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Recognizing Character: A New Perspective on Character Evidence

ABSTRACT. Courts have historically regulated the use of character in trials because of its potential to prejudice juries. In order to regulate this type of proof, courts must be able to recognize what is and is not character evidence, but past attempts to define character in the law of evidence have been unsatisfactory. This Note proposes a new framework to help courts unravel this age-old mystery. By considering legal scholarship in conjunction with psychological research and employing common tools of statutory interpretation, this Note contends that proof must have two components for it to be regulated by the character scheme in the Federal Rules of Evidence: propensity and morality. It then explains the elements of each component under the Federal Rules regime, examines several evidentiary examples drawn from real cases to illustrate how courts would apply the proposed framework, and concludes by discussing the broader implications of this new perspective on character evidence.

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INTRODUCTION

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

*Chief Justice Seth D. Montgomery, New Mexico Supreme Court*¹

Character in the law of evidence is an enigma. Advances in psychological research over the past few decades have drastically altered modern conceptions of character and, in the process, have created the potential for confusion as courts determine the admissibility of character evidence.² For example, under the law of evidence, is alcoholism a trait of character or of genetics? Should an individual’s sexual preference be analyzed as character or something else entirely? Could someone’s mental illness be considered part of that person’s character? Finding answers to questions like these is critically important because it will often determine whether or not special rules of evidence apply and, therefore, whether or not the proof is admissible.³ Indeed, classifying proof as character evidence can be the difference between life and death for criminal defendants.⁴ Unfortunately, the Federal Rules of Evidence do not define character,⁵ and worse still, there is no judicially manageable definition of character for courts to apply when the admissibility of evidence turns on this determination.⁶ This Note aims to address this problem by proposing a

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1. *State v. Williams*, 874 P.2d 12, 25 (N.M. 1994) (Montgomery, C.J., concurring). Although the New Mexico Supreme Court was interpreting the New Mexico Rules of Evidence, that state’s character evidence rules are closely modeled on the Federal Rules of Evidence. Compare N.M. R. EVID. 11-404, with FED. R. EVID. 404.
 2. See, e.g., *Freeman v. State*, 486 P.2d 967, 972 (Alaska 1971) (seemingly conflating “personality” and “character” traits).
 3. See, e.g., *Parisie v. Greer*, 705 F.2d 882, 900 (7th Cir. 1983) (en banc) (Swygert, J., concurring in part and dissenting in part) (noting that if a trait is a medical condition and not character evidence, then it is “directly provable by evidence of symptoms”).
 4. See, e.g., *Mosley v. State*, 983 S.W.2d 249, 261-66 (Tex. Crim. App. 1998) (affirming lower court’s application of Texas character evidence rule in appeal by defendant sentenced to death).
 5. See FED. R. EVID. 404, available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms.aspx> (introducing the term “character” but leaving it undefined). See also *infra* note 45 and accompanying text for more discussion on defining the term “character” in the Federal Rules.
 6. See, e.g., 22 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5233 (1st ed. Supp. 2011) (explaining that “character” in the law of evidence has not yet been satisfactorily defined).

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framework to help courts find an answer to the age-old question: what is this thing called character evidence?

Character proof can have enormous consequences on trial outcomes because of how character is perceived by ordinary people. It seems intuitive that people have something within them called “characters,” composed of “character traits,”⁷ and that these traits influence the way that people behave. For example, if Sally has the character trait of altruism, then an observer might believe it less likely that she committed a theft. Likewise, if Bob has the character trait of violence, then that same observer might think it more likely that he committed an assault. Indeed, as psychological studies have repeatedly demonstrated, popular wisdom holds that character is strongly determinative of future conduct.⁸ In other words, society believes that if you know a person’s character, then you can most likely predict how that person will act in a future instance. But what exactly is this internal force? Defining character as simply someone’s propensity to act in a certain way does not distinguish between what is commonly perceived as character and other propensity-based qualities that courts have recognized are not character,⁹ such as habits,¹⁰ mental illnesses

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7. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.11, at 182 (4th ed. 2009) (“[C]haracter is not a unitary concept. Everyone has multiple traits of character . . .”). Popular examples of these character traits include “honesty,” “violence,” “temperance,” and “cruelty,” as well as their opposites (among countless others). See 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 52, at 121 (1904) (“[Character is] the actual moral or psychological disposition, or sum of traits . . .”); H. Richard Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 849 (1982) (“[Character is] a collection of ‘traits,’ each a self-contained packet of potential conduct . . .”).
 8. See *infra* notes 119-128 for a discussion of this research.
 9. Edmund Pincoffs’s distinction between “personality traits” and “character traits” helps clarify the difference. Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905, 906 (1973). Professor Pincoffs views a personality trait as simply a propensity: a “stable and permanent disposition by means of which one individual may be distinguished from another.” *Id.* Character traits, then, are “personality traits which are generally approved or disapproved.” *Id.*; see also JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 19 (2002) (“Character traits appear to have an evaluative dimension that personality traits need not . . .”).
 10. Habit is seen as distinct from character for several reasons. First, habit is said to be observable, whereas character is not. 22 WRIGHT ET AL., *supra* note 6, § 5233. Second, habit is a person’s regular, repeated response to the same situation over numerous instances, while character is a general disposition. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 195, at 782 (6th ed. 2006). Third, habit is conceived of as unconscious or semiautomatic, akin to a Pavlovian response, but character is a conscious tendency, similar to a Freudian trait. 2 JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. McLAUGHLIN, WEINSTEIN’S EVIDENCE § 404[01] (1996); see also FED. R. EVID. 406 advisory committee’s note (distinguishing habit and character); *United States v. Holman*, 680 F.2d 1340, 1350-51

and genetic attributes,¹¹ skills and abilities,¹² or other traits of personality.¹³ Without a consistent and reliable way to distinguish between these types of propensity evidence, courts may admit seriously prejudicial proof or exclude important and relevant evidence.¹⁴

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- (11th Cir. 1982) (“In contrast to character evidence, . . . habit denotes conduct of a much more specific variety”); *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511-12 (4th Cir. 1977) (elaborating on the definition of, and evidence for, habits); 2 WEINSTEIN ET AL., *supra*, § 404[01] (“Character and habit . . . are not synonymous.”).
11. See *Lapime v. Pallazzo*, No. 95-30883, 1996 WL 625367, at *1 (5th Cir. Oct. 9, 1996) (allowing evidence of “anti-social personality disorder” characterized by “manipulative behavior and aggressive reactions to authority figures”); *Bemben v. Hunt*, No. 93-C-509, 1995 WL 27223, at *2 (N.D. Ill. Jan. 23, 1995) (accepting evidence of “organic delusional disorder with symptoms of paranoid ideations and irrational behavior”); *Bell v. Whitten*, 722 So. 2d 1057, 1061 (La. Ct. App. 1998) (permitting evidence of “intermittent explosive disorder” and “conduct disorder, solitary aggressive”); *State v. Ferguson*, 803 P.2d 676, 685 (N.M. Ct. App. 1990) (finding that being “suspicious” and “paranoid” are not necessarily traits of character unless they carry a moral connotation in context); ROGER C. 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) (“[A] stroke victim’s propensity to forget is considered a medical condition, rather than a trait of character.”); 22 WRIGHT ET AL., *supra* note 6, § 5233 (attempting to distinguish, with difficulty, “mental characteristics” from character); Pincoffs, *supra* note 9, at 906 (identifying the personality traits of being “excitable, brainy or prescient” as distinct from character). *But cf.* *United States v. Kepreos*, 759 F.2d 961, 964-65 (1st Cir. 1985) (upholding the exclusion of evidence of “personality traits” such as “avoidance, denial, repression, naivete, dependency, and tunnel vision” due to their likelihood of confusing the jury).
 12. See *United States v. Cortez*, 935 F.2d 135, 138-39 n.3 (8th Cir. 1991) (finding “slowness to answer, forgetfulness, or poor ability to express oneself” not to be character traits); *United States v. West*, 670 F.2d 675, 682 (7th Cir. 1982) (holding that intelligence is not a character trait); *Phillips v. Gen. Motors Corp.*, No. Civ. A. 99-3423, 2000 WL 1407896, at *3 (E.D. La. Sept. 25, 2000) (“Neither Mr. Fortenberry’s physical condition nor his medical records constitute character evidence”); 1 WIGMORE, *supra* note 7, § 87, at 163 (differentiating “special skill, dexterity, or knowledge” from character); 22 WRIGHT ET AL., *supra* note 6, § 5233 (differentiating “color-blindness, clumsiness, or strength” from character).
 13. These could include features like emotions or motives, see 1 WIGMORE, *supra* note 7, § 385, at 466 (distinguishing emotion and motive from character by implication); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 302 (1996) (noting that emotions cannot be “educated” like character and therefore one cannot be held responsible for an emotion); David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 452 (2001) (arguing that a motive’s “existence in a given situation does not depend on the person’s general moral fiber” and so cannot be character), or attitudes and values, see DORIS, *supra* note 9, at 86-89 (noting that values and attitudes are different from character).
 14. See 22 WRIGHT ET AL., *supra* note 6, § 5233 (noting that, given changes in the concept of character and the law of evidence, “the need for a definition is . . . pressing”); Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. CHI. L.J. 1, 9-10 (1988)

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Courts are cautious of character proof for two primary reasons: a jury could (1) believe that character played a greater role in the defendant's actions than it truly did,¹⁵ or (2) convict a defendant for the kind of person he is rather than for what he did.¹⁶ To counter these potential sources of prejudice, over time courts have developed special common law rules to regulate and restrict the use of character proof at trial,¹⁷ many of which have been incorporated into the Federal Rules of Evidence (the Rules).¹⁸ Many scholars refer to these rules as the "character evidence prohibition,"¹⁹ but character proof is not, in fact, completely prohibited at trial.²⁰ It is admissible in several different forms²¹

(warning that an imprecise judicial definition of "character" leaves open the possibility of "arbitrary and intrusive decision making").

15. Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 741-42 (2008); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1185-86 (1998); Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 223-24 (1996).
16. See Imwinkelried, *supra* note 15, at 741-42; Leonard, *supra* note 13, at 450.
17. See, e.g., 22 WRIGHT ET AL., *supra* note 6, § 5232 (describing the origins of character proof in the law of evidence).
18. FED. R. EVID. 404(a) advisory committee's note.
19. See Imwinkelried, *supra* note 15, at 741; Leonard, *supra* note 15, at 1161.
20. See PARK ET AL., *supra* note 11, § 5.04, at 126 ("[Rule 404] is subject to exceptions . . ."); Leonard, *supra* note 15, at 1165 ("This [character evidence prohibition] is actually rather narrow.").
21. The form of evidence is important because even when character proof is admissible in a trial, there remains the problem of how to prove character. Character can be proven only by circumstantial evidence because it is an invisible, internal guiding force that cannot be "directly perceived; it must be inferred from the conduct of a person." 22 WRIGHT ET AL., *supra* note 6, § 5233; see also Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 833 (1998) (noting that "character is deep within each one of us" and that "there are many components of character that are hidden from the immediate view of strangers and even ourselves").

There is widespread agreement about the possibility of three forms of character proof: reputation, opinion, and specific acts evidence. See, e.g., FED. R. EVID. 405 (categorizing the three forms of character proof). The first form of character proof is testimony about an individual's reputation. See PARK ET AL., *supra* note 11, § 5.06, at 133 (noting that reputation "represented the community's collected wisdom about a lifetime of activity"); *id.* § 5.13, at 157-58 (providing an example of reputation testimony). But reputation should not be confused with character. See *Amos v. Commonwealth*, 516 S.W.2d 836, 837 (Ky. 1974) ("The words 'reputation' and 'character' are not synonymous and different rules apply to [each] . . ."); 1 WIGMORE, *supra* note 7, § 52, at 120 ("Character and reputation are as distinct as are destination and journey.").

The second form of character evidence is another witness's opinion as to the individual's character. See PARK ET AL., *supra* note 11, § 5.13, at 158-59 (providing an example of opinion testimony); 22 WRIGHT ET AL., *supra* note 6, § 5233. Many legal scholars suspect

under various circumstances. Instead, it is more useful to think of these combined rules as a “regulatory scheme”²² that sometimes permits, sometimes restricts, and sometimes completely prohibits character evidence in trials.²³

Before a court may apply the character evidence regulatory scheme to a proof, it must ask a threshold question: is this actually character evidence?

that opinion and reputation are the same thing because reputation evidence is, in truth, a witness’s opinion in disguise. See David P. Leonard, *The Use of Character Evidence To Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 23 n.132 (1986) (“It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise.” (quoting FED. R. EVID. 405 advisory committee’s note)).

The third form of character proof is specific instances of the individual’s prior conduct. See 1 WIGMORE, *supra* note 7, § 52, at 120; Susan Marlene Davies, *Evidence of Character To Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 507-10 (1991); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 760 (1975).

22. For the remainder of this Note, the complex of rules that comprise the character proof regulatory system will be referred to as “the scheme.” The scheme should not be confused with this Note’s own proposed “framework,” which is presented in Part IV, *supra*.
23. See MUELLER & KIRKPATRICK, *supra* note 7, § 4.11, at 182 (“[T]he Federal Rules impose a complicated scheme that limits the situations in which character may be proved and the form of proof permitted.”). The Rules that comprise the scheme regulate the form, timing, and substance of character proof and include FED. R. EVID. 404, 405, 412, 413, 414, 415, 607, 608, and 609.

