchangeably.”²⁶⁴

One immediately senses Ladd’s frustration in distinguishing character from its modes of proof. Character is nebulous, an “existent quality” that reveals “what a person actually is.”²⁶⁵ It presents two problems: “[O]ne is whether general character, if provable, is a sufficient barometer for predicting human action in the specific case to justify its use; the other is whether the methods available for its proof are reliable enough to warrant their application.”²⁶⁶

The risks, however, were worth it. Courts and juries needed the assistance of character proof “in solving controversial issues” because of the “significant part” played by character “in all phases of business and social life.”²⁶⁷ Put differently, evidence law must conform with prevailing social, cultural, and economic assumptions to the extent practicable. Although Ladd concurred that specific instances of conduct (anecdotes) should be severely restricted, he supported the use of “abstract observations” whether in the form of reputation or personal opinion.²⁶⁸ Of the two forms, Ladd preferred personal opinion: “The personal judgment of a qualified and reliable witness ought to be better than reputation of character based upon hearsay interchange of gossip of scandal in the community.”²⁶⁹ In short, modern conditions rendered reputation less reliable than the opinion of a properly qualified character witness.

Ladd sketched the “general qualit[ies]” that comprise character in a manner consistent with the balanced character ideal of a century earlier. The law recognized that (some) people possess a “good moral character,”

261. *Id.* The FREs permit character proof by reputation as well as personal opinion. *See* FED. R. EVID. 405, 608.

262. Ladd, *supra* note 257, at 535–36 (arguing that this would simplify the law, reduce error, and allow more probative evidence).

263. *Id.* at 510.

264. *Id.* at 505.

265. *Id.* at 506.

266. *Id.*

267. *Id.* Ladd did not, however, advocate relaxing the general ban against character evidence.

268. *Id.* at 509 (“[T]he general quality of the individual as an abstract observation is a more accurate basis of predicting human conduct than his occasional misdoings or good deeds.”).

269. *Id.* at 511.

which “clearly” includes the “elements” of “[h]onesty, integrity, and good citizenship” and are distinct from “truth and veracity.”²⁷⁰ Adding to the complexity, both “good moral character” and “truth and veracity” could be used to test a witness’s “credibility.”²⁷¹ Proof might be made that a person was “quiet, peaceable, law-abiding, and inoffensive” or “industrious, hardworking and honest.”²⁷² Distinctions among traits were necessary even if somewhat “artificial.” There was no precise lexicon of traits. Rather, such “quiddities of definition” should be eliminated in favor of lawyers asking questions in words that represent whatever “trait” was pertinent.²⁷³

The important point is that Ladd did not question the concept of character itself, its role in social life, or its usefulness as proof in a courtroom. Although “modern conditions,” particularly the anonymity of urban life, made it difficult to learn about others, Ladd said it was worth the cost:

[W]e have not outgrown the importance of a person’s standing in a community, nor can a person totally escape notice of his activities which depart from the norm of the social standards of those among whom he lives. *Good living consistently pursued* is recognized, and marked departures from approved conduct becomes known and the subject of comment.²⁷⁴

By equating character with a person’s “standing in a community,” Ladd stressed its peculiarly lay nature. He was unconvinced that modern science could usefully assist the pursuit of truth in the courtroom. Psychologists had difficulty identifying persons with “falsifying tendencies,” much less indicating whether they were indeed lying in a particular case.²⁷⁵ Nor was it remotely practical to think that psychologists could spend “substantial time with each witness” in each case.²⁷⁶ He also dismissed the helpfulness of lie detectors or “truth serums,” finding it “quite

270. *Id.* at 500 n.6; *see also id.* at 498–99. Ladd distinguished among the various traits, but argued that the law irrationally permitted proof by reputation for all while selectively allowing personal opinion for some.

271. *Id.* at 500 n.6.

272. *Id.* at 517 (contending that reputation testimony was little more than a proxy for the character witness’s personal opinion in any event).

273. *Id.* at 528–29. Ladd, however, endorsed questions about a person’s “*general* reputation for *general* moral character,” vigorously defending his choice of “general” as an adjective for both terms. *Id.* at 522–23 (emphasis in original).

274. *Id.* at 517 (emphasis added).

275. *Id.* at 533 (“There are all degrees between the truth and a lie and between people who falsify and those who do not.”).

276. *Id.* at 535.

inconceivable” that we would give “all witnesses a shot in the arm” before they took the stand.²⁷⁷

In sum, Ladd showed that character remained a vibrant core construct in evidence law, drawing its strength from lay witnesses and popular thought. Ladd accepted much of the common law doctrine while sharply criticizing the rules restricting methods of proof. There was, however, no questioning of character itself or its vitality as something peculiarly within the realm of lay thought.²⁷⁸ Its values remained tuned to the liberal self-culture of the nineteenth-century, which, despite some detractors, remained dominant.²⁷⁹

A decade later, Justice Jackson’s masterful opinion in *Michelson* reveals much the same. Earlier we looked at *Michelson* as an example of how the rules of character proof worked in an average criminal case, yet the opinion’s true significance is its elaboration of character’s role in the “common law tradition.”²⁸⁰ Departing from earlier practice, the common law forbade prosecutors from proving a “defendant’s evil character to establish his probability of guilt.” This did not mean that the law assumed the defendant’s “good character” or that bad character was “irrelevant” to guilt.²⁸¹ Rather, “practical experience” taught that “over-riding policy” concerns justified its exclusion:

[I]t is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.²⁸²

The defendant, however, may elect to prove his good character, as did *Michelson*, in the hope that it might raise a reasonable doubt. This brings into play yet another “anomalous rule”: the character witness’s testimony must be based on “hearsay,” that is, reputation. Cross-examination about *Michelson*’s 1920 arrest was lawful even though it “invited hearsay,” inquired about an arrest rather than a conviction, involved a crime very different from the charged offense, and occurred over twenty-five years earlier.²⁸³ *Michelson*’s own character witnesses testified to his reputation

277. *Id.*

278. *Id.* at 517.

