A New Baseline for Character Evidence

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INTRODUCTION

Perhaps no rules of evidence are as contested as the rules governing character evidence.[1] To ward off the danger of a fact finder's mistaking evidence of character for evidence of action, the rules exclude much contextual information about the people at the center of the proceeding.[2] This prohibition on character propensity evidence is a bedrock principle of American law.[3] Yet despite its centrality, it is

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1. *See, e.g.*, David P. Leonard, *The Legacy of* Old Chief *and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 SW. U. L. REV. 819, 821 n.12 (2008) (citing sources describing frequency of contestation over Rule 404(b)).

2. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it 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." (footnote omitted)).

3. *See, e.g.*, David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1162 (1998) (describing the prohibition on character evidence as "[o]ne of the oldest principles of Anglo-American law"). This Essay will use the terms "character evidence" and "propensity evidence" when referring to the character evidence targeted for exclusion under the rules. Because the rules exclude character propensity evidence, both terms are apposite. *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character

uncertain of both content and application.[4] Contributing to this uncertainty is a definitional lacuna. Although a logical first question in thinking about character evidence is how to define it, the Federal Rules of Evidence have never offered an answer.[5] The rules exclude character evidence offered to prove action in conformity with the character but do not specify what is meant by character.[6]

At this fiftieth anniversary of their enactment, however, it is apparent that the Federal Rules governing character evidence and their state analogs do operate from a definitional premise.[7] They assume a baseline figure whose attributes inform the way the rules guard against negative character propensity reasoning. The baseline most strongly resembles a middle-class, cisgender white man.[8] He has a position of privilege. He has no prior convictions, is able to meet expectations of dress and manner in the courtroom, and has an unobjectionable outward appearance unlikely to trigger jurors' negative preconceptions. Unlike many other defendants, this baseline figure can go to a U.S. courtroom confident that he will be judged based on evidence of conduct rather than character. For him, the rules offer the benefit of good character assumptions while shielding him from evidence that might undercut them. This baseline is reflected in the formal rules addressing

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or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); *id.* at 404(b)(1) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). If a piece of evidence is being used for a noncharacter purpose, then it is not being used as propensity evidence. *See id.* at 404(b)(2). If it is being used as character evidence, unless character is at issue in the trial, its relevance will be to show a character propensity.

4. *See, e.g.*, Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 786 (2018) (describing as a "faulty premise" appellate courts' "routine[ ]" assumption that Federal Rule of Evidence 404(b), which provides for nonpropensity uses of character evidence, is a "rule of inclusion" that in fact permits propensity reasoning).

5. *See* FED. R. EVID. 404 (prohibiting "evidence of a person's character or character trait" from being used to prove action in conformity, but not defining what is meant by "character" or "character trait").

6. This definitional void has sparked interesting scholarly debate but not consensus. *See, e.g.*, David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 837 (1998) (arguing that there is no consensus about the proper definition of character and that "[u]ntil agreement is reached, rational reform of the character evidence rules cannot proceed"); Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 105 (2013) (describing character evidence as a concept "that is deliberately left amorphous").

7. Unless otherwise specified, throughout this Essay, references to "the rules" or "the character evidence rules" are meant to encompass both the Federal Rules and the many state evidence codes that follow the Federal Rules.

8. Though I highlight the cisgender white man as the baseline figure for whom the rules create maximum protection, middle class cisgender white women also have baseline characteristics that are more likely to fit the mold and thereby achieve propensity protection in ways unavailable to others.

prior conduct or character-related testimony, the methods of proof permitted, and the tacit endorsement of certain applications of the rules, as well as what the rules have refused to address. Indeed, it is a testament to the enduring strength of this baseline and the assumptions that go with it that, in this fiftieth year of the Federal Rules, we still lack a formalized definition of character.[9]

Understanding the problem through this lens sharpens our view of the deep problems of inequality brought about through the character evidence rules themselves. And it suggests an urgent need to find a way to pivot the baseline. In what follows, I will argue that making such an epistemic change requires new perspectives in our rulemakers themselves. In offering this framing of the problem and proposed solution, I am influenced by feminist and intersectional feminist thinkers as well as critical race theorists who have exposed how the legal system assumes white men as the baseline.[10]

The past five decades of scholarly critique of the character evidence rules bear out the existence of a baseline figure. This work, in its potent dissection of the failures of the propensity prohibition, illuminates how the rules defend and reinforce this baseline premise. To see this requires a small adjustment of focus, a shift that reads existing critiques as evidence of coherence rather than of disorder. For example, scholars have rightly questioned the Federal Rules' foundational claim that "evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[11] How, scholars have asked, can this stated commitment to prohibiting character propensity evidence be squared with the sanctioned practice of impeachment with prior convictions?[12] Other scholars have pointed out the fallacy in the claim that we do not try people for their characters when a witness's outward appearance is taken to be a crucial form of evidence.[13] Still

9. For example, Daniel Blinka suggests that the drafters did not define character because "they thought everyone largely understood" what it meant. Blinka, *supra* note 6, at 105.

10. *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2223 (2019). Carbado and Harris offer examples explored by Kimberlé Crenshaw, who argued that "Black women's discrimination claims are measured based on their correspondence or lack of correspondence with the experiences of white women . . . ." *Id.* At the same time, the experiences of Black men "constitute the race discrimination benchmark against which Black women are the same or different." *Id.*

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

12. *See, e.g.*, H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 863 (1982) (calling Rule 609 "a rule so devastating as to make a mockery of the bar against specific instances of conduct").

13. *See, e.g.*, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2019); Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1 (2021); Jasmine B.

others have noted the regularity with which courts ignore the propensity prohibition when it would disallow evidence that they view as necessary to a trial.[14] Given how misunderstood and broadly misapplied the propensity prohibition itself is, this scholarship has argued that there is reason to suspect the genuineness of the commitment.[15]

We can read this body of work as powerful evidence that the Federal Rules have not achieved their stated goals, which it surely is. But we might also see existing critiques as equally powerful evidence of a system that is operating as designed.[16] I will argue here that the interventions and noninterventions of the Federal Rules on character evidence are designed to offer people who fall within the baseline coherent and effective protection from being judged on the basis of character. For example, those in positions of relative power are largely unaffected by provisions, like Rule 609, that explicitly invite us to judge witnesses for their prior convictions.[17] It is also our baseline figure for whom the modes of speech and dress prescribed by courtroom norms of decorum are a comfortable, if not everyday, mantle. Further, it is the powerful who might be most confident that the witnesses they might call on their behalf would similarly benefit from a lack of prior convictions or "suspicious" demeanors.

The reading I posit here is not an apology for the rules. To be coherent and biased is arguably more damning than to be flawed because of incoherence, as scholars have largely argued.[18] My claim is that the rules' commitment to judging acts rather than character exists, but it is thin and targeted. To the extent that the rules are forgiving to

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Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017); Blinka, *supra* note 6.

14. *See, e.g.*, Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717 (1998); James Stone, *Past-Acts Evidence in Excessive Force Litigation*, 100 WASH. U. L. REV. 569, 596–98 (2022); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575 (1990).

15. *See, e.g.*, Uviller, *supra* note 12, at 880 (suggesting that the Federal Rules's failure to instantiate a propensity prohibition "cannot be passed off as a quaint residuum of . . . common law confusion"); Blinka, *supra* note 6, at 144 (arguing that at common law there was never a true exclusion of character evidence, and the rule drafters assumed "the common law of character, however grotesque its rules, would continue to prove serviceable").

16. Here, I follow in the footsteps of critical race theorists who have made similar arguments in other areas. For example, Paul Butler has argued that aspects of the policing crisis in America are "not actually problems" but are instead "how the system is supposed to work," and that recognizing this is important to thinking about reform. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

17. FED. R. EVID. 609 (permitting "attacking a witness's character for truthfulness by evidence of a criminal conviction").