The scheme also permits character proof if character is an essential element of a charge, claim, or defense. *Id.* § 4.20, at 221-24. Furthermore, it sometimes allows character evidence for narrow purposes under Rule 404(b), such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident.” *Id.* § 4.15, at 193-98. Rule 404(b) is discussed in more detail *infra* Section II.B.

Finally, the scheme most heavily regulates and often prohibits “circumstantial” character evidence. *Id.* § 4.11, at 182. The common law supposedly fashioned an absolute prohibition on character evidence in both criminal and civil cases, 1 WIGMORE, *supra* note 7, § 57, at 127, § 64, at 134; 22 WRIGHT ET AL., *supra* note 6, § 5233, which has carried over into the Rules, FED. R. EVID. 404(a). However, the “prohibition” had exemptions and exceptions from the beginning, 1 WIGMORE, *supra* note 7, § 56, at 123-24, § 58, at 127; 22 WRIGHT ET AL., *supra* note 6, § 5233, and, over time, has gained even more, FED. R. EVID. 404(b), 413, 414, 415. For example, character proof is admissible when the defendant opens the door by offering “good” character proof about himself or “bad” character evidence about the alleged victim, FED. R. EVID. 404(a) advisory committee’s note, or when the character trait in question goes to the witness’s truthfulness on the stand, FED. R. EVID. 608 advisory committee’s note. Because character proof is so often admissible in trial, it is more useful to conceptualize the rules of character evidence as a regulatory scheme rather than a complete ban.

Few would call the scheme rational; indeed, even the Supreme Court considers it a “grotesque structure.” *Michelson v. United States*, 335 U.S. 469, 486 (1948). Nevertheless, it exists to guide courts in mediating the influence of character evidence in trials. See 1 WIGMORE, *supra* note 7, § 54, at 121-22 (detailing the common law practice for admission of character evidence).

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Only after a court determines that proof involves character reasoning can it then ask how it should be used in trial, if at all.²⁴ The character evidence scheme in the Rules provides the answer to this second inquiry. However, too often courts either ignore the first question or analyze evidence in ways that obscure and conflate these two distinct questions. This Note seeks to help courts answer the first question—the threshold inquiry of determining character—by proposing a framework for courts to apply when confronted with evidence that may implicate strictly regulated character reasoning.

Answering the threshold inquiry is easier said than done because character is an exceedingly difficult concept to define. Legal scholars and courts have long struggled to define character in the law of evidence. Since the time of John Henry Wigmore, observers have lamented that “[t]he prohibition against ‘character evidence’ is one of the great enigmas in the law of evidence.”²⁵ Even today, legal scholars still have “no general agreement about the precise meaning of the term [character].”²⁶ Searching outside the law to find a workable definition only yields more confusion. In the realm of philosophy, where character has been a subject of careful study since Aristotle, there are widely diverging opinions about the degree to which character is determinative of a person’s past, present, and future actions.²⁷ Moreover, recent psychological research suggests that character is, in reality, a much weaker predictor of a person’s conduct than was previously supposed. The results of these studies have created a debate among psychologists and reinvigorated the debate among philosophers about what constitutes an individual’s character. Although these discussions have not offered a reliable definition, they provide the foundation of this Note’s effort to crack the seemingly impenetrable law of character evidence.

Courts require a clear, reasoned framework for identifying character evidence when it comes before them to ensure a consistent, predictable, and rational application of the law of evidence. Even now, courts are struggling to decide whether proof of human sexuality, mental characteristics, addictions, psychological disorders, and other traits that appear in both civil actions and

24. The structure of Rule 404(a) supports this two-step process, because it contains both a description of the evidence to be barred (“character or trait of character”) and a statement of the forbidden purpose (“proving action in conformity therewith on a particular occasion”). FED. R. EVID. 404(a)(1).

25. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 55, at 1150 (Peter Tillers ed., 1983).

26. Leonard, *supra* note 13, at 450.

27. Compare ARISTOTLE, NICOMACHEAN ETHICS (Joe Sachs trans., Focus Publ’g/R. Pullins Co. 2002) (c. 384 B.C.E.), with DORIS, *supra* note 9. For more discussion of various philosophical perspectives, see *infra* note 164 and accompanying text.

criminal prosecutions implicate the character evidence rules or not. The decisions these courts make will not only affect the outcomes of individual cases, but also have a long-lasting impact on the law of character evidence. Unfortunately, as courts have recognized, finding a judicially manageable definition of character is likely impossible.²⁸ Therefore, this Note does not suggest a new definition of character. But if courts cannot conclusively *define* character, then they at least need help *recognizing* character.

To better enable courts to recognize character, this Note proposes a conceptual framework to add some much needed clarity to the law of character evidence.²⁹ At the core of the current confusion is the fact that “character” in the psychological sense has become divorced from character in the legal, evidentiary sense. Psychologists and other researchers seeking to learn what character truly is have conducted numerous studies, in the process uncovering fascinating insights into human behavior.³⁰ But this Note reasons that this new “metaphysical” notion of character is causing some courts to lose sight of the reasons for regulating character evidence in the first place, namely the two ever-competing principles of relevance and prejudice.³¹ In short, whether or not a proof involves character in the metaphysical sense is unimportant; what actually matters is the proof’s logical relevance and prejudicial effect on the jury. Legal scholars largely agree that, in the character evidence context, a proof’s logical relevance rests on demonstrating an individual’s propensity to undertake certain actions.³² Less well accepted, however, is the notion that much of a character proof’s prejudicial effect is represented by the morality of that conduct in the local community. This Note examines the character evidence scheme and other legal sources and concludes that character cannot be understood without this morality component.

28. See *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) (“We doubt that a fully satisfactory, comprehensive definition of ‘character evidence’ is possible . . .”).

29. What this Note proposes is not a mechanical test, but rather a new way of conceptualizing the law of character evidence in the same way that the tripartite scheme in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), “provides the accepted framework for evaluating executive action,” *Medellin v. Texas*, 552 U.S. 491, 524 (2008), and the two-step test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), sets forth the “framework of deference” of courts to agency decisionmaking, *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

30. See *infra* Section II.D for an overview of psychological research into character traits.

31. See 1 WIGMORE, *supra* note 7, § 55, at 122 (“The evidentiary use of character . . . cannot be understood without separating the principles of Relevancy and of Undue Prejudice.”).

32. See *infra* Section II.B for a discussion of the logical relevance of character evidence.

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This Note further contends that morality—a set of duties that one owes to oneself and others³³—is the key to understanding the difference between character evidence and non-character propensity proof, such as habits and mental traits. While the common law courts that created the character proof scheme likely had an intuitive sense that character involved morality, modern scientific conceptions of character define it simply as propensity. But morality is what adds the unacceptable prejudice to an otherwise relevant propensity proof. By disentangling morality from propensity, and providing an evidentiary standard for determining whether each is sufficiently implicated by the proof in question, the proposed framework frees courts from the circular task of deciding whether or not a proof implicates metaphysical character. Rather, the framework refocuses courts on something well within their expertise: determining whether the proof at issue is relevant from the objective view of a reasonable juror and unfairly prejudicial from the subjective perspective of the local jury. Answering these questions within the framework will enable courts to recognize character evidence more easily and therefore properly apply the character evidence regulatory scheme.

In Part I, this Note surveys the massive confusion of courts and legal scholars surrounding definitions of character evidence and clarifies why those definitions are unsatisfactory. Part II discusses how character evidence is logically relevant in trials, the rationales behind the character evidence regulatory scheme, and empirical research connected with potential jury prejudice from character proof. Part III examines the statutory language of the Rules and argues that both their text and purpose support the two components of the proposed framework: propensity and morality. Part IV presents the proposed framework for how courts can recognize whether a given proof implicates forbidden character reasoning and provides figures to represent graphically how it works. In Part V, this Note applies the framework to several examples from real-world evidence cases and, in Part VI, it discusses the potential implications of the framework.

I. CHARACTER EVIDENCE DEFINED?

It is crucial for courts to know what evidence implicates this thing called “character” so that they know when to apply the special character evidence rules. If a party seeks to admit proof that does not rest on character reasoning, then the regulatory scheme does not apply and the proof is admissible unless barred by another Rule of Evidence. Alternatively, if the evidence does involve

33. Michael J. Perry, *What Is “Morality” Anyway?*, 45 VILL. L. REV. 69, 74 (2000). For further discussion of morality, see *infra* notes 212-221 and accompanying text.

character, then the scheme applies and either regulates how that evidence is to be used at trial or completely prohibits it.³⁴ This Part will review how courts presently approach character proof, which is important to understand before discussing the new perspective on character evidence.

Both common law courts³⁵ and modern courts applying the Rules³⁶ have attempted to define what exactly character is.³⁷ A survey of cases dealing with character evidence shows that courts often attempt their own definitions. Some court-created definitions of character include “[a] fixed disposition or tendency, as evidence to others by the man’s habits of life;”³⁸ the “disposition or propensity to commit certain crimes, wrongs or acts;”³⁹ and “a person’s tendency to act in a certain way in all varying situations of life,”⁴⁰ among others. At best, these definitions are too general, confusing, and vague. They do not distinguish, for example, between a character trait on one hand, and a person’s habit, mental disorder, or sexuality on the other.

Courts do not always try to define character. Sometimes they use other troubling methods that obscure their character determinations. For instance, courts on occasion simply skip the threshold question of whether evidence is character proof and assume that it falls under the character evidence scheme.⁴¹ At other times, courts demonstrate their confusion—and thereby hide their lack of reasoning—by reciting boilerplate definitions, listing several character traits as examples, and then attempting to discern which listed example is more

34. See *supra* note 24 and accompanying text.

35. See, e.g., 2 JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 668, at 1243 (2d ed. 1926); JAMES BRADLEY THAYER, A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW, ch. 2, § 2, at 272-84 (2d ed. 1900); 1 WIGMORE, *supra* note 7, § 52, at 119-20.

36. See, e.g., 1 BROUN ET AL., *supra* note 10, § 195; 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 404 (8th ed. 2002); 2 WEINSTEIN ET AL., *supra* note 10, § 404[03].

37. See 22 WRIGHT ET AL., *supra* note 6, § 5233 (“The definitions of ‘character’ that appear in the prior case law are often erroneous and seldom helpful.”).

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

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

40. *State v. Dan*, 20 P.3d 829, 830 (Or. Ct. App. 2001) (quoting *State v. Carr*, 725 P.2d 1287, 1290 (Or. 1986) (en banc)).

41. See, e.g., *Reyes v. Mo. Pac. R.R.*, 589 F.2d 791, 794 (5th Cir. 1979) (assuming that prior public intoxication convictions, if they were not habit, were character evidence); *United States v. Klein*, 474 F. Supp. 1243, 1247-48 (S.D.N.Y. 1979) (assuming the trait of being “closed-mouthed” implicated forbidden character reasoning without determining if it is a character trait); *Broome v. State*, 687 N.E.2d 590, 600 (Ind. Ct. App. 1997) (assuming homosexuality would be character evidence before excluding it as irrelevant).

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or less like the trait under consideration.⁴² In one case, a judge from the Seventh Circuit analyzed whether a victim's homosexuality was more like epilepsy or a disposition for violence.⁴³ These approaches to determining which traits do or do not involve character are unreasoned and create unprincipled precedents, which lead to unpredictable outcomes for litigants.⁴⁴

The Rules contain no definition of character in what is perhaps a nod to the impracticality of defining it.⁴⁵ The Notes of the Advisory Committee on Rule 405—written at the time the Rules were adopted—are just as imprecise, listing several examples of character traits, such as honesty, peacefulness, and violence, and then stating generally that “character is defined as the kind of person one is.”⁴⁶ The only attempted codification of a character definition was Model Code Rule 304, which defined it as “the aggregate of a person's traits, including those relating to care or skill and their opposites.”⁴⁷ These definitions are no more helpful than those attempted by courts.