279. Contrast the dynamism and individuality of “Bohemian culture” in the late 1800s with the dominant middle-class model of good character. See CHRISTINE STANSELL, *AMERICAN MODERNS: BOHEMIAN NEW YORK AND THE CREATION OF A NEW CENTURY* (2000).

280. *Michelson v. United States*, 335 U.S. 469, 471–72, 475 (1948). See *supra* Part II.B.

281. *Id.* at 475–76.

282. *Id.* at 476.

283. *Id.* at 481–82.

for good character going back thirty years; thus, the prosecutor properly tested their knowledge of what the community thought about him.²⁸⁴

The Supreme Court rejected a request to restrict cross-examination about prior arrests to offenses similar in nature to the charged offense. Institutional concerns played a part: the Court's "infrequent sallies into the field" of character evidence ill-equipped it to "recast the body of case law . . . even if it were clear what the rules should be."²⁸⁵ Additionally, the paradoxical character rules themselves cautioned against piecemeal tampering. In Justice Jackson's famous words:

We concur in the general opinion of courts, textwriters and the profession that much of this law [governing character proof] 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. But somehow it has proved a workable even if clumsy system. . . . To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.²⁸⁶

Michelson's scorn targets legal doctrine and hyper-technical rules, not the idea of character itself. Nowhere does the Court doubt its social utility in daily life or character's relevance to guilt or innocence in general. Nowhere does the Court question the vitality of proof that one is truthful, honest, or law-abiding.²⁸⁷ Justice Jackson himself, who had returned to the Court after serving as a prosecutor at the Nuremberg war crimes tribunal, invokes "evil" and "good" character without an iota of skepticism or cynicism.²⁸⁸ Character is assumed as something in no need of definition.

Jackson did, however, wrestle with the paradoxical relationship between a person's reputation and character. Reputation was the "shadow his daily has cast in his neighborhood," not his "personality."²⁸⁹ Moreover, the law precludes proof of character through specific instances of

284. *Id.* at 483–85 (noting that *Michelson* had not objected that the 1920 arrest was too "old and indecisive").

285. *Id.* at 486.

286. *Id.*

287. *Id.* at 483.

288. *Id.* at 475. In this respect Justice Jackson voiced popular thinking about character, but his service as a prosecutor at the Nuremberg Trials gave him a unique perspective on the "good" and "evil" in people. See Lord Shawcross, *Robert H. Jackson's Contributions During the Nuremberg Trial*, in MR. JUSTICE JACKSON, FOUR LECTURES IN HIS HONOR 127 (1969).

289. *Michelson*, 335 U.S. at 477. *Michelson* observes elsewhere that should the defense offer "good" character witness, the prosecution may impeach them by asking about "reports" of bad behavior and by calling other witnesses to testify that the defendant's reputation is bad. This is because "it is not the man that he is, but the name that he has which is put in issue." *Id.* at 479.

conduct or the witness's personal knowledge ("his own independent opinion") of the subject.²⁹⁰ A character witness is "allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself." Reputation, then, was "opinion-based-on-hearsay testimony."²⁹¹ It offers "practical convenience" by eliminating "innumerable collateral issues" that might otherwise confuse the trier of fact.²⁹² Reputation features the "compacting" of hearsay (community gossip) into the "brief phrase of a verdict."²⁹³ It "is one of the few instances in which conclusions are accepted from a witness on a subject in which he is not an expert."²⁹⁴ Jackson's latter point subtly yet clearly underscored that reputation (and character) was a peculiarly lay construct.²⁹⁵

Michelson, then, roundly lambasts the "common law tradition" governing character proof while upholding it in the end. What the Court found "grotesque" were the many paradoxical rules and "illogical options" that shaped its proof at trial.²⁹⁶ Nowhere, however, did the Court question the nature of character itself or its value as proof. As important, the *Michelson* Court, like Mason Ladd, recognized that character was about one's standing in the community. Whether it took the form of collective and compacted gossip (reputation) or the personal opinion of an acquaintance, character arose from the community and was something known to lay people in lay terms.

V. CHARACTER AND CONSTERNATION: THE UNSETTLING OF LEGAL DOCTRINE

The 1970s presented a series of watershed cultural, political, and legal events in the United States. In 1975, the Federal Rules of Evidence capped a decade-long effort to synthesize the common law into a terse, clear set of rules for use in the courtroom. *Michelson's* "grotesque structure" benefitted from new landscaping and a fresh coat of paint but was

290. *Id.* at 477.

291. *Id.*

292. *Id.* at 478 (internal quotation marks omitted).

293. *Id.*

294. *Id.*

295. Jackson asserted that the lay-composition of character had its roots in the "frontier phase of our law's development" when friends and supporters vouched for the defendant's good character while his "rivals and enemies" cast him as unworthy of belief. *Id.* at 480.

296. See *supra* text accompanying notes 61–62; see also *supra* notes 280–295 and accompanying text.

otherwise untouched.²⁹⁷ Nonetheless, social, political, and cultural shifts rocked the complacent assumptions buried in the new rules.

The prime movers behind the FREs, like the *Michelson* Court some twenty-five years earlier, saw no need to define character or, for that matter, habit. Rather, as we have seen, the advisory committee harkened back to Ladd's 1939 article and McCormick's homey 1950s formulations of character as a general moral disposition, including well-recognized traits such as truthfulness. The advisory committee adopted not only the doctrinal scaffolding of the common law but also its underlying social and cultural assumptions as well.²⁹⁸

Despite the law's best efforts to stand pat, the world shifted beneath it. Changes afoot in the 1970s had a subtle impact on the law while riling the deeper waters of American society. The core middle-class values that dominated the American scene since before the Civil War became a critical battleground ideologically, socially, culturally, and politically. Character itself, and the values it conveyed, now became the question, not quaintly technical problems of proof.

A. Character and Contemporary Academic Commentary

Before 1950, Mason Ladd, Justice Jackson, and others spoke confidently and comfortably about people's trustworthiness, peacefulness, honesty, and general moral character as well as the "evil" that lurks in some.²⁹⁹ Such assertions are strikingly absent in recent writings on character evidence. A wide sampling of student texts and law review commentary published since about 1980 reveals a number of trends that are discussed below.³⁰⁰ A common thread is the absence of any discernible consensus about the meaning of character.