18. *See, e.g.*, Blinka, *supra* note 6, at 88–89 (describing character doctrine as a set of "nonsensical rules, whimsical distinctions, and arcane procedures").

our baseline figure, they do not act as an equalizer and a check against bias but instead systematically disadvantage those with less power. A prime example is the person with one or more prior convictions. Another is the person whose demeanor does not conform with societal expectations. By privileging the powerful and their witnesses, the rules also make it more difficult to dismantle power hierarchies by, for example, offering proof of serial misconduct in cases against those who are more powerful, such as police officers or discriminatory employers.

Understanding the problem with the rules governing character evidence as a baseline problem opens up new avenues for reform. Specifically, it suggests an unsurprising epistemic failure on the part of the evidence rules themselves. The Federal Rules of Evidence were written and then debated and modified almost entirely by white men in positions of power.[19] These drafters were working with common-law rules that were similarly developed almost entirely by a bench and bar of white men. Whatever the intentions of the creators, the character evidence rules they produced function to protect people like themselves from evidence of negative character propensity even as they have been and continue to be blind to the ways in which assumptions of negative character form a routine element of proof against the marginalized.

What is the solution, if any? The change I propose here is simple yet untried: Why not broaden the perspective of the rulemakers? In 1975, evidence rulemakers were not pushed to interrogate the baseline assumptions that had long informed the rules. But once we see this as a baseline problem, or a failure to imagine the concerns of those marginalized by law and society, one obvious intervention presents itself. We must invite more voices to contribute to evidence rulemaking, and specifically, we must seek input from those who are most at risk in today's targeted regime of character propensity protection.

19. The Advisory Committee members appointed in 1965 were all white men. *See, e.g.*, 21 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5006 (2d ed. 2023) ("The Advisory Committee was far more homogeneous than any similar group of white, male lawyers."). They included Albert E. Jenner, Jr., David Berger, Hicks Epton, Robert W. Erdahl, Joe Ewing Estes, Professor Thomas F. Green, Jr., Egbert L. Haywood, Charles W. Joiner, Herman F. Selvin, Simon E. Sobeloff, Craig Spangenberg, Robert Van Pelt, Jack B. Weinstein, Edward Bennett Williams, and Edward W. Cleary (reporter). *Minutes of the Advisory Committee on Rules of Evidence*, U.S. CTS. 1 (1965), https://www.uscourts.gov/sites/default/files/fr_import/EV10-1965-min.pdf [https://perma.cc/LR2Q-JFCG]. The Judiciary Committees in the House and Senate that extensively engaged with and modified the Federal Rules had five members who were not white men over the course of working on the Federal Rules. Please contact the author for more information about her research on the committee member's demographics.

I. CHARACTER UNDER THE RULES

The Federal Rules of Evidence offer a web of provisions related to character evidence. Most prominently, Rule 404 prohibits propensity evidence.[20] There are some exceptions when defendants or victims put their characters at issue in a criminal case.[21] And there is a glaring reversal of the prohibition for defendants accused of sexual assault.[22] The rules also try to make clear that evidence that would otherwise look like character evidence is admissible for a nonpropensity purpose, such as showing that the defendant had the knowledge to commit a particular crime.[23] But the character evidence rules do not stop there. Rule 404 also incorporates by reference Rule 609, which permits the impeachment of witnesses with evidence of prior convictions subject to balancing tests that have been increasingly interpreted to favor admissibility.[24] Under Rule 608, also incorporated by reference in Rule 404, witnesses can be called to impeach another witness's character for truthfulness or to testify to a witness's character for truthfulness once that character has been attacked.[25] No Federal Rule makes explicit reference to demeanor. But demeanor has a firm footing in common-law evidence doctrine, which identifies it as one key to judging both credibility and character. Judges and jury instructions often direct jurors to consider it.[26]

This web of doctrine is justified by several rationales, chief of which is the basic premise that character evidence will hinder accurate fact-finding because although relevant, it carries too high a risk of unfair prejudice. As Justice Jackson famously wrote in *Michelson v. United States*:

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20. FED. R. EVID. 404.

21. *Id.* at 404(a)(2).

22. *Id.* at 413–415.

23. *Id.* at 404(b)(2).

24. *Id.* at 404(a)(3), 609. Anna Roberts has described how a judicial balancing test that originally cited the importance of the defendant's testimony as a factor weighing in favor of excluding prior convictions for impeachment that could trump other considerations evolved into simply a multifactor test in which that same factor is considered a reason to *admit* prior convictions for impeachment. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 843–55 (2016).

25. FED. R. EVID 404(a)(3), 608.

26. *See, e.g.*, Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1350 (2015) ("On the subject of demeanor, 'pattern jury instructions in virtually every state authorize jurors' use of demeanor evidence to detect prevarication.' " (quoting Renée McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 521 (2014))).

> The inquiry is not rejected because character is irrelevant; on the contrary, it 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. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[27]

That prejudice might lead fact finders to punish defendants for their prior acts, regardless of their present guilt,[28] or to give too much weight to the fact of a prior conviction in assessing the likelihood of guilt in the current case.[29] Of course, judicial efficiency is also a concern. A system that embraced character evidence might find itself "hopelessly entangled in the details of the parties' past lives."[30] Finally, the character evidence rules express an aspiration of the legal system. To quote David Leonard, the prohibition on propensity evidence "represents a substantive value about how people should behave in relation to each other. It tells us that in making judgments that affect each other, some kinds of consideration should be out of bounds."[31]

Critiques of the character evidence rules have largely fallen into four categories. For some, the problem with the rules has always been

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27. 335 U.S. 469, 475–76 (1948); *see also* 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 55, at 1159 (James H. Chadbourn rev. ed. 1974) (emphasis added):

> *A defendant's character*, then, as indicating the probability of his doing or not doing the act charged, *is essentially relevant*. In point of human nature in daily experience, this is not to be doubted. The character or disposition . . . of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct. In point of of legal theory and practice, the case is no different;

JOHN W. STRONG, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE, ROBERT M. MOSTELLER & E.F. ROBERTS, MCCORMICK ON EVIDENCE § 186, at 649 (John W. Strong ed., 5th ed. 1999) ("Evidence of the general character of a party or witness almost always has some probative value, but in many situations, the probative value is slight and the potential for prejudice large.").

28. *See* Park, *supra* note 14, at 745 ("If character could be explored freely, triers would be tempted to give litigants what they deserve, not what the law requires."); Leonard, *supra* note 3, at 1184 (describing one risk of character evidence as convictions for "being a bad person, not for guilt of the particular crime at issue"); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1242–47 (2001) (arguing that the costs of exclusion of character evidence must be weighed against the risk that "juries would be tempted to convict defendants for their 'bad character' ").

29. 1A WIGMORE, *supra* note 27, § 194, at 1212, 1859:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation, irrespective of guilt of . . . the present charge.

30. Sanchirico, *supra* note 28, at 1249.

31. Leonard, *supra* note 3, at 1188 (emphasis omitted). This aspiration may also reflect a certain pragmatism about character. As Daniel Blinka contends, the modern rules reflect a nineteenth-century conviction that character was not "an inborn mainspring that determined conduct." Blinka, *supra* note 6, at 131. This view of character may have contributed to an express commitment in evidentiary practice to rebirth and renewal, to moving beyond past failings, which persists in the theory that we should be judged not for our past wrongs but on our present actions.

that their object is fundamentally unattainable.[32] A second critique has argued that even if in theory a propensity prohibition is possible, our system has never had an effective one because it has always permitted certain forms of character propensity evidence, most notably prior convictions to impeach credibility.[33] A third critical camp has shown persuasively that the character propensity prohibition simply is not being followed.[34] At times, this might be for reasons that seem laudable or even necessary—in order to allow proof of prior acts of discrimination in employment discrimination cases, for example.[35] At others, this failure is deeply troubling, as when court after court permits evidence of prior drug possession to prove "opportunity" or "intent" in drug prosecutions where such proof can only come from propensity reasoning.[36] Finally, a fourth important line of criticism has highlighted how the rules do not address many sources of character-based reasoning, like the demeanor of witnesses or the appearance of their families or attorneys in the courtroom.[37]

While varied and evolving in content, criticism of the character evidence rules and their application has spanned the fifty-year life of the Federal Rules of Evidence. And yet, this commentary has resulted in very little significant change to the rules. The rules governing sexual assault trials are one notable exception. In 1978, after feminist activists

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32. *See, e.g.*, Blinka, *supra* note 6, at 90 (arguing that "evidence law's purported ban of character evidence is futile and misguided" because "character is hardwired into our social relations"); Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 446 (2019) (contending that "given the correct tools," jurors would "evaluate propensity evidence carefully and defensibly").