In addition, many legal scholars and commentators have attempted definitions, but they have also been practically useless for courts attempting to figure out if alcoholism and sexuality are character or not. McCormick called character “a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness.”⁴⁸

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42. See, e.g., *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) (comparing the alleged offense of importing narcotics to a dishonest person's “propensity to lie” or a hot-tempered person's to “throw the first punch”); *People v. Shoemaker*, 185 Cal. Rptr. 370, 372 n.2 (Cal. Ct. App. 1982) (comparing the trait in question to being “violent . . . bloodthirsty, dangerous, revengeful and turbulent”); *State v. Williams*, 874 P.2d 12, 25 (N.M. 1994) (Montgomery, C.J., concurring) (questioning if the “enjoyment of anal sex” is “more like a physical or mental characteristic . . . than it is like a generalized trait similar to honesty, temperance, or peacefulness”).
 43. *Parisie v. Greer*, 705 F.2d 882, 901 (7th Cir. 1983) (en banc) (Swygert, J., concurring in part and dissenting in part) (questioning whether “homosexuality is more like a medical condition than a character trait”).
 44. See, e.g., Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 191 (1998) (“[A]s is common in Rule 404(b) cases, the court failed to explain its reasoning at all.” (footnote omitted)).
 45. See 22 WRIGHT ET AL., *supra* note 6, § 5233 (“The Evidence Rules do not define ‘character.’”); Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 19 (1976) (“The Rules seem to designate as ‘character’ anything that cannot be photographed.”).
 46. See FED. R. EVID. 405 advisory committee's note.
 47. 22 WRIGHT ET AL., *supra* note 6, § 5233 (quoting MODEL CODE OF EVIDENCE R. 304, at 182 (1943)).
 48. 1 BROUN ET AL., *supra* note 10, § 195; see also JOHN HENRY WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 52, at 103 (3d ed. 1937) (defining character as “any and every quality or

Some authorities simply invoke common understandings of character.⁴⁹ Even textbooks on evidence have not been able to provide a satisfactory definition of character, defining it as “a person’s disposition or propensity to engage or not engage in various forms of conduct.”⁵⁰ Wigmore, in his seminal treatise on evidence law, argued that character is a person’s “actual moral or psychological disposition, or sum of [his or her character] traits,”⁵¹ but his definition is difficult for courts to apply without further explanation.

None of the above definitions can distinguish between traits guided by character and those compelled by other internal forces. Therefore, they cannot serve as judicially manageable standards. Stating that character is a “disposition” similar to a listed trait, such as “peacefulness,” cannot explain whether or not “sexuality” is character. It also cannot help a court distinguish between a proclivity for drinking alcohol as a trait of character (i.e., temperance) or a genetic disease (i.e., alcoholism). These prior attempts reinforce the notion that “[e]xisting definitions of character are circular, conclusory, or both.”⁵²

II. CHARACTER EVIDENCE REASONING

What courts need is not a new definition of character, which would likely be of little use. Rather, what they need is a framework to help them conceptualize character evidence and *recognize* what proofs should be regulated by the character evidence rules. In order to determine whether a given proof is character evidence, courts must assess how it is relevant. This Part will first outline how the Rules work. Second, it will explain the logical relevance of character proof, and, third, the reasons for which it has traditionally been regulated. Fourth, and finally, this Part will describe the psychological research that suggests these reasons are basically sound.

tendency of a person’s mind, existing originally or developed from his native substance, and more or less permanent in their existence”).

49. See, e.g., M.C. Slough, *Relevancy Unraveled: Part II*, 5 U. KAN. L. REV. 404, 404 (1957) (defining “the character of common parlance” as being comprised of “[t]hose definite qualities impressed by nature or habit upon the personality of an individual”).

50. MUELLER & KIRKPATRICK, *supra* note 7, § 4.11, at 182.

51. 1 WIGMORE, *supra* note 7, § 52, at 121.

52. Rhode, *supra* note 14, at 9 (commenting on legal definitions of “character” in the bar admission and disciplinary processes).

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A. The Basic Structure of the Federal Rules of Evidence

The modern law of evidence is prophylactic; proof must pass through several hurdles in three discrete categories before it may be presented to the jury. First, under the Federal Rules, evidence must be relevant under Rule 401, which requires that it “hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁵³ This is a low threshold and easy for a proponent of evidence to satisfy: he need only show that the evidence has “any probative value whatsoever.”⁵⁴ But relevance is not the last hurdle.

Second, other rules of evidence—such as those regulating hearsay,⁵⁵ lay or expert opinion testimony,⁵⁶ prior negotiations or plea agreements,⁵⁷ privileges,⁵⁸ and others—may also serve to restrict or prohibit proof from being presented to the jury. The character evidence regulatory scheme falls into this category. Evidence need not implicate any of these other rules. Alternatively, a proof could implicate multiple other rules and be prohibited or restricted accordingly.

Third, evidence must not be substantially more prejudicial than probative under Rule 403.⁵⁹ Therefore, the low threshold of relevance in Rule 401 is restricted somewhat by Rule 403’s requirement that proof not serve to prejudice the jury significantly more than it aids them in understanding some part of the case.⁶⁰ Of course, all evidence is prejudicial at some level, so unfair prejudice, which “result[s] from excessive emotional or irrational effects that could distort the accuracy and integrity of the factfinding process,” is not to be confused with probity, which “result[s] from the reasonable persuasive force of evidence.”⁶¹ Anything that a court believes could improperly prejudice the jury may factor into a court’s decision to exclude evidence under Rule 403. Once a proof passes this final stage, it is admitted into evidence. This Part examines both why courts believe that character proof is relevant and why they regulate it in the first place.

53. MUELLER & KIRKPATRICK, *supra* note 7, § 4.1, at 151; *see* FED. R. EVID. 401.

54. MUELLER & KIRKPATRICK, *supra* note 7, § 4.1, at 151, § 4.2, at 154. While Rule 401 sets the bar for relevance, Rule 402 establishes that relevant evidence is, and irrelevant evidence is not, admissible. FED. R. EVID. 402.

55. *See* FED. R. EVID. 801-807.

56. *See id.* R. 701-706.

57. *See id.* R. 407-411.

58. *See id.* R. 501-502.

59. *Id.* R. 403.

60. *Id.*; *see also* MUELLER & KIRKPATRICK, *supra* note 7, § 4.9, at 171.

61. MUELLER & KIRKPATRICK, *supra* note 7, § 4.10, at 175.

B. *The Logical Relevance of Character Evidence*

The relevance of character evidence under Rule 401 rests on the assumption that character evidence is “logically probative,”⁶² or that it actually does have an impact, even if minimal, on a person’s actions.⁶³ Whether character proof can affect someone’s actions depends, in turn, on propensity reasoning, or the inference that a trait will predict action on a specific occasion.⁶⁴

Propensity reasoning works in a two-step process: proof of an individual’s trait—either by reputation, opinion, or specific prior acts⁶⁵—suggests that the individual has that particular trait; then, from the existence of that trait, jurors are more likely to believe that the individual acted in conformity with it.⁶⁶ In other words, jurors assume that, because the individual behaved one way on a prior occasion, that individual is more likely to have behaved the same way on a more recent occasion. Of course, propensity reasoning is circumstantial evidence because it does not purport to provide a direct cause of the conduct in question.⁶⁷ Instead, by suggesting the existence of a trait, this proof only increases the likelihood—all things considered—that the individual behaved as alleged.

Using propensity reasoning, character evidence would be logically relevant in a trial if offered to show that an individual acted in conformity with their character or to attack a witness’s credibility on the stand. Courts have long assumed that character evidence “*is essentially relevant*” because of propensity reasoning, as Wigmore claimed.⁶⁸ The Rules continue the practice of assuming

62. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 263-66 (William S. Hein & Co. 1999) (1898) (defining “logical relevance”); *see also* George F. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 690 (1941) (“If an item of evidence tends to prove or to disprove any proposition, it is relevant to that proposition.”).

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

64. Imwinkelried, *supra* note 15, at 742. Character might also be logically relevant if it is an element of the charged offense. Davies, *supra* note 21, at 507; Leonard, *supra* note 21, at 23.

65. *See supra* note 21 for an explanation of the three forms of character proof.

66. Leonard, *supra* note 21, at 11-12 (demonstrating how propensity reasoning works).

67. *Id.* at 8-12 (explaining circumstantial evidence).

68. 1 WIGMORE, *supra* note 7, § 55, at 122; *see also* *Michelson v. United States*, 335 U.S. 469, 475-76, 476 n.9 (1948) (“The inquiry is not rejected because character is irrelevant As long ago as 1865, Chief Justice Cockburn said, ‘The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form . . . [a] reasonable . . . ground for the presumption and probability of guilt’” (quoting *R. v. Rowton*, (1865) 169 Eng. Rep. 1497)). In fact, some courts have historically

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character evidence is relevant to predicting a person's behavior on a specific instance.⁶⁹

Propensity reasoning is also the foundation for the logical relevance of other types of proof that courts have recognized are not character evidence. Proof of habits, which are usually defined as narrow, involuntary propensity traits;⁷⁰ mental conditions and illnesses;⁷¹ skills, abilities, and physical attributes;⁷² and emotions and motives⁷³ all depend on propensity inferences. Therefore, propensity should not be seen as synonymous with character, but instead as one component of it and the basis of its logical relevance.

Evidence may be relevant under both propensity reasoning and a different relevance theory. For example, in the case of proof of prior specific instances of conduct, some evidence normally relevant on propensity reasoning might also have an "independent" logical relevance.⁷⁴ This proof is commonly known as "other purposes" evidence and is governed by Rule 404(b). Rule 404(b) "purports to divide evidence into two categories according to the basis of its proposed relevance," one character evidence and one not.⁷⁵ Some of these other purposes include motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁷⁶ This categorization is not pointless; if a court determines that the proof in question implicates an "other purpose," then it is not subject to the normal restrictions on character evidence.⁷⁷ Not surprisingly, Rule 404(b) is the most litigated Rule in the

refused even to consider that character does not influence action. *See, e.g., Keith v. State*, 152 S.W. 1029, 1030 (Tenn. 1913) ("No valid reason can be offered to show that a bad character will not prompt to a bad action, as readily as a good character will prompt to a good action, or restrain its possessor from the commission of a bad one.").

69. *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").
70. *See supra* note 10 and accompanying text.
71. *See supra* note 11 and accompanying text.
72. *See supra* note 12 and accompanying text.
73. *See supra* note 13 and accompanying text.
74. Edward J. Imwinkelried, *The Need To Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1467 (1985); *see also* *Huddleston v. United States*, 485 U.S. 681, 691 (1988) (holding both that evidence must be offered for a "proper purpose" under Rule 404(b) and must be relevant under Rule 401).
75. *Morris, supra* note 44, at 186. This dichotomy is even more obvious given the newly restyled Rule 404(b), which separates "Prohibited Uses" and "Permitted Uses." FED. R. EVID. 404(b)(1)-(2).
76. FED. R. EVID. 404(b).
77. *Id.* "Other purposes" evidence is not automatically admissible simply because it may have an independent basis for relevance, however; to determine admissibility, a court must apply the Rule 403 balancing test, with the opponent of the evidence bearing the burden of proving

character evidence scheme,⁷⁸ because courts often struggle with determining whether proof is based on propensity reasoning or is relevant for one of the other purposes.

C. *The Rationale Behind the Character Evidence Scheme*

Even if propensity reasoning is accepted as a basis for character proof's relevance under Rule 401, courts still must consider the prejudicial nature of the evidence. Legal historians have commonly understood courts to have developed the law of evidence to prevent jurors' "cognitive and decisional failings" from impacting their solemn duty to find the truth.⁷⁹ To this end, two primary justifications are usually given for the rules regarding character evidence: prejudice resulting from inferential error and jury nullification.

The first justification for regulating character proof is the risk of "inferential error prejudice"⁸⁰ or, in other words, that the evidence may carry too much weight with the jury. People often use propensity reasoning to analyze whether their friends can be trusted with a secret, their partners will be faithful, or their bosses will make them stay late at work.⁸¹ Similarly, if jurors are exposed to character evidence, they are more likely to believe that the

that its prejudice substantially outweighs its probative value. Imwinkelried, *supra* note 74, at 1478-79; Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 797 (1981); T.M. Ringer, Jr., *A Six Step Analysis of "Other Purposes" Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence*, 21 N.C. CENT. L.J. 1, 7-9 (1995); Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 457 (1993).

78. See FED. R. EVID. 404(b) advisory committee's note on the 1991 amendment ("Rule 404(b) has emerged as one of the most cited Rules"); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct To Prove Mens Rea: The Doctrines Which Threaten To Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 576 (1990) (describing Rule 404(b) as "the single most important issue in contemporary criminal evidence law"); Morris, *supra* note 44, at 182-83 ("Decisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence, and bad acts evidence plays a central role in many negligence, harassment, and discrimination cases." (footnotes omitted)).
79. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 199 (2006); see also John Langbein, *Historical Foundations from the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172 (1996) ("The essential attribute of the modern law of evidence is the effort to exclude probative but problematic oral testimony . . . for fear of the jurors' inability to evaluate the information properly."); Leonard, *supra* note 15, at 1196 (explaining the historical development of the purpose of the character evidence scheme).
80. Leonard, *supra* note 15, at 1184.
81. Méndez, *supra* note 15, at 222.

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individual in question acted in conformity with that character, blinding them to the impact of other evidence.⁸² The danger of inferential error is twofold⁸³: jurors could overestimate the effects of a character trait by giving it too much predictive value⁸⁴ or they could fill in gaps in their knowledge by postulating entire characters out of isolated traits.⁸⁵ Inferential error prejudice concerns courts because propensity evidence might not be as predictive as it seems; indeed, it might not be predictive at all.