The dominant trend appears agnostic about character's meaning. Character, we are told, is undefined by the rules or case law.³⁰¹ Nor do

297. The most dramatic change was to permit proof of character by personal opinion as well as reputation. See FED. R. EVID. 405 advisory committee's note (1972) (observing that reputation is opinion "in disguise" anyway).

298. See *supra* text accompanying notes 88–91.

299. See *supra* Part IV.C.

300. Some of the commentary cited below embraces more than one of the trends, which are not mutually exclusive.

301. *E.g.*, DAVID LEONARD & VICTOR GOLD, EVIDENCE: A STRUCTURED APPROACH 321 (2d ed. 2008) ("What is *character*? Unfortunately, we do not have a good definition.") (emphasis in original); ROGER PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 5.04, at 127 (3d ed. 2011) (observing that "interestingly" the term "character" was undefined by Rule 404 and the federal advisory committee); PAUL R. RICE & ROY A. KATRIEL, COMMON LAW AND THE FEDERAL RULES OF EVIDENCE § 3.02, at 99–102 (6th ed. 2009) (character undefined; focus placed on its use as evidence and the forms of proof); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 7.01[1], at 7 (Student

commentators fill the breach: “Unfortunately the legal literature reflects little effort to define character.”³⁰² The implication is that a definition is hopeless in any event. The literature frequently settles for a string of nouns and adjectives describing familiar stereotypes without analyzing their sounding in popular thought.³⁰³ Character evidence is sometimes derisively treated as just another word for “propensity” evidence regardless of the “trait” involved.³⁰⁴

A second trend, one that would have astonished the character rule’s Victorian progenitors, openly muses whether character has an essential ethical or moral component and, if it does, what its contours are. A leading text reports that “one would think” there is a link between character and a “person’s *moral* being,” but the matter is “not settled.”³⁰⁵ Others within this trend approach delicate questions about morality and ethics more obliquely. Almost apologetically, they note that character is “awkward” because it “casts the speaker in a judgmental role” and, more broadly, “defines the essence (and in a sense measures the worth) of a person.”³⁰⁶

ed., 9th ed. 2011) (the FREs “do not define *character evidence*”) (emphasis in original); see also David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1165 n. 12 (1998) (“A satisfactory definition of ‘character’ is elusive.”).

302. E.g., PARK ET AL., *supra* note 301, § 5.04, at 127 n.42.

303. E.g., MICHAEL R. FONTHAM, TRIAL TECHNIQUES AND EVIDENCE 155 (3d. ed. 2008) (listing illustrative traits that include “sleazy” and “klutziness,” as well as “honest,” “upstanding,” and “dishonest”).

304. See Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 SW. U. L. REV. 769, 773–74 (2008) (discussing the confusion over “character” as seen in the use of synonyms like “disposition”); see also FONTHAM, *supra* note 303; Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 451, 458–59 (2006) [hereinafter Imwinkelried, *An Evidentiary Paradox*] (criticizing the view that character is “deterministic” while observing that the doctrine of chance gives freer play to human autonomy and free will); Allan G. King & Syeeda S. Amin, *Social Framework Analysis As Inadmissible “Character” Evidence*, 32 LAW & PSYCHOL. REV. 1, 17 (2008) (character is undefined in the FREs but notes that the Model Code of Evidence defined it as “disposition, not reputation”); Melilli, *supra* note 111, at 1549 (character is an “individual’s general propensity”); Miguel Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L. J. 221, 225 (1996) (assuming a consistency among law, science, and popular culture about character’s meaning but vigorously critiquing the propensity inference’s probative value); see also 22A CHARLES ALAN WRIGHT & KENNETH GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5233, at 211 (Supp. 2013) (a “good definition” of character has two elements: first, “a claim that person has a pattern of repetitive behavior”; second, “a claim that the behavior is morally praiseworthy or condemnable”).

305. PARK ET AL., *supra* note 301, § 5.04, at 127 (emphasis in original). Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 7 n.19 (1993) (character “does not necessarily have a moral connotation”).

306. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 403 (6th ed. 2008). The Victorians would have insisted that this is the whole point! The authors also identify a “narrower meaning” that describes a person’s “inclinations and suggests their innateness.”

Some modern commentators are less bashful. One student textbook declares that “character evidence” concerns “the propensity of a person to act in a certain manner that makes a general statement about that person and conveys a moral or ethical judgment.”³⁰⁷ This view rejects a “broader view of character that is not limited to morals or ethics.”³⁰⁸ Yet, what is meant by “ethics” or “morals”? If being “truthful” and “honest” qualify as character traits under this view, does this mean that being “thrifty,” “brave,” or “clean” do not? And for that matter, is being a “careful driver” a habit, a character trait, or none of the above?³⁰⁹ Recognition of a moral and ethical component returns character to its nineteenth-century Victorian roots, but that older approach was far more encompassing than some of today’s stingier formulations, as best seen in its recognition of a “general moral character.”³¹⁰ The current debate over an ethical or moral core, however defined, overlooks or perhaps deliberately ignores character’s roots in nineteenth-century liberalism.³¹¹

In a third trend, we see evidence law’s courting of modern psychology as the gold standard for valid, reliable rules. Some critics saw the FREs as a bust from the start. Robert Lawson skewered the newly-minted FREs for their naivety and, as he saw it, appallingly retrograde approach to character proof.³¹² Character evidence, Lawson posits, “involves the structure of human personality.”³¹³ For Lawson, the FREs failed to consider whether modern psychology offered new approaches to old problems, especially the “psychological assumptions” built into the purported link between “general moral character” and a willingness to testify truthfully or untruthfully.³¹⁴ The common law view, best expressed by Wigmore, paralleled the “prevailing scientific views” found

Id. This latter use points to what today is called “personality” as distinguished from character. *See infra* text accompanying notes 354–357.

307. LEONARD & GOLD, *supra* note 301, at 322 (emphasis added).

308. *Id.* at 322 n. 5; *see also* Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 779 (1981) (limiting character to “only those qualities of personality that have some moral overtone, which connote something good or bad about a person”).