33. *See, e.g.*, Uviller, *supra* note 12, at 863 (describing prior conviction impeachment as "a mockery" that functionally allows for propensity evidence).

34. *See, e.g.*, Imwinkelried, *supra* note 14, at 584 (arguing that prosecutors' ability to offer past conduct for a noncharacter purpose actually swallows the rule and allows character evidence into court).

35. *See, e.g.*, Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1064–65 (2005) (showing how, in the employment context, "courts routinely fail to comply with Rule 404").

36. *See* Hillel J. Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 133 (2022) ("[O]ther-acts character evidence is frequently admitted in drug cases to prove knowledge or intent."); Capra & Richter, *supra* note 4, at 771; Stone, *supra* note 14, at 596–98.

37. *See, e.g.*, Capers, *supra* note 13, at 868 (explaining how the appearance of parties and spectators, though it can influence juror decisionmaking, is not regulated under current evidence rules); Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 574–75 (2008) ("[T]he outcome of the case is affected by many factors that are not technically evidence: the quality of the lawyers' presentations, the appearance and reaction of the defendant in the courtroom, and even the presence of the victim's representatives."). Teneille Brown's work along these lines has expanded our understanding of how difficult it might be to attain a true propensity prohibition. It canvasses scientific studies showing that propensity reasoning is deeply embedded in the human psyche, so much so that we use cues like facial shape and structure to make assumptions about the character of those around us. *See* Brown, *supra* note 13, at 44.

had advocated for years for greater protection for sexual assault victims, Congress added a rape shield provision to prevent the complainant's sexual history from being introduced in sexual assault cases.[38] Notably, such a provision was absent from the then-recently enacted Federal Rules and "hardly mentioned" during the lengthy adoption process.[39] Proponents of reform noted that the status quo approach, which led to sexual history evidence being admitted under Rule 404(b) or Rule 608, reflected "judgments about female sexuality . . . made by male jurists."[40] And then in 1994, in a bundle of other "tough on crime" laws, Congress eliminated the propensity prohibition for defendants in sexual assault and child molestation cases.[41] These changes are significant—one addressed a glaring failure to offer propensity protection to women who were victims of sexual violence while the other eliminated protection from propensity reasoning for those seen as "predatory" or particularly threatening to society.[42] Yet these changes are the exceptions that prove the rule. They show just how coordinated the effort must be—or how responsive to broader moral panic the amendment must seem—in order to make any significant change to character evidence rules. And, in the case of the rape shield provisions, the rule ultimately enacted was arguably quite different from what reformers had proposed.[43]

In sum, the rules on character propensity evidence have laudable ends. They aspire to assure those on trial in U.S. courtrooms that they will be judged for their conduct and not their character. Few have questioned the underlying goal of a system that seeks to avoid punishing people for who they are or what they may have done in the

38. FED. R. EVID. 412; *see, e.g.*, Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 591–92 (2009) ("[I]n the 1970s and 1980s, 'second-wave' feminist activists engaged in concerted efforts to reform rape law and educate the public about sexual assault stereotypes.").

39. 23 WRIGHT & MILLER, *supra* note 19, § 5371.

40. *Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. 81 (1976) (statement of J. Patricia Boyle, Detroit Recorder's Court).

41. *See* Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 970 (1998) (noting that in passing Federal Rules of Evidence 413, 414, and 415, "Congress bypassed the normal enabling rules and directly enacted the amendments through the crime bill").

42. In combination, Rules 412–415 have arguably exacerbated racial disparities in sexual assault prosecutions without solving the problem of putting women's sexual history on trial. *See, e.g.*, Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 209 (2017) (arguing that without information excluded by Rule 412, "jurors fall back on default assumptions and stereotypes to assess what 'really happened,' " leading to racially disparate outcomes).

43. 23 WRIGHT & MILLER, *supra* note 19, § 5371, at n.13 ("Rule 412(a) and (b) were substantially rewritten [before being passed] so as to limit the scope of the rule to criminal cases and to add the exception for constitutionally required evidence, as well as making numerous other changes in language and structure whose intent is difficult to decipher.").

past rather than what they are being tried for doing. Yet, it is beyond question that measured against that goal, the system is a failure.

In what remains of this Essay, I suggest a different frame for the problem presented by the Federal Rules' regulation of character evidence. Rather than a sign of internal incoherence or failure per se, it is worth asking if the problem begins not with the shape of the rules but with the perceived shape of the problem they were intended to solve.

II. THE CHARACTER EVIDENCE BASELINE

The character evidence rules create protection for specific forms of propensity reasoning in specific scenarios. Through the rules addressed to prior conduct or character-related testimony, the methods of proof permitted, and the tacit endorsement of certain applications of the rules, as well as what the rules have refused to address, a clear baseline figure takes shape. He is the person whose concerns the rules seem to recognize and try to address, both as written and as applied. In contrast to this baseline figure, there are others routinely subjected to character propensity reasoning in U.S. courtrooms. Seeing the problem as one of baselines may suggest some specific reforms. For example, Anna Roberts's proposal for reform of Rule 609 in another piece for this Symposium is apt here.[44] Seriously curtailing prior conviction impeachment would go some way toward ameliorating a major gap in the propensity prohibition. But more broadly, this framing suggests a need to change our vision of the person whom we are trying to protect through these rules in order to account for the experiences and knowledge of people who often find themselves judged based on invalid assumptions about their characters and, in this way, to pivot away from the current baseline.

A. Three Characters Within the Baseline

Let us call our first baseline character Williams. Williams achieves protection under the rules. He is most often a man and white, and he has a position of some authority in society. He may be an unpleasant character, verbally abusive and disliked by many, but he has no prior convictions. He can come to a civil or criminal proceeding in relative certainty that the propensity prohibition will shield him from being judged on the basis of his abusive past conduct or bad reputation.

44. *See generally* Anna Roberts, *Models and Limits of Federal Rule of Evidence 609 Reform*, 76 VAND. L. REV. 1879 (2023).

To bring this character to life, consider Mitch Williams, a former Major League Baseball player who, after his playing days were over, worked as a television analyst for MLB Network. Williams also coached his children in youth sports. In 2014, the sports news website Deadspin reported that he had engaged in a profanity-laced tirade directed at an umpire during his son's baseball game.[45] That tirade, as reported by the umpire, oozes entitlement. Williams allegedly said to anyone in earshot, "[T]hese fucking guys don't know who I am and who I fucking know. They make fourteen to fifteen dollars a fucking hour . . . . [Y]ou guys will both be out of jobs tomorrow."[46]

The Deadspin article suggested that this was not isolated conduct and that Williams had engaged in similar tirades at his daughter's youth basketball games.[47] Deadspin also reported that he directed a slur at a ten-year-old player on the opposing baseball team and that he ordered his pitcher to hit a batter on the opposing team.[48] Williams's alleged conduct at the baseball game eventually caused MLB Network to fire Williams, citing a morals provision in his contract.[49] Williams then sued for breach of contract, among other causes of action, and MLB Network filed counterclaims.[50]

At the resulting jury trial in New Jersey, which follows the Federal Rules' approach to character evidence, Williams denied the alleged misconduct.[51] Each side called witnesses to the event who told conflicting stories, and a video of the event also could have supported either account.[52] The court prohibited MLB Network from introducing propensity evidence, namely a New York Post article detailing similar behavior at his daughter's basketball game and evidence suggesting that Williams smelled of alcohol during the incident at his son's game.[53] The jury reached a verdict for Williams and awarded him $1.5 million in compensatory damages.[54]

The outcome in the Williams case turned largely on which version of events the jury believed. And, by a divided vote, the jury found that the proof of Williams's misconduct fell short.[55] Significantly,

45. Williams v. MLB Network, Inc., No. A-5586-16T2, 2019 WL 1222954, at *3 (N.J. Super. Ct. App. Div. Mar. 14, 2019).

46. *Id.* at *9 (first and third alterations in original).