The second justification for regulating character evidence is the prevention of “nullification prejudice,”⁸⁶ or the danger that jurors could use proof of character to justify a verdict “irrespective of guilt.”⁸⁷ Jurors might “deny [the defendant] a fair opportunity to defend against a particular charge”⁸⁸ by finding him guilty because they think he is a “bad” person and they want to “protect the public from him—even if he was not guilty of the charged crime.”⁸⁹ Jurors’ desire to punish someone for being a “bad” person might even be subconscious.⁹⁰ Courts have recognized the danger of nullification prejudice, echoing the common refrain that “[i]t is fundamental to American

82. *Id.* at 224; *see also* *Michelson v. United States*, 335 U.S. 469, 476 (1948) (noting that character proof might “weigh too much with the jury and . . . overpersuade them”); Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1007 (1984) (“[There is the] concern . . . that if the jurors learn that the accused has on other occasions engaged in the misconduct for which he is on trial, they may jump to the unwarranted conclusion that he committed the offense with which he is presently charged.”).

83. *See* Miguel A. Méndez, *Character Evidence Reconsidered: “People Do Not Seem To Be Predictable Characters,”* 49 HASTINGS L.J. 871, 881-82 n.38 (1998) (noting that attributional error can result due to jurors overestimating the probative value of character evidence and their assigning an incorrect probability estimate to the crime charged).

84. PARK ET AL., *supra* note 11, § 5.04, at 129 (finding that jurors could “overestimate the value of the evidence as proof that the defendant committed the crime charged”); *see also* Imwinkelried, *supra* note 15, at 742 (“The danger here is that lay jurors will ascribe undue weight to the trait.”).

85. *See infra* notes 119-128 and accompanying text.

86. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 745 (1998). Jeremy Bentham termed this type of jury error “misdecision.” 6 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 105 (John Bowring ed., London, Simkin, Marshall & Co. 1843).

87. 1 WIGMORE, *supra* note 7, § 194, at 233.

88. *Michelson v. United States*, 335 U.S. 469, 476 (1948).

89. Imwinkelried, *supra* note 15, at 742; *see also* Mendez, *supra* note 82, at 1007 (concluding that jurors might punish a defendant for his past misconduct irrespective of his guilt on the charged crime).

90. Imwinkelried, *supra* note 15, at 741-42.

jurisprudence that ‘a defendant must be tried for what he did, not for who he is.’”⁹¹

In addition to inferential error and nullification prejudice, the character evidence scheme has also been defended because it “tends to prevent confusion of issues, unfair surprise and undue prejudice”;⁹² it wastes the court’s time and resources trying side issues;⁹³ and character proof could make the jury “unduly emotionally disposed in favor of or against one side” or “humiliate [and] discourage [witnesses] from coming forward.”⁹⁴ However, these types of prejudice are not unique to the character evidence context.⁹⁵ The prejudices specifically targeted by the character evidence scheme are inferential error and nullification prejudice,⁹⁶ and so they are what courts should look to when recognizing character.⁹⁷

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91. *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)). See generally *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding that, under the Eighth and Fourteenth Amendments, a person may not be punished for the crime of being addicted to narcotics because crimes may only relate to specific acts and not a person’s status).
92. *Michelson*, 335 U.S. at 476; see also *Leonard*, *supra* note 15, at 1185 (noting the “unfairness of surprising the actor with such [character] evidence”); Robert G. Spector, Commentary, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 347 (1979) (contending that evidence of a witness’s prior misconduct could “condemn[] [a defendant] through guilt by association”).
93. *Kuhns*, *supra* note 77, at 777.
94. PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, *EVIDENCE IN A NUTSHELL* 101 (4th ed. 2003).
95. For example, Rule 403 broadly excludes evidence that is unfairly prejudicial, confuses the issues, misleads the jury, or causes undue delay, waste of time, or presentation of cumulative evidence. See MUELLER & KIRKPATRICK, *supra* note 7, § 4.9, at 171. Additionally, Rule 701 provides that opinions offered by lay witnesses are admissible only if they are “helpful” to the jury, which prevents confusing testimony. See *id.* § 7.3, at 625-27. Finally, Rule 702 governs expert witness opinions to ensure that they indeed assist the jury in understanding a complex issue. See *id.* § 7.6, at 633-38.
96. *Park*, *supra* note 86, at 720.
97. The regulation of character evidence has been explained on the grounds that it helps the state regulate conduct outside of the courtroom, as opposed to providing a forum to discover facts about a past event. See Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1231-32 (2001) (arguing that character evidence is better evaluated in a broader context than just trial). *But cf.* *Uviller*, *supra* note 7, at 845 (“The process of litigation is designed for the reconstruction of an event that occurred in the recent past. And for the most part, the rules by which a trial is conducted are supposed to enhance the accuracy of the synthetic fact.”). This disagreement is unimportant for the purposes of recognizing character evidence, because in either situation there remains the need to differentiate character from non-character propensity proofs like habits and mental characteristics.

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D. Empirical Evidence

Psychological research has offered qualified support for both the inferential error and nullification prejudice rationales. These studies can be separated into those that show the actual predictive value of character proof and those that show how individuals generally use character evidence in evaluating other people's actions. First, studies have shown that propensity reasoning based on general character traits, such as "violence" or "peacefulness," is very unlikely to offer an accurate prediction of a person's future conduct.⁹⁸ These same studies do, however, seem to support a narrower version of propensity reasoning based on the situation affecting the actor.

Before examining what these studies reveal, it is useful to recount the historical arc behind them. Psychological inquiry into character has, since its inception, developed through three discrete stages: trait theory, situationism, and interactionism.⁹⁹ "Trait theory" posited that individuals have strong, stable personality traits that produce relatively consistent behavior in varying situations¹⁰⁰ and that character was a "useful and reliable predictor of behavior."¹⁰¹ However, empirical evidence¹⁰² led to the emergence of

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98. See, e.g., 1 HUGH HARTSHORNE & MARK A. MAY, *STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT* (1928) (examining cheating behavior in children); John M. Darley & C. Daniel Batson, "From Jerusalem to Jericho": A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973) (testing helping behavior in seminary students); Imwinkelried, *supra* note 15, at 742 n.13 (collecting studies showing laypersons' inferential errors); Alice M. Isen & Paula F. Levin, *Effect of Feeling Good on Helping: Cookies and Kindness*, 21 J. PERSONALITY & SOC. PSYCHOL. 384 (1972) (testing phone booth users for their helpfulness); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963) (testing subjects' willingness to follow orders and electrically shock innocent people); Philip G. Zimbardo et al., *The Mind Is a Formidable Jailer: A Pirandellian Prison*, N.Y. TIMES MAG., Apr. 8, 1973, at 38 (reporting the results of the so-called "Stanford prison experiment," in which subjects proved willing to impose and accept psychological abuse following role assignments as "prisoner" and "prison guard"). For examples of legal scholars who have examined these studies in the context of character evidence, see Davies, *supra* note 21; Imwinkelried, *supra* note 15; Lawson, *supra* note 21; Leonard, *supra* note 21; Méndez, *supra* note 15; and Spector, *supra* note 92.
99. See Imwinkelried, *supra* note 15, at 747-52; Mike Redmayne, *The Relevance of Bad Character*, 61 CAMBRIDGE L.J. 684, 687-90 (2002).
100. Davies, *supra* note 21, at 513.
101. Lawson, *supra* note 21, at 780.
102. See HARTSHORNE & MAY, *supra* note 98, at 15 ("Honesty appears to be a congeries of specialized acts which are closely tied up with particular features of the situation in which deception is a possibility, and is apparently not greatly dependent on any general ideal or trait of honesty.").

“situationism,”¹⁰³ which seemed to show that a person’s behavior depended more on context as opposed to innate traits.¹⁰⁴ After problems were discovered with situationist studies,¹⁰⁵ a more limited theory known as “interactionism”¹⁰⁶ developed, which acknowledged that character involves both traits and situational factors operating together to influence conduct.¹⁰⁷ Interactionism is now the “consensus [in psychology] rejecting both extreme trait and situationist positions.”¹⁰⁸

Importantly, interactionism requires that both situations and character traits be considered in conjunction for accurate predictions;¹⁰⁹ in fact, the theory insists that they cannot be understood in isolation.¹¹⁰ For example, a prior act in isolation is often not an accurate predictor of a future act.¹¹¹ However, several key factors—first applied to character evidence by Susan Davies—have emerged from this research that appear to increase significantly the predictive value of specific acts evidence. These so-called “Davies factors” include specificity and similarity, numerosity, temporal proximity, and inherent propensity.¹¹² The more similar and specific the contexts of the prior act and the charged conduct, the more accurate a prediction of a person’s future

103. See *supra* note 98 for examples of this research.

104. Davies, *supra* note 21, at 514-15.

105. Imwinkelried, *supra* note 15, at 751.

106. *Id.* For an example of an interactionist study, see Steven J. Sherman & Russell H. Fazio, *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 J. PERSONALITY 308 (1983).

107. Davies, *supra* note 21, at 518-19.

108. Imwinkelried, *supra* note 15, at 752.

109. There are two questions inherently related to character evidence: first, does the evidence accurately reveal the trait of character and, second, did the trait influence action on the specific occasion in question? Even if it is assumed that a person’s trait is known with 100% accuracy, research suggests that it cannot accurately predict future behavior without a situational element. See Leonard, *supra* note 21, at 29; see also Davies, *supra* note 21, at 519 (“[A] generalization of cross-situational consistency in behavior cannot be made on the basis of one or two observations of behavior in particular situations.”).

110. Imwinkelried, *supra* note 15, at 758 (“[A] situational component must be factored into, included in, or incorporated into the very conception of a disposition or character trait.” (footnotes omitted)); Leonard, *supra* note 21, at 28-30 (“Thus, accurate prediction about behavior depends on . . . whether the individual’s general tendencies are manifested in the kind of situation involved.”).

111. Empirical data suggests that conduct on a prior instance cannot accurately predict future behavior in any statistically significant way. See William Fleeson, *Toward a Structure- and Process-Integrated View of Personality: Traits as Density Distributions of States*, 80 J. PERSONALITY & SOC. PSYCHOL. 1011, 1013 (2001) (“At best, behavior on one occasion predicts behavior on another occasion at around the .30 level . . .”).

112. Park, *supra* note 86, at 729 (citing Davies, *supra* note 21).

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behavior will be.¹¹³ Because situations are a necessary element, character traits cannot be inferred from single, isolated, out-of-context prior instances of conduct.¹¹⁴ Only when an observer considers numerous observations of one person can the observer actually predict someone's future action.¹¹⁵ Additionally, research shows that traits can change over time,¹¹⁶ so trait-relevant conduct that was manifested long ago is less likely to be predictive than more recent behavior. There is also limited evidence that some types of propensities—namely sexual proclivities—are inherently more predictive than others.¹¹⁷ If provided with proof that meets the Davies factors, interactionists conclude that it “may be possible to accurately predict the conduct of some people most of the time.”¹¹⁸

The second set of empirical research regarding how people normally think about character proof supports the notion that modern conceptions of character have become divorced from common intuition.¹¹⁹ In other words, despite the fact that research has shown character to be a poor predictor of behavior, laypeople still commonly believe that character is highly predictive.¹²⁰

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113. Davies, *supra* note 21, at 531-32 (noting that there is a “level of generality most appropriate” for “predicting behavior”); Leonard, *supra* note 21, at 29 (“[T]he level of specificity at which a trait or attitude is measured will affect its predictive value.”).
114. Leonard, *supra* note 21, at 29.
115. Sherman & Fazio, *supra* note 106, at 325.
116. Brent W. Roberts & Avshalom Caspi, *Personality Development and the Person-Situation Debate: It's Déjà Vu All Over Again*, 12 PSYCHOL. INQUIRY 104, 106-07 (2001) (finding that behavioral signatures can change over time).
117. See, e.g., P.B. Carter, *The Admissibility of Evidence of Similar Facts—II*, 70 LAW Q. REV. 214, 231-32 (1954) (noting that there is evidence that sexual proclivities are stronger than other propensities).
118. Leonard, *supra* note 21, at 28. While specific prior acts appear to be poor predictors of future action, at least one study suggests that reputation and opinion evidence may be more effective. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 136-38 (1991) (finding that reputation evidence in the form of letters of recommendation provide a better basis for a prediction than an interview); D. S. Moskowitz & J. Conrad Schwarz, *Validity Comparison of Behavior Counts and Ratings by Knowledgeable Informants*, 42 J. PERSONALITY & SOC. PSYCHOL. 518, 526-27 (1982) (finding that opinion evidence in the form of three knowledgeable informants are as reliable at predicting a subject's average behavior as 1440 direct observations of conduct over eight weeks).
119. See Méndez, *supra* note 83, at 878 (arguing that results of empirical research “undermine not only ‘common sense’ or intuitive notions of the predictive value of personality traits; they threaten also the law's assumption about the probative value of character evidence”).
120. See DORIS, *supra* note 9, at 95 (noting that “experimental evidence of inflated expectations for behavioral consistency” by trial subjects); see also Ziva Kunda & Richard E. Nisbett, *The Psychometrics of Everyday Life*, 18 COGNITIVE PSYCHOL. 195, 210-11 (1986) (finding that

This cognitive mistake is called the “halo effect” and is also known as “fundamental attribution error.”¹²¹ These studies have shown that people tend to “make dispositional judgments freely” about others¹²² and thereby make inaccurate predictions because they “tend to assume a single sample of behavior is representative of what the actor ordinarily does.”¹²³ In other words, “one outstanding ‘good’ or ‘bad’ quality in a person casts its reflection upon all judgments pertaining to him.”¹²⁴ Studies have also demonstrated that a “bad” trait is considerably more likely to result in character attribution than a “good” trait of equal intensity,¹²⁵ a fact that does not bode well for those with “bad” traits.