309. *See Hart v. State*, 249 N.W.2d 810 n.9 (Wis. 1977). Relying on MCCORMICK, *see supra* text accompanying notes 92–93, the advisory committee distinguished one’s “character for care” in “handling automobiles” from one’s habit “of giving a left-hand signal for a left turn.” FED. R. EVID. 406 advisory committee’s note.

310. *See Ladd, supra* note 257, at 498.

311. *See* discussion *supra* Part IV.B.1.

312. Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, in 30 NOTRE DAME LAWYER 758 (1975). Lawson and others criticized the FREs as a “backward” step that reorganized “worn out concepts.” *Id.* at 758 (citation omitted). The FREs, he charged, “contained few notable departures from prevailing doctrine.” *Id.* at 763.

313. *Id.* at 759.

314. *Id.* at 760.

in so-called trait theory.³¹⁵ Yet psychology at this point had largely abandoned general trait theory: “[T]he theory of behavior that was so compatible with the law’s notion about character has ceased to have any scientific recognition.”³¹⁶ The fall from scientific grace, Lawson contended, undercut the law’s assumptions about a link between a person’s character for “veracity” or “general moral character” and their propensity to be truthful.³¹⁷ Particularly vulnerable, at least on scientific grounds, was the law’s assumption that a prior criminal conviction affected credibility.³¹⁸ Lawson’s intent was “to move the law closer to truth by exposing its lack of knowledge about the true nature of human character and about the true nature of the perception of character.”³¹⁹

Later commentators echoed Lawson’s lament that character law is not moored to good science—although it remains unexplained why any science, good or bad, is the litmus test.³²⁰ These critics contend that law remains inexplicably “mired” in the outmoded views of trait theory.³²¹ The hope is that science will deliver us by developing tools that are both reliable and valid in gauging a person’s propensity to act.³²²

315. *Id.* at 780. Lawson jabbed at Wigmore for not appreciating that both law and psychology shared common assumptions about character. *Id.*; see discussion *supra* Part III.A.; see also *supra* text accompanying notes 251–252.

316. Lawson, *supra* note 312, at 783.

317. *Id.* at 786. Scientific studies had “radically undercut” any assumption that “a person’s moral qualities are highly integrated and motivate transsituational consistency of moral behavior.” *Id.*

318. *Id.* at 787–89.

319. *Id.* at 789.

320. Mendez, *supra* note 304, at 225 (conceding the ubiquity of “character reasoning” among the lay public and its adoption by legal rules, but observing that such propensity inferences rest on untested assumptions about their probative value and “predictive quality”: “If, as a scientific matter, they do not [have this “predictive quality”], then the law has no business allowing parties to use character to prove or disprove the conduct elements of a cause of action to support or attack the credibility of witnesses.”); see also *infra* note 321; Taslitz, *supra* note 305, *passim*. For a critique of the law’s reliance on the “shifting consensus among psychologists,” see Melilli, *supra* note 111, at 1594. If science is the standard, appeals to lay thinking probably come off as “pop psychology.”

321. LEONARD & GOLD, *supra* note 301, at 322 n.5:

The law accepts a largely outmoded theory of character usually known as *trait theory*.

That theory holds that people possess fairly consistent traits of character and that those traits manifest themselves, more or less, in the varying circumstances of everyday life.

Id. The authors posit that psychologists “largely abandoned” trait theory by the mid-twentieth century in favor of “situationism” and more recently an approach called “interactionism.” They further observe that “[u]nfortunately . . . the law of evidence is still mired in trait theory.” *Id.* at 322–23. For a sketch of situationism and interactionism, see *infra* text accompanying notes 324–329.

322. See Mendez, *supra* note 304, at 227–235 (reviewing the psychological literature of the mid-1990s as it transformed from “situationism” to a view that found “relative stability and invariance of the basic personality structure” that might yield “stable patterns of variability” in people’s conduct); see also Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1242 (2001) (laying out the competing contentions among the “situationist”

Edward J. Imwinkelried thoughtfully surveyed psychology's journey over the past fifty years from trait theory to situationism and now to interactionism.³²³ Briefly, trait theory dominated psychology through the 1950s, holding that the human personality exhibited stable traits to which human conduct conformed. Situationism dominated the 1960s and 1970s; it rejected trait theory wholesale, contending that people's conduct was largely a product of whatever situation they faced, not some deep-seated personality structure.³²⁴ Between the polar extremes of trait theory and situationism, a third way—interactionism—promises an “attractive compromise position” based on a “growing consensus that an integrative model, based on the interactive interplay of character traits and situations cues is preferable.”³²⁵ Imwinkelried observes an emerging “taxonomy” yet cautions that much more research is needed.³²⁶ “Of most interest to legal commentators,” he remarked, “interactionists are now fundamentally transforming the very concept of a character trait” by “abandon[ing] the notion of situation-free trait descriptions.” Rather, a “situational component must be factored into, included in, or incorporated into the very conception of a disposition or character trait.”³²⁷ The scientific research is in its “early stages” and the field lacks consensus.³²⁸ Imwinkelried concludes that interactionism, even though incipient, can helpfully inform evidence law in a variety of ways. Some rules must be recrafted or withdrawn (e.g., Rules 413 to 415); interactionism may also help a judge exercise her discretion when evaluating other act evidence.³²⁹ The legal system need not fiddle while the interactionists search for useful tests and protocols.

In summary, when discussing the nature of character, the dominant trends are as follows: (1) a studied agnosticism about whether it can be defined at all; (2) a robust debate—to the shock of our Victorian forebears—over whether character has an essential moral or ethical core; and (3) an unwarranted assumption that character is or ought to be wedded to

school and those finding more “stability” in personality). Sanchirico's interest centers more on how character evidence may be used to shape conduct outside the courtroom than the nature of character itself.

323. Imwinkelried, *Reshaping the Grotesque Doctrine of Character Evidence*, *supra* note 120, at 747–51.

324. *Id.* at 749–51.

325. *Id.* at 754–55 (citations omitted).

326. *Id.* at 755–56.

327. *Id.* at 758.

328. *Id.* at 766.