47. *Id.* at *19.

48. *Id.* at *4.

49. *Id.* at *6.

50. *Id.*

51. *Id.* at *7.

52. *Id.* at *7–10.

53. *Id.* at *19.

54. *Id.* at *10.

55. *See id.*

in this credibility contest, Williams was the beneficiary of the propensity prohibition. By excluding this evidence, the trial court followed rules designed to ensure that Williams would not be judged based on negative, character-based assumptions about his conduct. Williams, a white man with a successful and lucrative career as a Major League Baseball player, also did not need to worry that his skin, his clothing, or the way he expresses himself would brand him as unreliable, deviant, or aggressive. To borrow Nicola Lacey's definition of character evidence, he was shielded from evidence from which fact finders may attribute responsibility for conduct based "in whole or in part on an evaluation or estimation of the quality of [his] (manifested or assumed) disposition as distinct from his [ ] conduct."[56] Williams is the baseline, and the system works for him.[57]

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Consider a second baseline character. Say a man like Williams is accused of sex discrimination at work. When this man, Smith, is sued for his discriminatory conduct, Rule 404 presents a barrier.[58] Smith

56. Nicola Lacey, *The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation*, U. OXFORD LEGAL RSCH. PAPER SERIES, July 2012, at 1, 5.

57. Many other cases discussed in the legal literature present examples of the baseline. For example, take the case of William Kennedy Smith, who was acquitted of rape after a judge refused to admit propensity evidence from three other women who said he had sexually assaulted them. Mary Jordan, *Jury Finds Smith Not Guilty of Rape*, WASH. POST (Dec. 12, 1991), https://www.washingtonpost.com/wp-srv/national/longterm/jfkjr/stories/wks121191.htm [https://perma.cc/55GC-PDBF]. This correct application of the rules allowed Kennedy Smith to benefit from all of the positive assumptions associated with his race, class, and heritage. *See, e.g.*, Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 446 (1996) (describing media portrayal of Kennedy Smith as a man with a medical degree who liked playing with puppies in contrast to the "sluttishness" of his accuser). Williams's case contrasts with these more sensational cases because it is not clear how his case *should* have been decided. Much as we might find Williams an unappealing figure, that is precisely the wrong reason to assume he committed the acts attributed to him. Thus, the propensity prohibition seems to succeed in doing real work to ensure that prior alleged misconduct will not decide the outcome in a close case. The problem arises when only certain figures benefit from this protection.

By contrast, many noteworthy baseline cases are widely accepted as miscarriages of justice, often because the evidence is excluded in the context of a sexual assault prosecution in which witnesses or physical evidence are not readily available and accusers have long struggled for credence when accusing powerful men. Those cases have raised a related and important debate about how and when evidence from other accusers should be admissible. *See, e.g.*, Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 363–64 (2019) (arguing for reforms including a more nuanced balancing that might admit highly similar prior acts while excluding other acts).

58. For a similar case, consider Marotta v. Ford Motor Co., No. 14-CV-11149, 2016 WL 3197425, at *7 (E.D. Mich. June 9, 2016). In that case, the Plaintiff alleged discrimination, harassment, and retaliation on the basis of sex by Ford and several of its employees who had been her supervisors. *Id.* at *1. The district court held that some prior misconduct by Defendants might

looks innocuous. He is well-spoken. He has been socialized to believe in his own entitlement and to use charm when needed. He denies that he discriminates against women at the office. The coworker who has accused him, by contrast, is uncomfortable in the courtroom. She has difficulty answering questions and expects, based on other life experiences, that she will be disbelieved.

The coworker also faces a hurdle in the substantive law. To prove that Smith has discriminated against her, she needs to show that his actions were on account of the fact that she is a woman.[59] Smith's lack of prior legal entanglements, his speech patterns, his clothes, and his obvious position of societal power conspire to reinforce his denials in the courtroom. His coworker's assertions that she was the target of sex discrimination, by contrast, enjoy no additional social indicia of reliability.

Because the substantive law requires proof of intentional discrimination, in the absence of smoking gun evidence, the coworker has few options. One way to prove Smith's intent is to show that he has discriminated in the past against other female coworkers, proof that will suggest the adverse action against her was also discriminatory. And courts do often ignore the propensity prohibition to admit such evidence in these cases, particularly when the past misconduct is very similar to the alleged misconduct.[60] Yet, under a correct application of

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be admissible if it also involved sexual harassment, but it excluded evidence of one supervisor's use of harassment broadly as a "management style" as well as evidence of "visits to strip clubs and supposed acts of oral sex outside the workplace" by the same supervisor. *Id.* at *7 (emphasis omitted). The court explained that the "management style" evidence, in particular, "would only be offered to show that Mr. Wendel is a bad person who must have committed the alleged misconduct at issue in the instant case or who deserves to pay damages regardless of whether he actually sexually harassed Plaintiff." *Id.*

59. Marshall, *supra* note 35, at 1068–69:

> The plaintiff in a discrimination suit has at his disposal a limited set of evidence, in large part because '[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail' indicating that animus. Having made his prima facie case and shown the employer's explanations to be pretextual, therefore, the typical plaintiff is left to rely on circumstantial evidence. Prior act evidence—the employer's comments, her treatment of past employees, statistical comparisons between employees, and the like—fills this gap, with the plaintiff proffering such proof in the hope that it will make the existence of animus at the time of the employment decision more probable.

(alteration in original) (footnote omitted) (quoting Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987)).

60. Courts have routinely ignored or misapplied Rule 404 when faced with the near impossibility of proving certain intentional discrimination cases without evidence of prior misconduct. Marshall, *supra* note 35, at 1075. Courts point to the substantive law, which requires proof of intent, and ignore the fact that proving intent through evidence of similar past misconduct requires using propensity inferences. *See, e.g.*, Heyne v. Caruso, 69 F.3d 1475, 1479 (9th Cir. 1995) (holding evidence of sexual harassment of other employees admissible to "prove motive or intent"

Rule 404, a court should not admit evidence of Smith's past acts. Showing that Smith has discriminated against other female workers in order to prove that he discriminated in this case would be introducing his past conduct to prove a propensity for sex discrimination and, therefore, that the present conduct constituted sex discrimination.[61] Unless a court is willing to ignore the propensity prohibition, Smith's misconduct will be shielded by a character propensity prohibition tailor-made for men like him.

* * *

Now consider a third baseline character. This man, Officer Fischer, was a member of the Mount Vernon Police Department.[62] Fischer and another officer stopped the car in which William Daniels was riding.[63] By Daniels's account, Fischer proceeded to shout racial slurs at him, slam him against his car, and then pistol-whip him with the help of another officer, eventually beating him unconscious.[64] When Daniels eventually sued Fischer, the second officer, and the city of Mount Vernon for excessive force and failure to train, among other things, he sought to introduce evidence of Officer Fischer's prior misconduct.[65]

Although Daniels's theory of admissibility focused on the city's failure to train its officers, Daniels may have hoped that introducing evidence of Fischer's past misconduct might offset the assumption of good character and credibility often accorded police officers in this country.[66] Daniels also may have hoped to counterbalance the negative character assumptions that would automatically attach to him, a Black man who had been the subject of at least one arrest.[67] Yet, the court

without explaining how such usage avoids the logic that the Defendant has a propensity to act discriminatorily and therefore intended to do so with respect to the Plaintiff).