A good example of the halo effect is the “interview illusion.” Research has shown that short interviews are particularly poor ways to gain information on which to predict if a person will be a good employee, yet laypeople wrongly assume that they “can learn a great deal of useful information about people’s personalities from a brief get-acquainted interview.”¹²⁶ In addition, it appears that Americans are particularly vulnerable to the halo effect, perhaps for cultural reasons.¹²⁷ While courts may be tempted to protect jurors from making

subjects rely on character traits to predict an actor’s conduct more than empirical studies suggest they should); Richard A. Shweder, *Likeness and Likelihood in Everyday Thought: Magical Thinking in Judgments About Personality*, 18 *CURRENT ANTHROPOLOGY* 637, 642 (1977) (same). *But see* Park, *supra* note 86, at 738 n.69 (arguing that more recent research seems to suggest that lay reasoning is more accurate than previously believed and collecting studies).

121. See DORIS, *supra* note 9, at 93; Lawson, *supra* note 21, at 778.

122. Park, *supra* note 86, at 740.

123. DAVID J. SCHNEIDER, ALBERT H. HASTORF & PHOEBE C. ELLSWORTH, *PERSON PERCEPTION* 239 (2d ed. 1979); see also Gopal Sreenivasan, *Errors About Errors: Virtue Theory and Trait Attribution*, 111 *MIND* 47, 51 (2002) (defining the halo effect as an “‘inflated belief in the importance of personality traits and dispositions, together with [a] failure to recognize the importance of situational factors in affecting behavior’” (alteration in original) (quoting ROSS & NISBETT, *supra* note 118, at 4)).

124. GORDON W. ALLPORT, *PERSONALITY: A PSYCHOLOGICAL INTERPRETATION* 521 (1937).

125. See Barbara Black Koltuv, *Some Characteristics of Intrajudge Trait Intercorrelations*, 76 *PSYCHOL. MONOGRAPHS: GEN. & APPLIED*, no. 33, 1962, at 3 (“[A] single negative trait is more prepotent than its opposite positive.”); Méndez, *supra* note 83, at 881 n.38 (noting that studies show lay persons “give greater weight to bad character than good character evidence”).

126. ROSS & NISBETT, *supra* note 118, at 136 (stating that the correlation between predictions based on personality gleaned from unstructured interviews and actual behavior is less than .10 in the majority of studies); see also Park, *supra* note 86, at 740 n.74 (quoting Ross and Nisbett).

127. See Hamaguchi Esyun, *A Contextual Model of the Japanese: Toward a Methodological Innovation in Japan Studies*, 11 *J. JAPANESE STUD.* 289, 297-302 (Kumon Shumpei & Mildred R.

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these cognitive errors by issuing jury instructions, several studies have demonstrated that jury instructions do not provide a satisfactory remedy when improper character evidence is presented to the jury.¹²⁸ That fact strongly suggests that the halo effect cannot be cured by informing people that they are likely to use character proof wrongly. Once those observers have evidence of a person's character, it is likely to affect their prediction of whether or not that person did the alleged deed.

Taken together, these two sets of empirical studies support the existence of both inferential error and nullification prejudice. Interactionism shows that the situational element of character cannot be ignored, which means that general character traits are highly unlikely to be predictive on any one occasion.¹²⁹ The halo effect demonstrates that juries are in grave danger of attributing character traits from isolated instances of conduct, postulating entire characters from single traits, overestimating the predictive value of those traits, and weighing bad traits more than good traits.¹³⁰ When combined, interactionism and the halo effect produce an unsavory picture of how improper character evidence could impact a jury's factfinding responsibility. This research makes it all the

Creighton trans., 1985) (arguing that the Japanese are "relational actors," while "Euro-Americans" and "Arabs . . . establish actorship by objectifying themselves rather than relationships with others"); Richard A. Shweder & Edmund J. Bourne, *Does the Concept of the Person Vary Cross-Culturally?*, in CULTURAL CONCEPTIONS OF MENTAL HEALTH AND THERAPY 9, 116-18 (Anthony J. Marsella & Geoffrey M. White eds., 1982) (discovering that Americans are far more likely than residents of the eastern hemisphere to attribute traits to other people).

128. See Edward E. Jones, *The Rocky Road from Acts to Dispositions*, 34 AM. PSYCHOL. 107 (1979) (arguing that individuals do not properly adjust their base rate upon receiving new information); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124-25 (1974). Legal scholars have applied this psychological evidence to argue against the effectiveness of limiting instructions. See Kerri L. Pickel, *Inducing Jurors To Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407 (1995) (presenting empirical evidence indicating that juror bias induced by character evidence is not solved by limiting instructions); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985) (same). But see Tillers, *supra* note 21, at 791 & n.21 (arguing that Kahneman and Tversky's conclusion that ordinary people cannot make accurate predictions if given the proper base rate should be questioned, and collecting contrary scholarship).
129. See Méndez, *supra* note 15, at 235 (arguing that, to make accurate predictions, "[o]ne would need to discover the active psychological ingredients in the two situations to begin to arrive at a valid personality profile or 'if . . . then' signature for the defendant").
130. But see Park, *supra* note 86, at 741 (contending that "[c]haracter attributions are unavoidable" and therefore more character evidence should be admitted to permit jurors more information when postulating character).

more important that courts have a reliable and consistent framework to apply when determining what proof to admit or exclude from the jury.

III. THE COMPONENTS OF CHARACTER

Parts I and II established that courts are correct in identifying character evidence as a source for prejudice, yet current judicial answers to the question “what is character evidence?” are unsatisfactory. In order to properly apply the character evidence scheme, courts require a new perspective on character proof.¹³¹ At its core, this new perspective should focus on the reasons for regulating character in the first place: inferential error and nullification prejudice. These two rationales are triggered when evidence is both relevant under propensity reasoning and has moral overtones, causing juries to overestimate the likelihood that a person’s character influenced their conduct. Courts should refrain from attempting to apply circular and conclusory definitions. They should also avoid adopting a metaphysical notion of character, as espoused by psychologists.¹³² Instead, courts must remember that evidentiary rules do not exist to truly reflect the world, but rather to ensure that jurors will properly consider the facts presented to them.¹³³

Under this new perspective, then, character has two components: propensity and morality. The propensity prong is universally accepted; there is no disagreement among legal scholars that the basis of character proof’s relevance is propensity reasoning.¹³⁴ If the proof is not relevant on the basis that it will show that an individual’s action was in conformity with his or her trait of character, then it is not character evidence. However, the morality prong has not yet received the same recognition.

Prior to the Federal Rules of Evidence, the Supreme Court concluded that character evidence is about identifying “moral traits.”¹³⁵ Today, some legal scholars and commentators acknowledge that morality is inherent in character evidence,¹³⁶ but none of them has explained how a court should take morality

¹³¹ See *supra* note 14 for commentators who acknowledge that a new perspective on character evidence is needed.

¹³² See *infra* notes 157-158 and accompanying text for a discussion on metaphysical character.

¹³³ See *supra* note 79 for a discussion of the purpose of the modern law of evidence.

¹³⁴ Imwinkelried, *supra* note 15, at 741. The only other basis for relevance is if character is an essential part of the charge, claim, or defense. See *supra* note 23.

¹³⁵ *Michelson v. United States*, 335 U.S. 469, 477 (1948).

¹³⁶ See, e.g., *PARK ET AL.*, *supra* note 11, § 5.04, at 127 (“To constitute a character trait, one would think (though this is not settled) that the tendency must arise in some reasonable degree from the person’s *moral* being”); 1 *WIGMORE*, *supra* note 7, § 52, at 121 (finding that

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into account when identifying character.¹³⁷ Other scholars firmly insist that character evidence does not have a morality component,¹³⁸ although the underlying disagreement seems to revolve around a policy debate over how broad the character-evidence scheme should be.¹³⁹ It would therefore appear that the necessity of morality as a component of character evidence is “not settled.”¹⁴⁰ However, a court analyzing whether evidence is character or not cannot rely only on the opinion of legal scholars. The Rules are federal statutory law,¹⁴¹ and thus courts must interpret the Federal Rules of Evidence, or their state counterparts, to find an answer. Therefore, courts will apply traditional tools of statutory interpretation when confronted with evidentiary issues.¹⁴² The Sections below argue that both the text and the purpose of the character-evidence rules support the existence of a morality component.

character is “the actual moral or psychological disposition” of a person); 22 WRIGHT ET AL., *supra* note 6, § 5233 & n.20.3 (noting that character has a “moral component” and that morality is the “element that seems to be missing from most of the definitions”); *see also* MICHAEL H. GRAHAM, *FEDERAL RULES OF EVIDENCE IN A NUTSHELL* 112 (1996) (arguing that “the concept of character has acquired strong moral overtones”); Kuhns, *supra* note 77, at 779 (“[C]haracter’ probably includes only those qualities of personality that have some moral overtone, which connotes something good or bad about a person.”); Leonard, *supra* note 13, at 451 (“Thus, from the perspective of the law of evidence, it is best to conceive of character as a subset of propensity, embracing only the moral aspects of a person.”); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264-65 (1995) (differentiating between moral “character” propensities and nonmoral “habit” propensities).

137. This is strange considering that moral considerations figure prominently in other areas of the law. *See, e.g.*, Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) (using moral philosophy to analyze rationales for punishment); Dan M. Kahan, *Essay, Ignorance of the Law Is an Excuse – But Only for the Virtuous*, 96 MICH. L. REV. 127, 127 (1997) (examining the “relationship between criminal law and morality in general and . . . the law’s understanding of moral responsibility in particular”).
138. *See, e.g.*, Imwinkelried, *supra* note 78, at 582 (analyzing character proof without a morality component); Morris, *supra* note 44, at 181-82 (same); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 7-8 (1993) (arguing that the law “has broader concerns” and that character evidence “does not necessarily have a moral connotation”).
139. *See* Kuhns, *supra* note 77, at 798 (arguing that Rule 404(b) “recognizes that on some occasions specific acts evidence which is not character evidence will be inadmissible”); Taslitz, *supra* note 138, at 7-8.
140. PARK ET AL., *supra* note 11, § 5.04, at 127.
141. *See* *United States v. Abel*, 469 U.S. 45, 51 (1984) (“In principle, under the Federal Rules no common law of evidence remains . . .”) citing Edward W. Clearly, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)).
142. *See* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989) (explaining that the tools of statutory interpretation apply to the Federal Rules of Evidence in the same way as any other statute).

A. Support from a Textualist Perspective

The text of the Rules is a powerful indicator that character evidence includes morality.¹⁴³ Rule 404(a) reads: “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.”¹⁴⁴ Rule 404(b) echoes that language, providing that “[e]vidence of a crime, wrong, or other 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.”¹⁴⁵ According to the canon of statutory interpretation known as the rule against superfluities – that a “statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”¹⁴⁶ – it follows that Rule 404(a) covers only “[e]vidence of a person’s character or character trait” and Rule 404(b) is also restricted to evidence that is intended to “prove character.”¹⁴⁷ The meaning of the term “character” is clearly of critical importance when recognizing what proof the character-evidence scheme governs,¹⁴⁸ but no definition is included in the Rules.¹⁴⁹

¹⁴³. The Federal Rules of Evidence were restyled by the Judicial Conference and Congress via the Rules Enabling Act, 28 U.S.C. § 2072 (2006). The Restyled Rules took effect on December 1, 2011. See Letter from Chief Justice John G. Roberts, Jr. to Representative John A. Boehner (Apr. 26, 2011), available at <http://www.supremecourt.gov/orders/courtorders/frev11.pdf> (submitting to Congress amendments adopted by the Supreme Court); see also Letter from Chief Justice John G. Roberts, Jr. to Vice President Joseph R. Biden, Jr. (Apr. 26, 2011), available at <http://www.supremecourt.gov/orders/courtorders/frev11.pdf> (same). However, the Judicial Conference Advisory Committee on the Federal Rules of Evidence has stated that no substantive changes were intended by the restyling. Daniel J. Capra, *Emerging Issues Analysis: The Restyled Federal Rules of Evidence*, 2011 Emerging Issues 5875 (LexisNexis), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/Ev2011-10%20Symposium.pdf>. Therefore, while this Note quotes the language of the newly restyled Rules, it also assumed that this language is consistent with past interpretations of the Rules on character evidence.

¹⁴⁴. FED. R. EVID. 404(a)(1).

¹⁴⁵. *Id.* R. 404(b)(1).

¹⁴⁶. *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

¹⁴⁷. FED. R. EVID. 404(a)-(b).