329. *Id.* at 759–67.

one or another psychological school.³³⁰ Troublingly unappreciated is character's lay nature. Some commentary is uneasy about the disjunct between law (which disdains the character/propensity inference, however defined) and popular thinking (which finds it enormously useful).³³¹ Yet it is clear that evidence law and its commentators are reluctant to take up the social and cultural values inherent in the popular uses of character. The familiar middle-class values espoused in *Michelson* and by academics like Mason Ladd are passed over or ignored despite their resonance in the FREs. More alluring is an approach to character that is non-ideological, value-free, and, best of all, rooted in a purportedly objective scientific school that is devoid of divisive social values. Why the alienation?

B. The "Ordeal" of the Liberal Character Since the 1960s

The Federal Rules of Evidence assumed that the common law of character, however grotesque its rules, would continue to prove serviceable in the nation's courtrooms. The foundation for that body of law, as we have seen, rested in the bedrock of a shared consensus on the prevailing values of American liberalism. It stands to reason that when temblors shook the social and cultural foundation at liberalism's core in the 1960s, these same forces would rock the law as well in the following decades. The purpose of this section is to sketch briefly a broad array of cultural, economic, and political developments that have convulsed American society for over forty years, from the counterculture of the 1960s to the ongoing culture wars that started in the 1980s. This historical survey provides some context while inviting further research into evidence law's uneasy and largely unexplored relationship with broader social and cultural developments.

Alan Brinkley, a leading historian, describes the 1960s as the "ordeal of liberalism."³³² The decade saw a greater awareness of social problems, although the solutions remained elusive. Lyndon Johnson's Great Society programs launched a war on poverty that soon became mired in its own quagmire as the Vietnam War sucked up money and killed thousands. The drive for racial justice wracked American society as the Southern sit-ins and "freedom rides" of the early 1960s gave way to

330. Linking character to trait psychology is, for some, a convenient way of jettisoning doctrinal problems that entail the messiness of dealing with current cultural and social unrest. See discussion *infra* Part V.B.

331. See *supra* text accompanying notes 312–322.

332. BRINKLEY, UNFINISHED NATION, *supra* note 144, at ch. 31. Brinkley also uses the phrase to describe the career of liberal activist Allard Lowenstein. ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS ch. 13 (1998). Other historians have gone further, calling the '60s a "civil war." See MAURICE ISSERMAN & MICHAEL KAZIN, AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S (2000).

pitched battles and murders in Alabama and Mississippi. Over 200,000 demonstrators packed the National Mall in Washington D.C. to hear Dr. Martin Luther King Jr. proclaim his “dream” of racial equality in 1963, an event that proved to be the “high-water mark of the peaceful, interracial civil-rights movement.”³³³ Landmark civil rights legislation offered some hope yet left unaddressed the social and economic expectations of black Americans. Tensions spread nationally. In 1966, dozens of riots erupted in cities across the nation.³³⁴ The ideology of “black power,” espoused by groups like the Black Panthers and the Nation of Islam, targeted white society itself as evil.³³⁵

Blacks were not alone in questioning America’s core values. As the Vietnam War intensified, student protests convulsed college campuses across the country, drawing heavy media coverage. Mostly white, the protestors attacked the war in a way that linked foreign policy to issues of racial, social, and economic injustices.³³⁶ The disenchantment soon broadened beyond the campuses. A watershed moment came in early 1968, when the Tet Offensive stunned an American public that had been told that the war was being won. The assassinations of Dr. King and of Robert Kennedy followed by the police riot during the Democratic Convention in Chicago that summer spelled the seeming bankruptcy of American political culture.³³⁷

This radicalism triggered a response as Richard Nixon successfully campaigned on behalf of what he called “Middle America” and a need to restore order.³³⁸ His razor-thin 1968 election win was seen as a reaction to “a dangerous assault on the foundation of [American] society and culture” and a victory for “traditional values.”³³⁹ Yet the turbulence accelerated.

Brinkley identifies two “impulses” within this “pattern of social and cultural protest.” First, the “political left” strove to create a new community of “the people” that would “break the power of elites” and promote racial, social, and economic justice.³⁴⁰ The political radicalism of the “New Left” found its strongest voice in student protests of the Vietnam War, the military draft, and restrictive university policies.³⁴¹ More far reaching, however, was the “counterculture,” which was “openly scorn-

333. BRINKLEY, UNFINISHED NATION, *supra* note 144, at 814.

334. *Id.* at 817.

335. *Id.* at 818–19.

336. *Id.* at 827–28.

337. *Id.* at 828–31.

338. *Id.* at 832.

339. *Id.* at 836.

340. *Id.*

341. *Id.* at 836–37.

ful of the values and conventions of middle-class society.”³⁴² To varying degrees, people, especially the nation’s youth, used sex, drugs, music, and clothing to embrace individual “fulfillment” by “rejecting the inhibitions and conventions of middle-class culture.”³⁴³ A new generation was manufacturing a fresh set of social norms.³⁴⁴

A second, “equally powerful impulse,” sought “liberation” for individuals and groups, such as Asians, Hispanics, Indians, blacks, gays, and women.³⁴⁵ The rekindling of the women’s movement in the 1960s, for example, burned deep into the fabric of the same middle-class values so reviled by the counterculture and the New Left.³⁴⁶ Racial and ethnic groups pointedly rejected the “melting pot’s” assimilationist ideal, choosing instead to celebrate their own “special character.”³⁴⁷ American culture was changing, no longer defined by those of white European descent. Multiculturalism inundated American universities and politics. Some portrayed western culture as “inherently racist and imperialistic.”³⁴⁸

The twin impulses did not stand unchallenged. Nixon’s triumph of traditional values proved short lived and even farcical in the light of the Watergate Scandal. By the 1980s, however, those values found more formidable defenders in evangelical Christians and the “New Right,” which joined economic issues with cultural and social issues in a far reaching struggle that was about much more than protecting middle-class standards.³⁴⁹ Groups like the Christian Coalition and the Promise Keepers railed against the “secular legacy” of the 1960s.³⁵⁰ The “culture wars” that began in the late 1980s contested “the cultural pluralism of the rapidly diversifying American population.”³⁵¹ Some feared the decline of community itself, as Americans elected to “bowl alone” rather than join

342. *Id.* at 383.