61. Marshall, *supra* note 35, at 1075–76.

62. Daniels v. Loizzo, 178 F.R.D. 46, 46 (S.D.N.Y. 1997).

63. *Id.*

64. *Id.* at 46–47.

65. *Id.*

66. *See, e.g.*, Mitch Smith, *Policing: What Changed (and Didn't) Since Michael Brown Died*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/us/racism-ferguson.html [https://perma.cc/BTX4-42D5] (describing national opinion polls showing widening racial and political disparities in views of the police, but finding a majority of Americans have confidence in the police); *see also* Lindsey M. Cole, *In the Aftermath of Ferguson: Jurors' Perceptions of the Police and Court Legitimacy Then and Now*, *in* CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW 109 (Cynthia J. Najdowski & Margaret C. Stevenson eds., 2019) (describing social scientific studies suggesting continued deference to police as witnesses).

67. *See, e.g.*, Gonzales Rose, *supra* note 13, at 2252 (describing evidentiary ramifications of the United States' "racial hierarchy," which confers benefits "upon whites en masse").

held—correctly—that evidence of Fischer's past misconduct was inadmissible evidence under Rule 404. "The past misconduct evidence," the court explained, "might be improperly considered by the jury as proof of the violent propensity and character of the Individual Defendants."[68] Thus, Officer Fischer was able to hold up a shield tailor-made to his image. The propensity prohibition helps ensure he and officers like him continue to benefit from the sticky assumption that police officers are trustworthy and upstanding by excluding evidence that might shake that assumption.

B. Three Characters Outside the Baseline

As the vignettes in the preceding Section show, if correctly applied, the character evidence rules will succeed in protecting men like Williams, Smith, and Officer Fischer from negative character propensity evidence. These men may benefit from social indicia of reliability conveyed on their faces, through their clothes, or in their body language. Evidence that might undercut the assumption that such men are upstanding and forthright fits squarely behind the barrier of Rule 404. But that barrier has a different valence when we consider people who lack such indicia of reliability and who may be punished for a demeanor that is socially branded as deviant or unreliable.

Consider another character, a man named Carlos Ruiz. Ruiz and Yaritza Muñoz-Delacruz were tried in Massachusetts in 2020 on drug charges stemming from a raid on their apartment.[69] Ruiz's name was on the lease, and the utilities were in Muñoz-Delacruz's name.[70] Neither took the stand, and there was no indication that either did anything

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Informational asymmetry is another part of the problem in these cases. The government will have information about the prior acts of those like Daniels who have prior convictions or other legal entanglements, but it may be very difficult to obtain comparable information about officers. *See, e.g.*, Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1361 (2018) ("The drastic contrast between the government's ability to access and utilize a defendant's history, and the defendant's inability to do the same with police officer witnesses, arises in part from . . . informational asymmetry.").

68. *Daniels*, 178 F.R.D. at 48. Substantive legal developments surrounding 42 U.S.C. § 1983 suits have helped ensure that using past misconduct to reveal an officer's intent or motive remains firmly behind the propensity shield. *See* Stone, *supra* note 14, at 590. In contrast to the employment discrimination scenario described above, where the substantive law requires proof of intent that courts have often used as a justification for at least partially ignoring the propensity prohibition, doctrine surrounding § 1983 claims has focused the inquiry on what an objectively reasonable officer would have done. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989). This has more firmly sealed the door to admitting prior misconduct evidence. *See* Stone, *supra* note 14, at 590.

69. Commonwealth v. Ruiz, No. 20-P-775, 2021 WL 5238605, at *1 (Mass. App. Ct. Nov. 10, 2021).

70. Petition for Writ of Certiorari, Ruiz v. Massachusetts, No. 22-132 (U.S. Aug. 2022), 2022 WL 3284615, at *3.

unusual in the courtroom.[71] During their deliberations, the jury sent a question to the judge: "Can we take the defendants [sic] body language into consideration? As evidence?"[72] Over Ruiz's lawyer's objection, the judge instructed the jury: "While not evidence, the jury [are] entitled to consider any observations you made of the defendants' demeanor during the trial."[73] The jury then convicted Ruiz of trafficking heroin but acquitted Delacruz.[74]

Ruiz's conviction offers a stark example of character propensity being used as outcome-determinative evidence against a defendant in a criminal case. The accusation was that he and his codefendant were dealing in heroin. There was no suggestion that a particular physical profile or appearance would be needed to perpetuate that criminal offense. He did not manifest guilt directly through a hand gesture or other action. And because Ruiz did not testify, his appearance could not have been thought to signify a lack of truthfulness on his part.[75] And yet, Ruiz's outward appearance somehow made jurors believe that he had engaged in heroin trafficking.

In *Peña-Rodriguez v. Colorado*, jurors revealed that anti-Mexican stereotypes had swayed them to believe in the Defendant's guilt, a result the Supreme Court found antithetical to the Constitution.[76] The chain of logic in Ruiz's case, while less obvious, is similarly pernicious. Something about how Ruiz looked or comported himself led jurors to make assumptions about his character. And from those assumptions, they concluded that he must have engaged in certain conduct—namely, dealing heroin. In other words, the jury attributed responsibility for conduct to Ruiz based "in whole or in part on an evaluation or estimation of the quality of the defendant's (manifested or assumed) disposition" flowing from his appearance.[77]

The *Ruiz* case makes clear that demeanor is a salient form of character evidence and not simply for defendants who take the stand. This is significant for a number of reasons. Most importantly, for our purposes, it traces a void in the rules' approach to character evidence. Evidence law has ignored demeanor as a potent source of propensity reasoning. The word "demeanor" does not appear in the Federal Rules

71. *Ruiz*, 2021 WL 5238605, at *1.

72. *Id.* at *3 (alteration in original) (internal quotation marks omitted).

73. *Id.* (alteration in original) (internal quotation marks omitted).

74. *Id.* at *1.

75. In other work, I have critiqued the legal insistence that demeanor is a helpful guide to a witness's truthfulness or untruthfulness, but that justification is not available when a defendant is not a witness. Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 168 (2020).

76. 580 U.S. 206, 212, 225 (2017).

77. Lacey, *supra* note 56, at 5.

of Evidence, and I can find no mention of demeanor in the discussions of character evidence during key meetings of the Federal Rules Committee from 1966 to 1972. Thus, when the court in *Ruiz* instructed the jurors that their observations may be "consider[ed]" but were not "evidence,"[78] it endorsed the evidentiary bedrock that witness's demeanor—unlike other evidence, which must at a minimum be relevant to be admissible—is in some way part of the evidence "without any definite rules as to its significance."[79]

At the same time, the Federal Rules explicitly assert that "[e]vidence of a person's character . . . is not admissible to prove that on a particular occasion the person acted in accordance with the character."[80] Because demeanor was the source of the character assumption in Ruiz's case, however, he could make no recourse to the rules on character evidence in seeking to overturn his conviction.[81] And yet it seems clear that demeanor-based assumptions about his character contributed to the jury's conclusion that the prosecution had proved beyond a reasonable doubt that he distributed heroin.

What to make of this chasm in the rules? One view is that this was simply the product of an ingrained and now-outmoded belief in the efficacy of demeanor as a guide to the inner lives of others. Shifting perspective slightly reveals another more troubling possibility. If the Williamses of the world are the baseline, those not within the baseline may be judged for their deviance from that starting point. Through this lens, the incomplete nature of the protection from negative propensity reasoning accorded Ruiz and others outside the baseline comes into focus as a feature of the Federal Rules of Evidence. Put simply, the rules contemplate a world in which having a certain exterior is a necessary part of receiving character evidence protection. Thus, it is a predictable function of the system that Williams, a powerful white man, benefitted from positive character associations arising from his outward appearance whereas Ruiz's demeanor likely marked him, a man of color, as having a character associated with criminalized conduct.[82]

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78. *Ruiz*, 2021 WL 5238605, at *3 (internal quotation marks omitted).