¹⁴⁸. The rule against superfluities is best explained by an example. If the drafters of the Rule had intended the character evidence scheme to cover all propensity-based evidence, then referencing “character” at all would have been quite unnecessary. Instead, Rule 404(a) could have been drafted to read “evidence of a trait is not admissible to prove that on a particular occasion the person acted in accordance with the trait” and Rule 404(b) to read “evidence of a crime, wrong, or other act is not admissible to prove that on a particular occasion the person acted in accordance with that crime, wrong, or other act.” But the drafters did

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According to the Supreme Court, when a term is undefined in a statute, courts should look to the plain meaning of the term.¹⁵⁰ Therefore, the question is: what is the ordinary meaning of the word “character”? Dictionary definitions of the word character include a morality component. The 1973 edition of *Webster’s New Collegiate Dictionary*, which was published while drafts of the Rules were circulating¹⁵¹ and just before the Rules were formally adopted by Congress,¹⁵² includes morality in one of its primary definitions of character: “the complex of mental and ethical traits marking and often individualizing a person, group, or nation.”¹⁵³ This definition does not help differentiate between character and non-character traits any more than the conclusory definitions used by courts and commentators,¹⁵⁴ but it does strongly reinforce the notion that the Rules should be interpreted to include a morality component.

Everyday usage of the word “character” reinforces the dictionary’s inclusion of morality. If someone were to impugn another’s character, it seems commonly understood that this would entail calling into question the other’s integrity or moral goodness. In contrast, referring to someone’s medical condition is unlikely to be seen as commenting on that person’s character. School programs like “Character Counts” embody this ordinary usage by supporting the idea that character involves “right” and “wrong” decisionmaking

include the word “character,” so it appears not to be synonymous with the concept of propensity.

149. See note 45 and accompanying text.

150. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 128 (1998) (analyzing the “primary meaning” of the word “carry” in a federal criminal statute by reference to a dictionary); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995) (holding that the “ordinary understanding” of the word “harm,” as defined in a dictionary, was compelling evidence of that word’s meaning in the Endangered Species Act of 1973).

151. See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (delaying implementation of the proposed Rules to permit Congress time for review).

152. See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (adopting the Federal Rules of Evidence).

153. See WEBSTER’S NEW COLLEGIATE DICTIONARY 187 (1973). Although *Webster’s* first definition under character is “a conventionalized graphic device placed on an object as an indication of ownership, origin, or relationship,” *id.*, which does not suggest any moral connection, it is worth noting that almost every definition of character in *Webster’s* that is not about “graphic symbols” contains some allusion to morality. Indeed, other dictionaries likewise identify morality as a key part of character. See, e.g., 3 THE OXFORD ENGLISH DICTIONARY 30-32 (2d ed. 1989) (mentioning morality in most definitions not relating to graphic symbols); see also THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 163 (C.T. Onions ed., 1992) (defining “character” as the “sum of mental and moral qualities”).

154. See *supra* Part I for a discussion of these definitions.

and that the tendency to make “right” decisions can be inculcated in children.¹⁵⁵ Additionally, the character requirements for admission to state bar associations across the United States demonstrate that morality retains a place in common understandings of character.¹⁵⁶

Modern scientific conceptions of character appear to have replaced this common understanding with a psychiatric analysis of mental and behavioral tendencies. Psychiatrists and researchers sometimes use the word “character” to refer to nonmoral propensities. In other words, the Freudian conception of character as only propensity seems to dominate the scientific lexicon.¹⁵⁷ The scientific emphasis on morally neutral character has threatened to spread beyond the realm of science to obscure the connection between morality and character in the law of evidence.¹⁵⁸ However, as there is no indication in the text of the Rules that Congress preferred this broader scientific meaning, the notion that the plain meaning of character includes a moral component seems much stronger.

In addition to the text, the structure of the Rules strongly implies that character proof involves more than propensity. Rule 406 provides for the admission of habit evidence, which the Rule states may be offered “to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit.”¹⁵⁹ In other words, proof of habit is propensity evidence, but is not character evidence under Rule 404. By recognizing habit propensity proof, the Rules’ structure demonstrates that propensity is greater than character, and, therefore, that character cannot be synonymous with propensity.¹⁶⁰

155. *Character Counts!: Frequently Asked Questions*, CTR. FOR YOUTH ETHICS, JOSEPHSON INST., <http://charactercounts.org/overview/faq.html> (last visited Oct. 23, 2011) (arguing that character can be taught and that “there is such a thing as right and wrong”); see also DORIS, *supra* note 9, at 121-27 (arguing that character can be taught).

156. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985).

157. See, e.g., Brian Johnson, *Psychological Addiction, Physical Addiction, Addictive Character, and Addictive Personality Disorder: A Nosology of Addictive Disorders*, 11 CANADIAN J. PSYCHOANALYSIS 135, 141-42 (2003) (discussing Freud and defining “addictive character” without a morality component).

158. See, e.g., *State v. Johns*, 725 P.2d 312, 320 (Or. 1986) (“In these days of changing values, we doubt that we could effectively define ‘moral’ or ‘psychical’ disposition.”); 22 WRIGHT ET AL., *supra* note 6, § 5233, at n.16.

159. FED. R. EVID. 406. See *supra* note 10 for more discussion on habit in the Rules.

160. See Kuhns, *supra* note 77, at 794 (“All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence.”).

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B. Support from a Purposivist Perspective

The purpose of the character evidence scheme also suggests the existence of a morality component. Congress most likely adopted the character evidence Rules to address the same concerns that troubled common law courts: inference error and nullification prejudice. Although the legislative history does not reveal Congress's exact understanding of the term "character,"¹⁶¹ there are four other considerations that indicate that morality is integral to understanding character proof: the common law history of the scheme, the Advisory Committee Notes, the rationales behind the scheme, and prudential concerns.

First, the history behind the common law of character evidence – although shrouded in mystery – is rife with concerns about morality. This history seems to suggest that common law courts were prompted to heavily regulate and prohibit character proof in trials because they understood that a defendant's morally weighted propensities were too likely to prejudice the jury.¹⁶² Undergirding common law courts' belief was psychology in the nineteenth century, which viewed character as a "unique blend of free will and determinism" where a person's choices determined their character and, by extension, their future conduct.¹⁶³ For example, an individual could gain a violent disposition by repeatedly committing violent acts over a stretch of time; this violent character, in turn, could then influence that individual to act violently on future occasions.¹⁶⁴ In other words, people believed that an

161. The legislative history accompanying Congress's adoption of the Rules does not define the term "character evidence," nor does it even propose a common understanding of what character evidence is. See S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 1974 WL 11680 (addressing Rule 404(b), but not defining "character evidence"); H.R. REP. NO. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 1973 WL 12555 (addressing amendments on Rules 404(b) and 405(a), but not defining "character evidence").

162. 22 WRIGHT ET AL., *supra* note 6, § 5233.

163. *Id.* (noting that "many of the assumptions about morality, psychology, and society that gave [character] meaning [in the nineteenth century] would probably be questioned today").

164. The belief of common law courts that people are responsible for their character descends all the way from Aristotle. For Aristotle, every person has a moral right to demand that everyone else be "responsible for making [themselves] beings who can help doing what [they] do." Pincoffs, *supra* note 9, at 919. Aristotle's belief still holds some sway in modern philosophy. For instance, Robert Audi contends that an individual's morality is intertwined with his or her traits and, consequently, "our responsibility extends to our character." ROBERT AUDI, MORAL KNOWLEDGE AND ETHICAL CHARACTER 170 (1997). But others emphasize that this responsibility is only partial. See, e.g., Pincoffs, *supra* note 9, at 920 ("[T]he formation of one's character is neither entirely the doing of others nor entirely one's own doing.").

individual was morally responsible for his or her character.¹⁶⁵ Character proof threatened the integrity of trials, which were proceedings designed to find whether that person actually did the act in question. Indeed, prior to the enactment of the Rules, the Supreme Court seemed to adopt this conception of character.¹⁶⁶ This history of the common law rule is not explicitly mentioned by Congress in the legislative history and is not binding on courts under the Rules.¹⁶⁷ However, it strongly implies that Congress intended to adopt the same purpose for the Rules when it copied them from the common law, and, therefore, that Congress understood character evidence as including a morality component.

Second, the notes of the Advisory Committee on Rules of Evidence also strongly suggest that Congress intended character to include a morality component. The Committee—the group of judges, academics, and lawyers who first drafted the Rules—provided explanatory notes that accompany each of the Rules it drafted that reveal the Committee’s understanding of those Rules.¹⁶⁸ In the notes covering the character evidence scheme, the Committee commented that “[t]raditionally, character has been regarded primarily in

Regardless of whether people are responsible for their characters, morality still plays a significant role in modern philosophy. Owen Flanagan writes interchangeably of “character traits” and “habits of the heart and mind” that pertain to moral life” in explaining his theory of character. Owen Flanagan, *Moral Science? Still Metaphysical After All These Years*, in PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY 52, 56 (Darcia Narvaez & Daniel K. Lapsley eds., 2009). Even philosophers like John Doris, who argue that character is wholly dependent on situational context, DORIS, *supra* note 9, at 121-27, agree that morality is a part of character. In their view, individuals display their morality through the situations in which they participate. *See id.* at 147 (suggesting that “attending to the determinative features of situations” is “[t]he way to get things right more often”). *But see* Candace L. Upton, *The Structure of Character*, 13 J. ETHICS 175, 176 (2009) (“Doris provides no reason why the ethicist should embrace local traits as traits of *character*, as opposed to mere behavioral dispositions.”).

165. *See, e.g.*, 22 WRIGHT ET AL., *supra* note 6, § 5233 (“According to the neurologists of the day, the physical explanation [of character] was that a consistent pattern of choices created a worn nerve path that made it all but impossible for impulses to travel a different route.”).
166. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 471-72, 477 (1948) (noting that character is a person’s “moral traits” and describing a typical exchange where character evidence is elicited at trial that concluded with “Q: And what is his reputation? A: Very good”).
167. *See supra* note 141 and accompanying text.
168. When first addressing the proposed Rule regarding character evidence, the Advisory Committee’s minutes indicate only that “[d]iscussion ensued and the Committee agreed that the principle was sound.” Advisory Comm. on the Rules of Evidence, Committee Minutes 5 (Sept. 29, 1966), available at http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV09-1966-min.pdf.

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moral overtones of good and bad: chaste, peaceable, truthful, honest.”¹⁶⁹ This statement, which is included in the Congressional Record,¹⁷⁰ indicates that the Committee understood the common law history of character evidence. Furthermore, it seems to show that the Committee intended to adopt that understanding in the statutory character evidence scheme.

One difficulty with this argument is that the notes also state that “nonmoral considerations” should fall under the character evidence scheme.¹⁷¹ However, this reference to “nonmoral” character should not be taken to suggest that character does not have a morality component. Traits can be inherently moral or be moral in the situation in which they are elicited.¹⁷² The Committee’s language appears to acknowledge that some traits which do not inherently implicate moral concerns, such as proof of being an incompetent driver,¹⁷³ can gain moral overtones in certain contexts. Under this view, the character evidence scheme regulates nonmoral traits when they carry moral weight in the context of the situation, and does not govern nonmoral traits otherwise. For example, while perhaps driving a car is ordinarily a morally neutral act, if a person incompetently drove a car with the knowledge that doing so endangered lives, then that otherwise morally neutral act would gain moral weight in context. This view is supported by the fact that the strong form of the Committee’s note—that propensities that are nonmoral both inherently and in context might still be character—has not been adopted by courts.¹⁷⁴ Therefore, it seems likely that the weak form of the nonmoral consideration language is correct,¹⁷⁵ and that the Committee recognized that morality is a crucial component of character proof.

169. FED. R. EVID. 405 advisory committee’s note.

170. See 120 CONG. REC. 2371 (1974) (statement of Rep. Wiley Mayne).

171. FED. R. EVID. 405 advisory committee’s note.

172. See, e.g., *State v. Ferguson*, 803 P.2d 676, 685 (N.M. Ct. App. 1990) (Hartz, J., dissenting) (arguing that being “suspicious” and “paranoid” are not necessarily traits of character unless they carry a moral connotation in context).

173. FED. R. EVID. 405 advisory committee’s note.

174. For example, although the court in *Bell v. Whitten*, 722 So. 2d 1057, 1061 (La. Ct. App. 1998), was interpreting the Louisiana Code of Evidence, it held that mental disorders are not character evidence. See also *supra* notes 9-13 for other examples of nonmoral traits that courts have found not to be character.

175. Some scholars believe that the Committee’s notes should be viewed cautiously as an interpretive source. In their view, the Committee’s note to Rule 406 evinces support for the “trait theory” of general character traits in psychology. See FED. R. EVID. 406 advisory committee’s notes (supporting a definition of character as a “tendency to act . . . in all the varying situations of life.”); see also PARK ET AL., *supra* note 11, § 5.04, at 127-28 (noting that the Committee’s description of “all the varying situations” indicates “general tendencies” as opposed to traits with a situational component). As this Note has already discussed, trait

Third, the rationales for the character evidence scheme, as recognized by legal commentators, also support morality as a component. These rationales— inference error and nullification prejudice—are much more likely to become activated in a juror’s mind when a given trait carries moral weight; in contrast, these rationales are unlikely to prejudice jurors when a trait is morally neutral.¹⁷⁶ Prejudice would not exist unless jurors could use the proffered evidence in an inappropriate manner, and courts have rightly noted that morally neutral traits do not engender the types of gut-level reactions from jurors that would cause prejudice.¹⁷⁷ For example, proof of an individual’s violent nature seems much more likely to result in nullification prejudice than evidence of a medical condition like epilepsy. Even the threat of inference error is reduced with morally neutral traits, because psychological research has shown that negative traits are more likely to result in attribution than neutral or good traits.¹⁷⁸

Fourth, prudential concerns suggest that morality may be the only principled way for courts to distinguish between character and non-character propensities. Discriminating between the two is practically impossible without considering the morality of the trait, as some commentators and scholars have suggested,¹⁷⁹ because there is simply no other aspect of character besides morality that is not also present in other, non-character propensity proofs. In other words, an individual’s character is virtually indistinguishable to an observer from any other propensity—such as a mental trait or a habit—except

theory has been replaced in modern psychological studies by interactionism. *See supra* notes 99-108 and accompanying text. Accordingly, these scholars contend that the Committee’s notes should carry little weight. *See, e.g.,* Imwinkelried, *supra* note 15, at 750 (noting that situationism had not yet dethroned trait theory at the time that the Advisory Committee and Congress were debating and adopting the Rules).