343. *Id.* at 838–39.

344. *Id.* at 839.

345. *Id.* at 836.

346. *Id.* at 848–49.

347. *Id.* at 845.

348. *Id.* at 911.

349. See BRINKLEY, LIBERALISM AND ITS DISCONTENTS, *supra* note 332, at 292–96 (discussing religious fundamentalism and its uneasiness with “modernism”).

350. PATTERSON, *supra* note 5, at 257. As Patterson colorfully puts it, critics on the right saw only “pot smoking, bra burning, love beads, radical feminism, black power, crime in the streets, pornography and sexual license, abortion, family decline, Darwinian ideas of evolution, and gross-out popular culture.” *Id.*

351. BRINKLEY, UNFINISHED NATION, *supra* note 144, at 911.

others on teams or leagues.³⁵² Fights over “political correctness” reveal “a painful change in the character of American society.”³⁵³

This fragmentation of social ties leads some critics to wonder whether “character” is being replaced by “personality,” although the two seem to overlap. The nineteenth and most of the twentieth century was “a culture of character,” which “came to mean a group of traits believed to have social significance and moral quality.”³⁵⁴ Character was “a method for both mastery and development of the self” in a society that stressed work and producer values.³⁵⁵ By contrast, personality emphasizes the qualities that make one unique and different. It offers a very different definition of self, one that from the start was closely associated with emerging thought in psychology and psychiatry. While character emphasizes duty, honor, and obedience to law, personality is “essentially anti-nomian,” stressing the “importance of being different, special, unusual, of standing out in a crowd.”³⁵⁶ Percolating since the late nineteenth century, personality offers a competing vision of “self” to that of character, one well suited to a “consumer mass society.”³⁵⁷

Battles over sex on television, provocative art, and school curriculums sometimes dominate the media but should not overshadow that the United States retains a “large *cultural center*.”³⁵⁸ The cultural divide did not necessarily pit “character” against “no character” (or “personality” for that matter). Instead, the issues pooled around what content character should carry. Clearly, the values and standards of the 1950s had been transformed by the 2000s. As shown previously, Burnett and his fellow jurors valued character proof and openly disdained the law’s futile attempts to eliminate it. Burnett’s musings about the “gender-bender” witnesses nicely captures how character has evolved over the decades.³⁵⁹

In sum, since the 1960s, a series of convulsions have rent the social fabric. The middle-class values that had once seemed so uncontroversial and obvious are now contested and occasionally reviled by many and just

352. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

353. BRINKLEY, *UNFINISHED NATION*, *supra* note 144, at 911. See ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 163 (W.W. Norton & Co. 1998) (1991) (harshly critiquing multiculturalism and contrasting the approaches to “political correctness” by the left and the right).

354. WARREN I. SUSMAN, *CULTURE AS HISTORY* 273 (1984).

355. *Id.* at 273–74; see also ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 143 (1995) (“In the 19th century, the middle class justified itself with concepts of Character . . .”).

356. SUSMAN, *supra* note 354, at 277–80.

357. *Id.* at 280.

358. PATTERSON, *supra* note 5, at 291 (emphasis in original).

359. BURNETT, *supra* note 64, at 51–57. See *supra* text accompanying note 76.

as passionately defended by others. The law's conception of "character" embraces these disputed values. It is little wonder that the law doused the controversy as best it could with pails full of ambiguity, cant, and a fervent prayer that psychology and the neurosciences might soon deliver a better solution.

VI. CHARACTER IN THE TWENTY-FIRST CENTURY: CONCLUSIONS AND NEW DIRECTIONS

Curiously, the law of evidence is uncomfortable with popular thought and culture.³⁶⁰ We invite lay people into the courtroom as witnesses and jurors yet, like rude hosts, demand they abandon familiar ways of thinking, especially with regard to character. They can't and won't. It is time, then, to rethink character proof in a way that acknowledges the salience (and limits) of lay fact-finding.

In light of the law's futile efforts to ban most forms of character evidence, some commentators have gone in the opposite direction, arguing that the propensity rule itself should be jettisoned. It does seem to be a good thing, however, that prosecutors are barred from calling character witnesses who would brand the defendant with hurtful stereotypes (i.e., name calling via character traits), despite having no knowledge of the charged crime itself.³⁶¹ The current rule also regulates the tenor and content of closing arguments, inducing lawyers to argue facts instead of hurling invective and calling people names. Yet this regulation begs whether the propensity rule really matters in light of its broad exceptions, glaring evasions, and clash with common sense and life experience. Richard Uviller notes that "[t]he human mind instinctively seeks personality predicates for the inferences of behavior," a view surely seconded by juror/historian Burnett.³⁶² Writing in the early 1980s, Uviller contend-

360. This is strikingly evident in the embrace of summary judgment and emergence of highly technical evidence rules—especially the "gatekeeping" rules governing expert testimony—designed to augment judicial "fact" finding and summary judgment.

361. For similar reasons, courts sometimes ban guilt-assuming hypotheticals during cross-examination of defense character witnesses. *See* *United States v. Guerrero*, 665 F.3d 1305, 1312 (D.C. Cir. 2011) (distinguishing between "opinion" and "reputation" testimony but finding no error in any event).