79. 3A WIGMORE, *supra* note 27, § 946, at 783; *see also* Blinka, *supra* note 6, at 114 ("We believe that demeanor is critical to credibility, even if we are unsure exactly what to make of it.").

80. FED. R. EVID. 404(a).

81. Petition for Writ of Certiorari, *supra* note 70, at *i. Similarly, the demeanor-based nature of the assumptions precluded Ruiz from asserting that racial animus and stereotypes contributed to his conviction, in contrast to *Peña-Rodriguez*. *Id.*

82. This reading is not inconsistent with Daniel Blinka's argument that the evidence rules were indebted to a school of thought that considered character to be relevant to guilt or innocence and that still embraced a dominant nineteenth-century ideal of "good character." Blinka, *supra* note 6, at 123–38.

Ruiz's plight presents an unusually stark example of the power of demeanor evidence. But this is precisely the way demeanor operates when witnesses do testify. Despite its absence from the Federal Rules of Evidence, demeanor has long functioned as legally sanctioned character evidence.[83] Jury instructions tell jurors to consider it when drawing inferences about the evidence in a case, and credibility decisions based on demeanor are shielded from appellate review.[84] How a person looks, sounds, and behaves on the stand is viewed as a key element of confrontation.[85] The distinguishing feature in Ruiz's case is simply that the jury was told explicitly that it could consider the silent testimony of his perceived body language as it deliberated.[86]

* * *

Bearing an advantaged demeanor is not the only line of demarcation between receiving protection under the character evidence rules and falling outside their boundaries. The story would be similar if we slightly change the facts. Imagine a new joint trial much like Ruiz's, but in this case, a prior conviction is the only distinguishing feature between two defendants, James and Davis. Imagine that both defendants tell the same story on the stand and the same evidence is brought against both. But the jury is told that James has a prior conviction for an offense punishable by more than one year in prison. As in Ruiz's case, here James is convicted and Davis is acquitted.[87] And once again, a propensity inference is the logical explanation for the jury's decision. Based on the equivalence of the trial evidence against them, we can infer that the jury has used James's prior conviction to draw a conclusion about his character. Yet in this case, the jury's use of propensity inferences from the prior conviction is explicitly authorized under Rule 609.[88] In applying this Rule for the past fifty years, courts have not cared to distinguish whether the jury has assumed the prior conviction means a defendant has the character of being a liar or a

83. Simon-Kerr, *supra* note 75, at 163.

84. *Id.* at 162.

85. *Id.* at 163.

86. Commonwealth v. Ruiz, No. 20-P-775, 2021 WL 5238605, at *3 (Mass. App. Ct. Nov. 10, 2021).

87. This is a variation on an account I recently heard from a public defender. His client was convicted after not taking the stand for fear of being impeached with his prior convictions. The verdict was thrown out because of a procedural issue. Before the second trial, the attorney spent six months teaching his client the rules of evidence. At the second trial, his client represented himself in order to have his voice heard in court without offering testimony, which would have triggered impeachment with his prior convictions. At the second trial, the client won his acquittal.

88. FED. R. EVID. 609.

rulebreaker and is therefore likely lying on the witness stand, as the Rule contemplates, or whether the jury has gone straight from learning about a defendant's prior conviction to assuming he must be guilty in this case, as research indicates jurors actually do when confronted with prior convictions.[89]

Again, one way to understand why prior conviction impeachment is so ingrained, even though it creates a gaping hole in the propensity prohibition, is to see that those with prior convictions are different from the baseline figure for whom the rules were designed. A man like Williams has no prior convictions with which to be impeached (an outcome made more likely because he exists within a system designed for his protection). His appearance will not prompt fact finders to imagine prior convictions where none exist.[90] By contrast, the rules embrace the obvious propensity inferences involved in finding someone like James guilty based on knowledge of his prior conviction.[91]

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Finally, the police misconduct cases discussed above show how the pull of the baseline in the rules' approach to character propensity evidence can also distort courts' applications of the rules themselves. To restate the initial point, officers in misconduct cases are doubly protected by the substantive law that makes their intent irrelevant and character evidence rules that courts enforce to keep out evidence of their past misconduct.[92] By contrast, plaintiffs seeking to hold police accountable in excessive force cases "face at least four different species of past-acts evidence."[93] These include impeachment with prior convictions, evidence of past drug use or other bad acts admitted under specious Rule 404(b) theories, evidence of past encounters with police, and evidence of gang affiliations.[94]

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89. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357–58 (2009) (finding a significant statistical association between a jury's learning of a defendant's criminal record and convictions in cases with weak evidence in an empirical study of state court data).

90. This problem extends beyond simply assumptions of prior convictions. For example, Jody Armour has described how "[i]f cues of group membership such as race serve to prime trait categories such as hostility, people will systematically view behaviors by members of certain racial groups (e.g., blacks) as more menacing than the *same* behaviors by members of other racial groups (e.g., whites)." Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 752 (1995) (emphasis added).

91. Eisenberg & Hans, *supra* note 89, at 1361.

92. Stone, *supra* note 14, at 590–98.

93. *Id.* at 601.

94. *Id.*

For an example of this, consider Cammerin Boyd, who was shot and killed by an officer of the San Francisco Police Department.[95] When his family sued the County claiming excessive use of force, the trial court permitted the County to introduce a plethora of information about Boyd—including that he had drugs in his system, prior convictions and arrests, and rap lyrics in his car.[96] Boyd's family contended that he had been trying to surrender at the time he was shot and that the evidence about him was irrelevant to the legal question.[97] Instead, they argued, the evidence was likely to inflame the jury and create a pathway for negative character propensity reasoning, allowing the jury to make impermissible character-based assumptions about how Boyd was acting when he was killed.[98]

The trial court and later the U.S. Court of Appeals for the Ninth Circuit, however, found the evidence admissible.[99] The courts reasoned that the evidence supported the County's "suicide by cop" theory by bolstering the County's account of Boyd's "plan, intent or motive."[100] In so ruling, the Ninth Circuit erroneously referred to the list of permitted uses for prior acts in Rule 404(b) as "exceptions" to the propensity prohibition.[101] It then rejected the family's correct argument that the only way that the prior acts could bolster the County's claims was through propensity reasoning.[102]

The ways in which the character evidence rules are misapplied in these cases brings into relief what might be called the baseline double standard in the application of the character evidence rules. Judges routinely admit evidence of a plaintiff's prior drug use or gang affiliation using erroneous reasoning for why that evidence has

95. Boyd v. City of San Francisco, 576 F.3d 938, 942 (9th Cir. 2009). I am indebted to James Stone's article for pointing me to this example. Stone, *supra* note 14, at 603.

96. *Boyd*, 576 F.3d at 943.

97. *Id.* at 943–44.

98. *Id.* at 947.

99. *Id.* at 948.

100. *Id.* at 947.

101. *See id.* Although this might seem a mere mistatement, the mistake is common. *Compare* Capra & Richter, *supra* note 4, at 831 (in an article highlighting misapplications of Rule 404(b), referring to "exceptions in Rule 404(b)(2), which permit the use of such evidence for other purposes"), *with* GEORGE FISHER, EVIDENCE 158 (3d ed. 2013) ("[T]he permitted purposes listed in Rule 404(b)(2) are not 'exceptions' to Rule 404(a)(1). They are merely possible uses of other-acts evidence *not banned* by Rule 404(a)(1).").

102. *Boyd*, 576 F.3d at 948. The Ninth Circuit explicitly rejected the reasoning that "this evidence served to convince the jury that Cammerin acted in a suicidal fashion at the time he was shot" through the logic that he was acting in accordance with "suicidal tendencies." *Id.* at 947. This determination is in keeping with what James Stone exposes as a pattern of courts admitting prior act evidence about plaintiffs in excessive force cases that is both highly prejudicial and "often of limited relevance in excessive force inquiries." Stone, *supra* note 14, at 603.

nonpropensity significance.[103] At the same time, evidence of past police misconduct is off-limits.