However, even if the Committee’s notes are based on an obsolete theory of character, that does not mean that the Committee’s recognition of the morality component is likewise discredited. The morality prong comes from the rationales for the character evidence scheme and not from how predictive traits may or may not be. In other words, while modern psychology might frown on the Committee’s references to trait theory, it would still support the Committee’s understanding that morality is the basis of juror prejudice. *See supra* notes 119-128 and accompanying text.

176. *See, e.g.,* Kuhns, *supra* note 77, at 796 (“The degree of prejudice associated with any specific act evidence is a function of how the factfinder is likely to respond to the badness of the act.”).

177. *See supra* notes 10-13 and accompanying text.

178. *See supra* note 125 and accompanying text.

179. *See* PARK ET AL., *supra* note 11, § 5.04, at 127-28 (“To constitute a character trait, one would think . . . that the tendency must arise in some reasonable degree from the person’s *moral* being . . .”); 22 WRIGHT ET AL., *supra* note 6, § 5233 (opining that character likely includes morality); *see also* sources cited *supra* note 136.

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by reference to that propensity's morality. It is difficult to imagine how a court could determine whether a mental characteristic or an inherited condition implicates character concerns without considering some distinguishing factor such as morality. But no other differentiating factor has yet been discovered. Morality, as these scholars have realized, is the most obvious feature by which to discriminate between character and non-character propensities. Moreover, until the day when psychology can provide a window into a person's mind, it may well be the only discriminating feature that is observable to courts. That suggests that morality is necessary as a component of character.

When put together, the text and purpose of the Rules offer a compelling argument that morality is integral to understanding character evidence. The text's plain meaning and the structure of the Rules support that character includes morality, and the common law history of character evidence, the Advisory Committee notes, the underlying rationales, and prudential considerations all counsel toward recognizing a morality prong.

IV. THE FRAMEWORK FOR RECOGNIZING CHARACTER

As Part III demonstrated, character for the purposes of evidence law contains two components: propensity, which serves as the basis for character proof's relevance, and morality, which serves as the factor that discriminates between character and non-character propensities.¹⁸⁰ What courts need now is guidance on how these two components fit together. This Part will propose a logical, coherent framework that incorporates the two components and helps courts identify when a trait implicates character as opposed to something else, be it a habit, mental condition, personality trait, or otherwise. First, it will describe the general structure of the framework. Second, it will explain how a court would address the propensity prong and, third, the morality prong.

This Note will not take a normative position on the admissibility of character proof, and it will not propose an amendment to, or repeal of, any of the Rules.¹⁸¹ This normatively neutral perspective should not be taken to

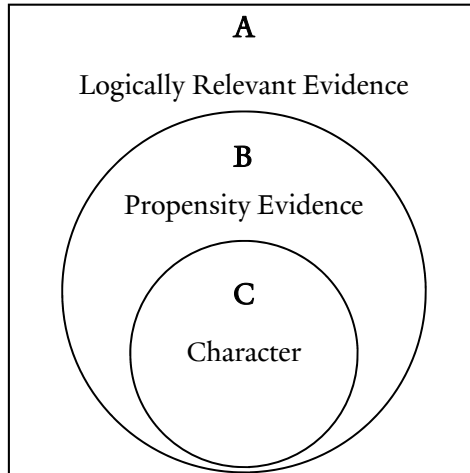
^{180.} See 22 WRIGHT ET AL., *supra* note 6, § 5233 (noting that character likely contains two components: repeated behavior and morality).

^{181.} It may seem odd that the character evidence scheme exists at all; why not just replace the entire scheme with a Rule 403 balancing test? First, this Note aims to enable courts to implement the proposed framework without having to amend the Rules, which would be required by a proposal to abandon the character evidence scheme entirely. Second, Rule 403 is regarded by many courts as an "extraordinary remedy to be used sparingly," *United States v. Reyes*, 660 F.3d 454, 464 (9th Cir. 2011) (quoting *United States v. Patterson*, 819 F.2d 1495, 1505 (9th Cir. 1987)), so a balancing test under Rule 403 may not prove to be a complete or satisfactory replacement. Third, the function of the two Rules is quite different:

suggest that the Rules are perfect. But many scholars have already proposed reasonable amendments in line with the psychological scholarship noted above.¹⁸² Instead, the proposed framework will work within the current parameters of the Rules to give courts the analytical tools they need to recognize character without amending the Rules.

Figure 1.

VISUALIZING CHARACTER EVIDENCE



A. The Basic Overview

The framework is a two-step process for courts to use when recognizing character evidence. The first step, the propensity prong, discriminates between evidence that is logically relevant under propensity reasoning and evidence relevant under a different theory. The second step, the morality prong, helps courts differentiate between character and non-character propensity proof.

Rule 403 operates either to fully exclude or admit proof, but the character evidence scheme acts to regulate, restrict, or prohibit certain forms of character proof. Fourth, the law of character evidence has developed over time and represents hundreds of years of combined wisdom of common law courts; abandoning it could “upset [the] present balance [in the Rules] between adverse interests.” *Michelson v. United States*, 335 U.S. 469, 486 (1948). Fifth, Rule 403 still applies regardless of whether the proof is character evidence, so it will operate to exclude any unfairly prejudicial proof that the character evidence scheme does not.

¹⁸² See, e.g., *Davies*, *supra* note 21, at 533-37 (proposing a balancing test); *Kuhns*, *supra* note 77, at 803-09 (same).

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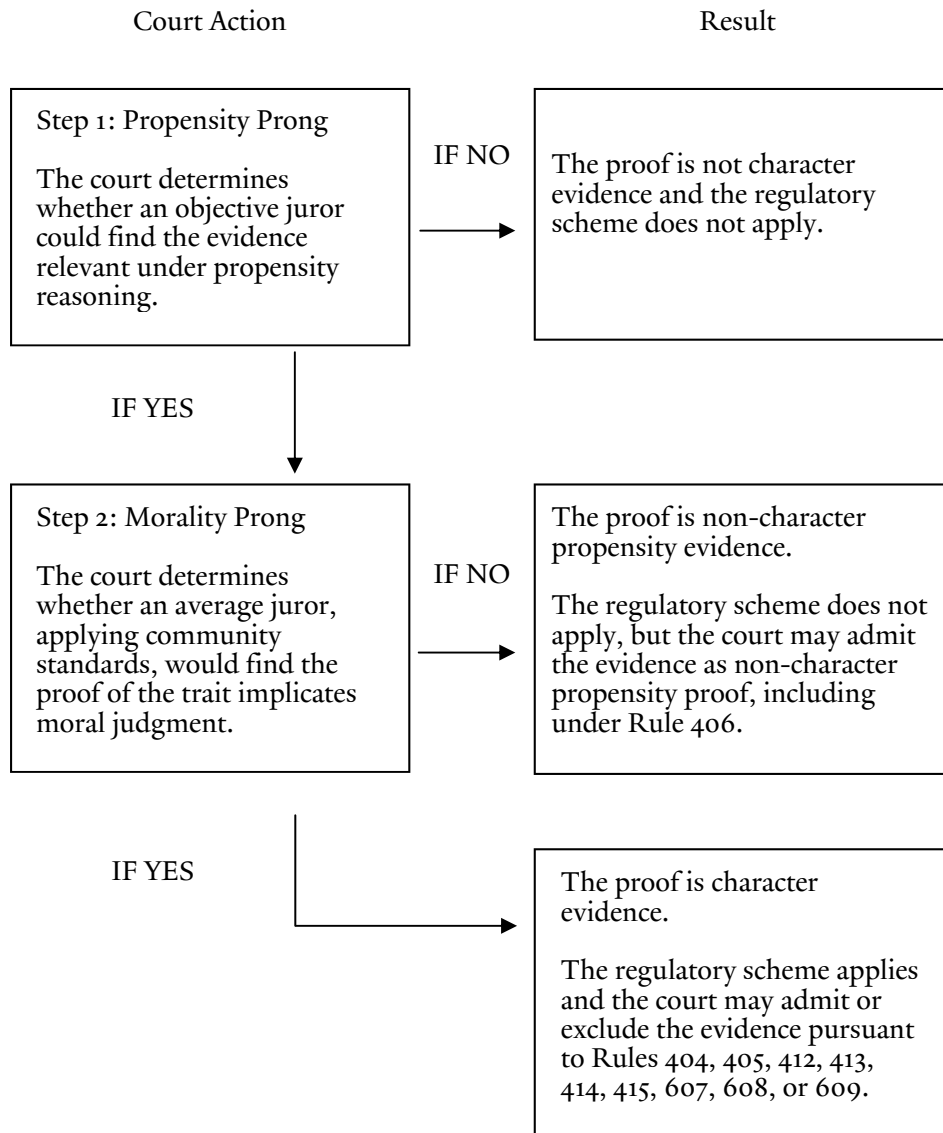
Figure 1 visualizes where character proof lies within the universe of relevant evidence. The figure is a circle (Area C) within a circle (Area B) within a box (Box A). Box A represents the complete set of all logically relevant evidence or, in other words, all evidence that a court would deem relevant under Rule 401. Within Box A, proof is admissible unless barred or regulated under another Rule. Within Box A is Area B, which represents the subset of proof that is, or could be, relevant under propensity reasoning. If a proof is in Box A, but not Area B, then it is relevant under a theory different than propensity. Not all propensity evidence is character evidence,¹⁸³ so Area B contains within it Area C, which signifies the set of character evidence. Proof within Area B and not Area C is non-character propensity evidence, such as habit under Rule 406 or genetic traits.

Importantly, because Areas B and C are inside Box A, Figure 1 demonstrates that character and non-character propensity proofs must still be analyzed under all of the Rules. For example, character evidence that is also hearsay may face multiple bars to admission: the character evidence regulatory scheme and the hearsay rules. This evidence could be appropriate under one, but not the other. The fact that proof which is admissible pursuant to the regulatory scheme is not necessarily admissible under other rules is most significant in regards to Rule 403, which operates as the final barrier for evidence.¹⁸⁴ Accordingly, the framework does not enable courts to fully determine a proof's admissibility, but rather to establish whether or not the character evidence regulatory scheme applies.

¹⁸³. See *supra* notes 70-77 and accompanying text for a discussion of the difference between propensity and character proof.

¹⁸⁴. See *supra* notes 59-61 and accompanying text for a discussion of Rule 403.

Figure 2.
VISUALIZING CHARACTER EVIDENCE



The proposed framework assists courts in placing evidence in one of the zones within Figure 1. The basis of the framework is the two components of character: propensity and morality. Figure 2 lays out the structure of the framework, with arrows representing a court's decisionmaking process. While

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Figure 2 is a step-by-step guide, courts should not view the framework as a formalistic, mechanical test to apply. Instead, it simply provides the questions that courts should be asking to enable them to recognize character proof.

The first step in the framework is the propensity prong. In this stage, the court is discerning whether proof belongs inside or outside Area B in Figure 1. Once an opposing party has objected to or moved to exclude evidence as improper character proof,¹⁸⁵ the court would determine whether the proof in question relies on propensity reasoning as the theory of its logical relevance. Any proof that does not rest on propensity reasoning must either be relevant on another ground or logically irrelevant, but in any case that proof would not fall under the character evidence regulatory scheme. In other words, the proof would be situated in Box A, but outside of Area B. But if the court decides that the evidence is propensity proof, then it would be located inside Area B.

Second, if the proof does rely on propensity reasoning, the court would then determine whether the trait implicates morality. This step, the morality prong, involves the court deciding whether proof belongs inside or outside Area C in Figure 1. If the evidence does not have moral weight inherently or in context,¹⁸⁶ then it is not character proof. Because this type of evidence does not trigger both inferential error and nullification prejudice in jurors, it is not regulated by the character evidence scheme.¹⁸⁷ This non-character propensity evidence may be admissible as habit under Rule 406,¹⁸⁸ or as another form of

¹⁸⁵. Although the prosecution is unlikely to object, a defendant has the right to present “good” character evidence at trial. By presenting it, a defendant opens the door under the character evidence scheme for the prosecution to offer rebuttal “bad” proof. FED. R. EVID. 404(a); see *Greer v. United States*, 245 U.S. 559, 560-61 (1918).