362. H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 240 (1996). "The underlying behavioral assumptions" of the character rules, says Uviller, "can only be described as bizarre, and the rules that have sprouted from them are arcane and arbitrary, undermining all the claims of jurisprudence to rationality and predictability." He asks further whether "we in litigation" are really trying to reconstruct "real events involving human actors" or instead "like modern medieval monks, trying to reconcile artificial doctrine with imaginary behavior . . ." *Id.* He closes by suggesting we scrap the propensity rule in favor of reposing discretion in judges. *Id.*

ed that “[p]redisposition, so long a pariah in the law of evidence, must be reclaimed from the shadows.”³⁶³

How do we “reclaim” character or at least acknowledge its lurking presence in the courtroom’s shadows? Of prime importance, we must recognize character’s roots in today’s society and culture. Lay factfinders apply their common sense and life experiences when listening to testimony by lay witnesses, which is often the predominant source of proof, especially in criminal cases. Burnett’s astute observations about how his jury decided a murder case vividly underscore that character inferences are drawn regardless of whether formal proof is introduced by the lawyers and in the face of jury instructions telling them not to: We need to know “what kind” of people are involved in the case. The propensity rule eliminates most avenues of formal character proof, yet there are numerous back-alleys through which the jury learns about the “kinds” of people involved as witnesses or parties. “In everyday life,” observes Edward Imwinkelried, “we commonly rely on character reasoning.”³⁶⁴ Jury instructions will not and cannot change this. Other commentators also acknowledge that “‘character’ and ‘propensity’ are ubiquitous, and characterological attributions of cause seem built into human reasoning.”³⁶⁵

The disjunct between legal reasoning and common experience is disquieting yet usually defended, unconvincingly, on grounds that decisions in the courtroom are fundamentally different from those in everyday life.³⁶⁶ Confining character to lay evidence hedges against over-

363. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 883 (1982). Uviller concluded:

In sum, character evidence cannot and should not be banished from the field of proof. Humans have always sought to read one another’s character and often base important decision on these judgments. Inescapably, character does tend to prove a fact to which it may be relevant by establishing a proclivity or tendency to do the act in question or to perform with a critical intelligence or understanding. Yet today, character evidence most often appears either in burlesque of its function, or as a product of an arcane legalist wordplay, or as a cruel and senseless shard of forgotten dogma. It is foolish to exclude helpful evidence simply because it tends to prove the fact by providing predisposition to perform it. Relevant is relevant.

Id. at 890.

364. Imwinkelried, *An Evidentiary Paradox*, *supra* note 304, at 425.

365. RICHARD O. LEMPET ET AL., *A MODERN APPROACH TO EVIDENCE* 377 (4th ed. 2011). The authors also observe that “jurors almost never deliberate on a case without substantial evidence on the character of the parties and the witnesses” which may not be technically “admitted” or, if so, was admitted for other purposes. *Id.* at 334; *see also* Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 229 (2004) (“jury trials are all about character”).

366. *See* PARK ET AL., *supra* note 301, § 5.04, at 130:

When formal judgments affect a person’s life or freedom, some kinds of considerations should be out of bounds. But it is appropriate to examine evidence of character in our dai-

reliance on such proof. Although Burnett was initially bowled over by allegations that the victim may have attacked another young man, on further reflection, he deeply discounted this evidence.³⁶⁷ Not all jurors will have Burnett's fact-finding facility, but the larger lesson is that common sense and life experiences teach us to handle such anecdotes carefully. "Background" evidence should be acknowledged as character evidence. Cross-examination, closing arguments, and frank instructions that warn about the weaknesses of character inferences will protect against overvaluing such evidence but only if we first honestly acknowledge it for what it is—character.

From this, it also follows that psychology is not the answer. Character is a lay construct and should be confined to lay terms. Character witnesses offer their opinions of the subject, as Theodore Roosevelt did, based on personal dealings or their sense of the subject's reputation. Psychologists' assumptions are based in objective scientific research, not community gossip built on myriad daily interactions among lay people. This is not to say that psychologists have nothing useful to offer about propensity; rather, their evidence should be (closely) scrutinized for what it is, namely, expert testimony subject to the reliability analysis under Rule 702.³⁶⁸ Should a psychologist testify that only a Ph.D. in psychology has anything useful to say about propensity, historian Burnett might be called to impeach the testimony.

As a lay construct, character must be attuned to today's society and culture, which is difficult given its unsettled state. Struggles among legal commentators to define character, including whether it has a "moral" component, have arisen in part because it is often couched in a lexicon of a very different time and place. Greenleaf's reference to one's "entire moral character" made sense in the 1840s and apparently the 1940s but seems a mystery today. The United States, historians tell us, maintains a

ly lives when deciding diverse matters, such as whom to hire as a babysitter or whom to entrust with a bank deposit. Nobody would deign to tell us we should not do so, and any effort to regulate our behavior to prevent us from considering such qualities would necessarily fail. Moreover, we can live comfortably with inaccuracy in this realm of private behavior. If it turns out that the information received about the person's past behavior or general character is simply wrong, the error will usually cause a relatively small degree of harm (though at times the harm can be great, as in marriage or employment decisions). It would thus be impractical, intrusive, and of little actual value to try to regulate the use of character evidence in the private dealings of daily life.

Id. The problem arises, however, because the law chooses to "regulate" in the courtroom how most people think outside the courtroom; the results are artificial rules and unhelpful fictions. Moreover, selecting a babysitter is among the most important decisions a parent makes, and it is usually based on personal contacts or references—namely, "character witnesses."

367. See *supra* text accompanying notes 79–80.

368. See Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991 (2007).

“large *cultural* center,” albeit one that is earnestly contested and continually evolving.³⁶⁹ Legal commentators justifiably complain about the “semantic” problems and careless usage by which we describe character traits.³⁷⁰ Yet the problem is likely more one of generational trends; values that made sense in the 1930s are not always applicable today.³⁷¹ Burnett’s casual reference to “gender-bender” witnesses would likely mystify the *Michelson* Court, yet today’s average teenager, broadly educated in the popular culture through social media, would be instantly familiar with such labels. Moreover, educational organizations and public commentators vigorously support instilling modern notions of character into the nation’s youth as an answer to contemporary social problems.³⁷² As character evolves, so must evidence law.

So too, distinctions between character and personality should be plumbed by evidence scholars. Socially, culturally, and historically, character and personality point in different directions, the one oriented at group behavior and the other at individuals.³⁷³ We may find, for example, that character traits (social judgments) are best expressed through reputation testimony while personality traits (an individual’s unique qualities) are better left to lay opinions (if not expert opinions). In sum, the challenge is to recognize that character is fluid and dynamic, a product of prevailing society and culture, which will be expressed in those terms.