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In sum, the rules of evidence do not pretend to remove negative propensity reasoning from adjudications involving people like Ruiz, James, and Boyd, but they do offer a propensity prohibition to shield the Williamses, Smiths, and Officer Fischers of the world. These men can come to court without fear of negative inferences from their demeanor and, in most instances, with no worry about prior convictions. Indeed, they can come with confidence that they will benefit from their demeanors and their positions in society. And the prior misconduct in which they may have engaged sits nicely behind a character evidence barrier tailor-made to hide it from view.[104]

III. REIMAGINING CHARACTER EVIDENCE

The question remains: What is to be done? If we hold to the notion that trial by character is antithetical to the nation's ideals, how do we then construct a set of rules around character that comes closer to offering equal protection across lines of race, class, gender, and other subordinated statuses? The problems I have enumerated here point to some obvious interventions. Reconsidering impeachment with prior convictions is one.[105] Thinking about how to regulate demeanor as character evidence is another.[106] Addressing the misuse of Rule 404(b) to admit prior act evidence against certain groups and not others is a

103. Stone, *supra* note 14, at 601.

104. Admittedly, this confidence is sometimes misplaced, as in the recent case involving Alex Murdaugh, the scion of a family of prosecutors who was himself a successful attorney. Murdaugh chose to testify in his own defense while being tried for the murder of his wife and was convicted. The trial court admitted significant evidence of his past misdeeds on a theory that his defense had opened the door to a discussion of his character. Bill Chappell & Victoria Hansen, *Here Are 8 Big Revelations from the Alex Murdaugh Murder Trial*, NPR, https://www.npr.org/2023/03/01/1160319398/alex-murdaugh-murder-trial-revelations (last updated Mar. 3, 2023, 11:37 AM) [https://perma.cc/58KJ-M3FH]. Yet, the fact that Murdaugh chose to testify and believed that he could benefit from positive assumptions of the jurors about his character is significant. Research suggests that few Black defendants would be advised to take a similar gamble. *See, e.g.*, Roberts, *supra* note 24, at 860–73 (describing why Black defendants, in particular, are harmed by a regime in which many choose to remain silent rather than face impeachment with prior convictions).

105. *See generally* Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377 (2023) (making the case for reform of the prior conviction impeachment rules).

106. *See generally* Capers, *supra* note 13 (arguing for limiting instructions and changes to the character evidence rules to account for the role of demeanor at trials); Brown, *supra* note 13 (arguing for the introduction of positive character evidence, among other reforms, to combat demeanor-based assumptions).

third.[107] And considering reform proposals that suggest ways to legitimize the use of prior act evidence in situations like the employment discrimination cases described above is yet another.[108] These are all promising ideas, and it is encouraging that modern evidence scholarship and movements for reform are growing around them.

Yet there remains another specific lesson to be drawn from understanding the problem with character evidence as a problem with baselines. Viewing this as an epistemic problem—a failure to conceptualize inputs, like demeanor, as a source of negative propensity reasoning or to push back against accepted tropes of character, like the notion that a person with a prior conviction is a "liar"—suggests that an epistemic solution is required. We need to change how we measure and know what constitutes character evidence and what successful character evidence protection looks like. And one way to incorporate new understandings of the problem with character evidence is to expand the perspectives of the rulemakers. As Jasmine Gonzales Rose has argued, "the ability of people of color to have a voice and share their experiences of systemic racism should be of particular concern" in the evidence context.[109] Why not invite the communities most likely to be misjudged by these rules into the process of rethinking them?

In her critique of Rule 609, Montré Carodine describes how congressional arguments in favor of prior conviction impeachment were ingrained with racially coded meaning.[110] For example, Senator John McClellan argued that preventing jurors from knowing about a defendant's prior convictions would be "an unwarranted and unjust shield for the criminal to the disadvantage of society."[111] Those remarks, Carodine contends, were a "rhetorical wink," a way to appeal to racial bias by invoking unspoken assumptions that anyone branded "criminal"

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107. *See, e.g.*, Stone, *supra* note 14, at 590 (describing use of Rule 404(b) to introduce negative character evidence against criminal defendants and Rule 404(a) to shield police officers from evidence of past misconduct).

108. *See, e.g.*, Marshall, *supra* note 35, at 1095–96 (2005) (arguing that broad reform of the propensity rule is needed and would be superior to a reform limited to addressing the problem in employment discrimination cases).

109. Gonzales Rose, *supra* note 13, at 2258. I am attentive to the essentialism problem critical race theorists have identified with a so-called "voice of color thesis," which suggests that "[m]inority status . . . brings with it a presumed competence to speak about race and racism." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 11 (4th ed. 2023). I hope that treating the character evidence problem as an epistemic one might focus reform efforts on what kind of knowledge is missing rather than what kind of person should be involved. Of course, the two are closely intertwined when the question is an awareness of racism and the ways in which racism silently introduces character evidence into a trial.

110. Montré D. Carodine, *"The Mis-characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 545 (2009).

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

would also be Black.[112] This critique is helpful in considering the broader climate in which the Federal Rules of Evidence were written and passed. While coded racial rhetoric was influential in the congressional debate, this was more generally an environment in which women and people of color had very little power and voice. It should perhaps be unsurprising that the rules that emerged seem tailor-made to the concerns of white men, particularly white men with authority.[113] Certainly, voices from overpoliced communities of color were absent in the rulemaking process.

Creating an expansive epistemic baseline from which to confront character evidence requires a different approach from the one taken in 1975. It will continue to require hearing from those who have traditional expertise, such as legal scholars, judges, and lawyers. But it must also include those with knowledge that the former group lacks. Crafting a set of rules on character evidence that works for the powerless as well as the powerful demands input from outside an elite group of lawyers and legislators. As Jocelyn Simonson has described, similar arguments are being made in favor of local control over policing: "[D]irectly impacted people are themselves the policy experts . . . to whom we should be listening for specific, grounded proposals for change."[114]

Two of the theoretical defenses that Simonson offers in support of shifting power in police reform—antisubordination and contestatory democracy—are helpful in thinking about the benefits of expanding the ranks of the evidence rulemakers. As the preceding Part shows, the rules on character evidence, in particular, have been a legal conduit for "enforc[ing] the inferior social status of historically oppressed groups."[115] Antisubordination theory suggests an affirmative obligation for the law to do the opposite—to "dismantle unequal status relations."[116] And one way to confer the dignity and self-respect that is essential to true equality is not only to recognize that we are professing to offer character evidence protection through rules that perpetuate

112. *Id.* at 549 (quoting Lani Guinier, *Clinton Spoke the Truth on Race*, N.Y. TIMES, Oct. 19, 1993, at A29). Carodine attributes the expression "rhetorical wink" to sociologist Jerry Himelstein. *Id.*

113. A committee of fifteen white men plus a white male reporter drafted the Federal Rules of Evidence. The Rules were debated and amended by a Senate Judiciary Committee with sixteen members, one of whom was not a white man. The House Judiciary Committee had forty different members over the years in which the Rules were discussed. Of those, thirty-six were white men. *Supra* note 19.

114. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 829 (2021).

115. *Id.* at 838 (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004)).

116. *Id.*

subordination but also to recognize the epistemic limitations that contribute to this problem.

Those who are familiar with the existing rulemaking process may object that the existing structure has lent itself to reforms pushed by subordinated groups. Rape shield laws might be cited as one such example of a change made when a subordinated group gained some limited power over rulemaking. But the rape shield rule eventually enacted has been critiqued as "a cautious extension [of existing rules] produced by experts steeped in evidentiary traditions."[117] Whatever one thinks of the successes or failures of rape shield reform, it does not represent the sort of radical departure from evidentiary norms that will almost certainly be required to address our character evidence problems.