Our lexicon of character traits clearly needs rethinking, especially in light of the social transformations of the last fifty years. What are today’s “pertinent” character traits, as required by Rule 404(a)? Burnett’s reference to the gender-benders is, once again, a vivid reminder that juries draw character inferences regardless of formal proof or jury instructions telling them not to. It also teaches us that the social and cultural divisions of the last thirty years necessitate sensitivity to diverse communities and groups, particularly those not attuned to traditional middle-class values. No definitive list is possible or even desirable.³⁷⁴ It is likely

369. PATTERSON, *supra* note 5, at 291 (emphasis in original).

370. See Uviller, *Evidence of Character to Prove Conduct*, *supra* note 363, at 849.

371. PATTERSON, *supra* note 5, at 259.

372. See Brooks, *supra* note 3; Peggy Noonan, *America’s Crisis of Character*, WALL ST. J. (Apr. 20, 2012), <http://online.wsj.com/article/SB10001424052702303513404577354221282508372.html> (“I think more and more people are worried about the American *character* – who we are and what kind of adults we are raising.” (emphasis in original)). For examples of contemporary character-building, see *Character Counts*, JOSEPHSON INST., <http://charactercounts.org/> (last visited Aug. 18, 2013); *Foster Success: Become a National School of Character*, CHARACTER EDUC. PARTNERSHIP, <http://www.character.org/> (last visited Aug. 18, 2013).

373. WIEBE, *supra* note 355, at 143–44, 183.

374. Referring to the “quiddities of character,” Ladd urged lawyers to use whatever words accurately described the trait rather than confining the testimony to some arbitrary verbal formula. Ladd, *supra* note 257, at 529.

that the old doctrine—a facial but ineffectual prohibition on character evidence—survived as long as it did because it leaked so badly, allowing courts to account for contemporary attitudes and norms. If character is socially constructed—what others think of a person—the vocabulary will be that of the group as expressed by the witness. Nonetheless, some “traits” may be ripe for pruning.

The eminently Victorian trait for “truthful character,” for example, is queued for reconsideration. At common law the trait for “truth and veracity” stood alongside that of “good moral character,” which included “elements” of “honesty, integrity, and good citizenship” that in turn related to “the probability of one’s telling the truth.”³⁷⁵ Today’s rules still recognize a trait for truthful character. As we have seen, Rules 608 and 609 are exceptions to the propensity rule and convenient avenues for parties, especially prosecutors, to flood courtrooms with misconduct evidence, including prior criminal convictions and deceitful behavior.³⁷⁶ Yet what does such evidence tell us about credibility? Do we really need this type of proof to know that a person may have a “propensity to lie,” a “fact” shared by all humans?³⁷⁷ Or is this evidence just the law’s convenient rationalization for informing the jury that the witness skews low on the social score card?

There are other candidates for woodshedding. Rules 413–415 foster broad propensity inferences about alleged sex offenders. It rests on spotty social science research, as has been observed, but what about popular attitudes about repeat offenders?³⁷⁸ Recall that Burnett’s jury wondered whether the shooting victim had lured and sexually attacked other men on prior occasions and felt vindicated when they later learned of one possible incident. Such problematic evidence is better left to the judge’s broad discretion under Rule 404(b) and Rule 403.

Negotiating the sinkhole that is Rule 404(b) can begin with a frank acknowledgment that limited admissibility is a chimera. Other act evidence is almost always relevant to character despite its proffer to prove intent, knowledge, plan etc. When assessing admissibility, particularly under Rule 403, the judge should assume that the jury will also draw a character inference alongside of the proffered purpose, not pretend that it won’t, and instruct accordingly.

In recognizing that character is a social construct, it is imperative that reputation and personal opinion testimony are taken seriously. Simply put, character translates to what other people think of the subject.

375. *Id.* at 500 n.6.

376. See discussion *supra* Part III.B.

377. See *supra* note 104.

378. See discussion *supra* Part III.C.2.

Foundations for opinion and reputation testimony should not be pro forma. Rather, judges should adopt a gatekeeping role in much the same way they are compelled to do when policing expert testimony. If reputation is gossip, the judge should find that the trait was actually discussed (“gossiped about”) within a group (no gossip, no reputation). Reputation should be approached as a decidedly unscientific, ad hoc survey of family, co-workers, friends, etc.³⁷⁹ Banned too should be testimony that the witness “never heard anything bad” because this may point only to the absence of an identifiable community or the witness’s ignorance of any ad hoc survey. Although reputation is crude, lay factfinders are familiar with its weaknesses and foibles.

Similarly, lay opinion testimony requires that the witness have sufficient personal knowledge of the subject’s pertinent traits to provide a helpful (useful) opinion. How long, how well, and in what way do they know each other? Specific instances (anecdotes) may not be used on direct examination under the FREs, but there should be some assurance of sufficient contacts to support an opinion where one is permitted by the judge. Lay opinion at its basest may amount to little more than name calling, but here, too, the lay factfinders’ familiarity with its problems coupled with exposure of a witness’s bias are usually sufficient.

Additionally, social media must be accounted for in recalibrating the foundations for opinion and reputation testimony. Classic opinion and reputation rested on face-to-face contact, the proverbial backyard fences across which neighbors gossiped, but the urbanization and digitalization of society has changed this dynamic. Critics, particularly Mason Ladd and the *Michelson* Court, decried reputation proof because the anonymity of urban life rendered it a bygone relic of rural America.³⁸⁰ Technology, though, may resurrect reputation without forcing a return to the farm. Social media, such as Facebook, have created cyber-communities that foster close, even intimate, relationships that may substitute for the fences and church socials of our fancied past.

The trial is a device for lay fact-finding. While it has dramatically evolved over the last 200 years, the trial remains a place where lay decision makers are given voice. The law of evidence is built upon accommodating lay observations (testimony) and lay decision making (verdicts) with legal policy. The unworkable fictions of current law must be

379. *E.g.*, *People v. Fernandez*, 950 N.E.2d 126, 131–32 (N.Y. 2011) (intra-family sexual abuse prosecution, reversible error occurred when trial court precluded reputation testimony by the victim’s “family and family friends”).

380. *Michelson v. United States*, 335 U.S. 469, 480 (1948); *see also supra* text accompanying notes 278–296.

replaced with more serviceable rules that reflect and respect how lay people think. Character is a good place to start.