And here, it is helpful to consider how contestatory democracy may offer another reason to be open to the prospect of expanding the ranks of the rulemakers. Such a view recognizes that, in a pluralistic society, not all ideas can be easily reconciled. Contestation provides an avenue for dialogue and decisionmaking when there is "no one 'people' or 'community' to whom the state should be beholden, but rather multiple publics with contrasting ideas about justice."[118] The rules on character evidence may be a strange instantiation of the potential benefits of contestatory democracy, but as this Essay shows, they are a site of legal decisionmaking that is particularly inflected by normative social judgment. And evidence law has too often treated the people, and in particular the cultural assumptions that undergird the rules, as monolithic.[119] Put differently, the central project of evidence law is regulating the production of knowledge itself, and this has come with assumptions of rationality and logic.[120] Yet, as the critical vein of evidence scholarship has argued, while "[e]vidence law lays down what the legal system will take to be real,"[121] it is beholden to the viewpoints of its decisionmakers[122] and, I would add, to its rule drafters.

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117. Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 140 (1996).

118. Simonson, *supra* note 114, at 846.

119. *See, e.g.*, L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 275 (1977) (describing the main generalizations relied upon in the evidentiary process of inductive reasoning as "too essential a part of our culture for there to be any serious disagreements about them").

120. *See, e.g.*, FED. R. EVID. 401 advisory committee's notes to 1972 proposed rule (noting that whether a piece of evidence is relevant "depends upon principles evolved by experience or science, applied logically to the situation at hand").

121. Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 209 (2003).

122. *See, e.g.*, Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 431 ("Leaving relevance determinations to trial judges, most of whom are privileged white men . . . necessarily solidifies a white male perspective to questions of relevance.").

Contestation can expose the ways in which these rules embody certain advantages designed by elites for elites without input from different voices.

Beyond contestation, hearing from those who have been kept outside the room where it happens has other benefits. First, this expansion would be consistent with a broader effort to invest agency and self-governance into communities who have hitherto been excluded from policymaking. Second, it is also responsive to calls to reinvest our system of pleas and settlements with input from lay decisionmakers and to reconnect communities with the process of legal adjudication. Many lament the loss of the jury trial and its ability to connect everyday citizens with the legal process so that the process reflects community values and lay understandings.[123] Including more voices in rulemaking is a poor substitute for a reinvigorated jury trial tradition, but it can have some of the same advantages in the sense that it can bring a missing "sensitivity to diverse communities and groups, particularly those not attuned to traditional middleclass [sic] values."[124] Finally, it is a way to recognize and ameliorate the epistemic limitations of our current regime without the need for reformers to spend their limited energy and capital on a seemingly obscure evidentiary problem.

For those who worry that this kind of intervention in the rules could be messy or produce radical change, these are admittedly possible outcomes. As Simonson writes, "[G]overnance arrangement[s] inviting contestation must also be open to ceding ideological ground to visions of change coming from people subject to domination."[125] If we believe that our rules against character evidence offer scant protection to people like Ruiz and give the Officer Fischers of the world undue protection from being held accountable for their conduct, there may be less to lose than we might imagine. To the contrary, today's rules arguably allow an end run around fundamental norms of equality and fairness. Safeguarding those values is hardly radical, even if the change needed to do so might be.

A final concern is how this proposal would impact accuracy in fact-finding. This is an essential question to which I have two responses. First, the current character evidence rules were not wholly designed to promote accuracy, and they arguably interfere with that pursuit more than they aid it. The probability of impeachment with prior convictions

123. *See, e.g.*, Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 84–85 (2022) (arguing that the civil jury trial is an essential democratic institution that serves as a "bulwark against powerful social and economic actors" and has the power to "foster[ ] commitment to democratic governance").

124. Blinka, *supra* note 6, at 151.

125. Simonson, *supra* note 114, at 848.

keeps defendants from testifying in criminal cases,[126] depriving the court of some of the best possible evidence in those cases.[127] Attorneys who fear jurors will interpret a client's demeanor unfavorably may advise that client not to take the stand, again depriving the system of valuable information. Systemic inequalities in the arena of character evidence have helped make it notoriously difficult to hold police accountable for violence against Black men, in particular. And the system as enacted creates a literal bar to some of the most essential evidence in discrimination and harassment cases. A further point on the accuracy question is a reminder that plea bargaining has become the main vehicle for the resolution of cases in the criminal system. And there is reason to believe that the character evidence rules are contributing to guilty pleas by innocent people who see little chance of a fair trial.[128]

In short, the present character evidence rules reflect the "grotesque structure" famously described by the Supreme Court in *Michelson*.[129] The Court's nonsolution in that case was to leave the gargoyle in place for fear of worse outcomes should we try to refashion it.[130] As I have tried to show, however, a change—even a major one—to the character evidence rules is not to be avoided for fear of "upset[ting the system's] present balance."[131] To the contrary, upsetting the present balance is exactly what is needed.

CONCLUSION

The baseline problem in character evidence is part of a broader difficulty for any evidentiary system: the problem of preconceptions. Evidence rules aim to constrain the information introduced at trial, but this ignores the reality that fact finders have evidence in their heads

126. *See, e.g.*, Roberts & Simon-Kerr, *supra* note 105, at 378–80 (describing the case of John Thompson, who was wrongfully convicted and wrote about deciding not to testify for fear of being impeached with a prior conviction).

127. *See, e.g.*, Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 854 (2008) (arguing for the importance of the defendant's testimony to accurate fact-finding and noting the disincentive to testify created by prior conviction impeachment).

128. *See, e.g.*, John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL. LEGAL STUD. 477, 492 (2008) ("There is a statistically significant association between defendants with criminal records failing to testify and innocence.").

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

130. *Id.*

131. *Id.*

before trials begin—they have beliefs about the world and life experiences that shape their understanding.[132]

Even if we accept these limitations, it behooves us to identify when the rules themselves amplify problematic preconceptions or ignore others. Seeing the problem of character evidence as a baseline problem helps to do just that. The character evidence rules are targeted to a particular conception of the sources of bias at trials. They themselves express normative beliefs about what types of character propensity reasoning are problematic.

Certain concrete fixes might help address the greatest offenders in this area, like impeachment with prior convictions. Other reforms may also go some way toward a remedy—such as revising the propensity prohibition so that the most similar past misconduct is admissible, as has been done in the United Kingdom.[133] Those suggestions are worth consideration, but more is needed to address facets of the baseline problem, like demeanor and prior bad acts evidence.[134] Further, any proposal in the current environment will surely run into the various headwinds that foster resistance to changes in the Federal Rules, including among the Rules Committee members.[135]

To change the baseline, a reimagining is in order. We need a Rules Committee that has the impetus and ability to address not only the relatively clearer problems, like impeachment with prior convictions, but also the character evidence that is not recognized as such.[136] That reimagining will be fraught and may demand experimentation. But it will certainly only be possible, both procedurally and substantively, through reconceiving the rulemaking body as one that requires the knowledge not only of those whose

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132. *See* Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 627 (1994) (noting that factors that influence a fact finder's decision include "the sum total of that person's experiences").

133. *See* Brown, *supra* note 13, at 18 (discussing recent changes to the United Kingdom's evidence laws).

134. Teneille Brown's proposal to address preconceptions about fact finders illustrates the complexity of the solutions that may be warranted. *See id.* at 49–57.

135. *See, e.g.*, G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 958 (2022) ("[T]he Federal Rules' cumbersome amendment process has largely foreclosed the possibility of the material change . . . ."); Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 827 (2002) (critiquing the unwillingness of the Rules Advisory Committee "to consider more than minor change").

136. *See, e.g.*, Nunn, *supra* note 135, at 962–63 (arguing that judges should regularly and thoroughly reassess the Federal Rules of Evidence); Rice, *supra* note 135, at 817–18 ("[P]eriodically, every major component [of the Federal Rules of Evidence] must be examined for purposes of overhaul or replacement.").

livelihoods revolve around the courtroom but of those whose lives have been shaped by encounters with it.