¹⁸⁶. See *supra* notes 173-175 and accompanying text for a discussion of the difference between traits that carry inherent morality and those that are moral in context.

¹⁸⁷. See *supra* Sections III.A-B for discussion of why morality distinguishes between character and non-character propensity evidence.

¹⁸⁸. The way courts describe habit proof under Rule 406 is nearly identical to what psychological research suggests is the only truly predictive form of propensity proof, namely prior specific instances of conduct that satisfy the Davies factors of similarity, specificity, numerosity, and temporal proximity. Compare *Davies*, *supra* note 21, at 535-36, with *United States v. Holman*, 680 F.2d 1340, 1350-51 (11th Cir. 1982) (“In contrast to character evidence . . . habit denotes conduct of a much more specific variety”); 1 *BROUN ET AL.*, *supra* note 10, § 195 (defining habit as a “person’s regular practice of responding to a particular kind of situation”); 2 *WEINSTEIN ET AL.*, *supra* note 10, § 404[01] (“Character and habit . . . are not synonymous.”).

Therefore, once the court has determined that a trait carries no moral weight, it would be well advised to apply the Davies factors to the specific acts proof being offered to prove that trait in order to discern whether it is habit evidence under Rule 406. One advantage of the Davies factors is that they establish a clearer distinction between habit and non-habit evidence; a distinction that commentators have noted is sometimes difficult to see. See, e.g.,

propensity proof that courts have consistently recognized is not character evidence like mental illnesses or genetic attributes.¹⁸⁹ Regardless, it is not character evidence, and the regulatory scheme would not apply.¹⁹⁰ This proof would be located inside Area B, but outside Area C. If the court finds that a trait has moral weight, then that trait would be sited within Area C.

When a court finds that a trait implicates morality, then it has made a determination that the character evidence regulatory scheme applies. The moral weight of the trait activates the jury's inferential error and nullification prejudices, and the regulatory scheme acts to mediate the effect of those prejudices by either admitting, excluding, or restricting the form or timing of the proof.¹⁹¹ In short, the court uses the framework to decide if the regulatory scheme applies, and uses the scheme for admissibility decisions. Of course, one crucial element of the scheme is Rule 404(b) "other purposes" proof.¹⁹² However, because Rule 404(b) is part of the admissibility decision and not part of identifying character, the court would not employ Rule 404(b) in the framework for recognizing character.¹⁹³

B. The Propensity Prong

In the first step of the framework, a court would examine the evidence in question and identify whether its logical relevance rests on propensity reasoning.¹⁹⁴ In other words, the court would ask whether an objectively

1 BROUN et al., *supra* note 10, § 195, at 783 n.7 ("Character may be thought of as the sum of one's habits, although it doubtless is more than this."); GRAHAM, *supra* note 136, § 406.1 (noting that "the dividing line between habit and character is far from distinct").

189. See *supra* notes 11-13 for examples of non-habit, non-character propensity traits.

190. Non-character propensity evidence might on occasion give rise to inferential error prejudice associated with the halo effect. See *supra* notes 119-128 and accompanying text for a discussion regarding the halo effect. In other words, prior specific instances of conduct could conceivably be unfairly prejudicial under Rule 403 if they are relevant under propensity reasoning, morally neutral, and yet so dissimilar from the conduct for which they are being offered to prove that they threaten to mislead the jury. However, any residual inferential error prejudice arising from the proof would not trigger the character evidence regulatory scheme; rather, that prejudice would be included as part of the court's Rule 403 balancing test.

191. See *supra* notes 21-23 and accompanying text.

192. See *supra* notes 74-75 and accompanying text for a discussion regarding Rule 404(b).

193. See *infra* notes 264-270 for further discussion of the implications of the proposed framework on Rule 404(b).

194. Trial courts are experienced in identifying the logical basis of proof because they often make relevance determinations. See 1 BROUN ET AL., *supra* note 10, § 185 (noting that, when

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reasonable juror could use the proof to any degree, fairly or unfairly, to predict the actor's conduct.¹⁹⁵ An objective test is appropriate because the court is determining whether the evidence actually implicates propensity reasoning, not determining its admissibility, which is left to the character evidence scheme. As long as a reasonable juror could find the proof driven by propensity reasoning, then a court should deem it propensity proof. A court should make this determination even if the evidence rests only partly on propensity reasoning, because empirical evidence suggests that, in a multiple-relevance situation, the risk is higher that the jury will misuse the proof to predict an individual's behavior inappropriately.¹⁹⁶ In that case, the special protections of the character evidence scheme are more important to restrict this proof at trial. But the propensity prong is only the first stage of the framework.¹⁹⁷

C. The Morality Prong

The second step of the character-recognizing framework determines whether or not the court applies the character evidence scheme.¹⁹⁸ In this step,

determining relevance, "the answer must lie in the judge's personal experience, general knowledge, and understanding of human conduct and motivation").

195. The standard for this determination would be quite low, similar to a burden of production, because logical relevance is a purely legal requirement under Rule 402. It exists simply to classify proof, not to admit or exclude it. For example, if a proof is not based on propensity reasoning, then it might still be excluded, but it would not fall under the character evidence regulatory scheme.

One advantage to the low threshold is that it ensures that the judge will not make his or her own inference errors. See Park, *supra* note 86, at 739 ("There is certainly no guarantee that a judge will be immune from attribution error in making decisions . . ."). The consequences of mistakes are low because simply identifying a proof as being partly based on propensity reasoning is not the same thing as excluding it entirely. Furthermore, any inference error by the judge actually improves the effectiveness of the standard because the halo effect suggests that even an insignificant propensity basis will have an outsized influence on the jury and, therefore, be more noticeable as the court determines relevance.

196. See *supra* notes 119-128 and accompanying text.

197. Importantly, the court tests the proof under the morality prong before determining whether propensity proof is habit under Rule 406. If a trait happens to satisfy all of the Davies factors and yet still involves moral concerns, then it still involves the possibility of nullification prejudice and should be regulated by the character evidence scheme. However, those same Davies factors would be probative in determining whether the trait in question satisfied one of the "other purposes" under Rule 404(b).

198. Congress can and has made policy determinations about whether certain traits involve character, obviating the need for courts to decide if these traits involve moral overtones. For example, Rules 412, 413, 414, and 415 create a special structure within the character evidence scheme for proof relating to victims' and defendants' prior sexual conduct. See FED. R. EVID. 412-415. This special structure demonstrates that Congress intended for proof of prior sexual

courts will determine whether a trait carries a moral connotation in context. But in order to distinguish between moral and nonmoral traits, a court must have some idea of what morality is. At the most basic level, moral traits are those that are “good” or “bad” at the time and in the situation in which they are displayed.¹⁹⁹ More specifically, legal scholars and philosophers have viewed morality as the set of duties that one owes to oneself and to others.²⁰⁰ These duties can come in many forms, and can be religious or secular in nature.²⁰¹ For example, most societies recognize that people owe a duty to one another not to take another’s life. The morality of a community inheres in these duties, in the sense that public praise flows from upholding morals and societal condemnation results from disregarding them.²⁰² Some researchers have even concluded that morality is perceived through one’s automatic, emotional responses to another’s behavior.²⁰³ Therefore, a community’s morality can be recognized only by understanding how that community will perceive a given trait of character in the context in which it was elicited.

Trial court judges are the most likely to understand a community’s morality. To determine if a trait satisfies the morality component, the court should adopt a subjective standard and determine whether, more likely than not,²⁰⁴ the average juror from the community would find morality implicated by the proof of a trait. A subjective standard is appropriate because jurors are

conduct to fall under the regulatory scheme. Similarly, Rules 608 and 609 mediate the influence of testimonial character evidence related to a witness’s truthfulness on the stand. See FED. R. EVID. 608, 609. Honesty is a quintessential character trait. See FED. R. EVID. 405 advisory committee’s note. Under the proposed framework, proof involving truthfulness would automatically move to the character evidence scheme for mediation.

199. Kuhns, *supra* note 77, at 779. See *supra* notes 169-175 for a discussion on traits carrying a moral connotation in certain contexts.
200. See Perry, *supra* note 33, at 73-74.
201. See *id.* at 81.
202. See, e.g., Pincoffs, *supra* note 9, at 906 (defining character, for the purposes of the article, as anything from those traits that “raise[] eyebrows” or get “nods and smiles,” to traits that receive “public condemnation” or “testimonial scrolls”).
203. Peter Singer, *Morality, Reason, and the Rights of Animals*, in PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED 149 (Stephen Macedo & Joseph Ober eds., 2006).
204. Unlike the propensity prong, the morality prong involves weighing two competing, subjective claims that involve a prejudice inquiry from the perspective of the jury. The preponderance of the evidence burden would permit the court to consider both sides of the matter to decide whether the trait and the situation where the trait is elicited are dominated by moral or nonmoral considerations.

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drawn from the locality,²⁰⁵ and morals change over time and geography.²⁰⁶ Because federal trial judges by law must also reside in their localities,²⁰⁷ they are ideally placed to identify these local moral distinctions and determine whether or not a particular trait will be viewed as morally blameworthy in the community. Therefore, while this prong might seem vague, in reality it would operate as a way for courts to import subjective, local developments into the character proof analysis. Furthermore, to the extent that morality is based on subconscious, automatic “gut” reactions,²⁰⁸ judges placed in the locality are best positioned to make that determination.

Adopting a subjective test based on community standards is not novel in the law. In *Miller v. California*,²⁰⁹ the U.S. Supreme Court established a community-based standard for trying obscenity cases, a close cousin to the morality-based decision at issue here. Under the first prong of the *Miller* test, the trier of fact must determine “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”²¹⁰ The morality prong in the character proof framework would work in a similar fashion: when determining if evidence implicated moral concerns, a judge would decide whether the average juror, applying community standards, would find that the proof of the trait implicates moral judgment. However, as with the *Miller* test, the challenge for courts will not be in applying a subjective standard to character evidence determinations; the real difficulty will be separating moral from nonmoral traits.²¹¹ In the end, though, it will be judges sitting in local communities who will have the best intuitions about what is, and is not, a moral concern.

Often, moral traits will be simple to identify. Murder, rape, assault, and burglary all quite clearly violate societal duties. However, sometimes a trait will not be so obviously moral in nature. How might a court recognize moral traits in that situation? It is not easy to set forth a comprehensive set of factors for

205. U.S. CONST. amend. VI (guaranteeing that criminal defendants have the right to be tried “by an impartial jury of the state and district wherein the crime shall have been committed”).

206. See ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS* 1 (1973) (“In fact, of course, moral concepts change as social life changes.”).

207. See 28 U.S.C. § 134(b) (2006).

208. Singer, *supra* note 203, at 149 (noting that humans “have automatic, emotional responses to certain types of behavior, and these responses constitute a large part of our morality”).

209. 413 U.S. 15 (1973).

210. *Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

211. David Leonard noted this shared difficulty when he wrote that “[p]erhaps [character is] like obscenity, people believe they know it when they see it.” Leonard, *supra* note 21, at 15.

identifying when a trait carries moral overtones. This is especially true for universal factors, because societal morals can and do change greatly from one locality to another.²¹² Adding to the difficulty are the notions that morality is sometimes an involuntary response to stimulus,²¹³ and that sometimes morality is perceived only in the situation in which a character trait is elicited.²¹⁴ However, for the purposes of the framework, a court need not articulate a view of what morality is or how it operates.²¹⁵ Rather, to know if a certain trait of character carries a moral connotation in the relevant community, courts may find it useful to examine specific duties that community members believe they owe to one another.

There are three types of duties through which an individual might display moral traits. First, duties that people owe to one another;²¹⁶ second, internal duties they owe to themselves;²¹⁷ and third, a general duty to live well.²¹⁸ One helpful way to think about these types of duties is to analogize them to the operations of a fleet of ships: if the ships (1) are sailing in formation, (2) have effective crews and working parts, and (3) are traveling in the direction of the correct port, then the fleet is functioning properly.²¹⁹

This rubric may help courts to identify where to look for community morality. In the first dimension—duties people owe to one another—immoral behavior might be detected by violations of the criminal code, including past

212. See MACINTYRE, *supra* note 206, at 1.

213. See *supra* note 203 and accompanying text.

214. See *supra* notes 176-177 and accompanying text for a discussion regarding the morality of traits in the context of when they are elicited.

215. Furthermore, a court need not take sides in the “ancient controversy,” Gilbert Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3, 3 (1975), between moral relativists, who believe that all morals are determined within groups, *id.*, and moral absolutists, who believe there is a “single true morality,” Gilbert Harman, *Responses to Critics*, 58 PHIL. & PHENOMENOLOGICAL RES. 207, 207 (1998).

216. The first dimension is still espoused by many legal scholars and philosophers today. See, e.g., Harman, *Moral Relativism Defended*, *supra* note 215, at 3 (arguing that “morality arises when a group of people reach an implicit agreement or come to a tacit understanding about their relations with one another”); Perry, *supra* note 33, at 70 (2000) (noting that “[t]he penetration of legal discourse by moral discourse is not surprising”).

217. This second dimension descended from Plato, whose moral teachings suggested that “[t]he just man is the man who has a soul all of whose parts are functioning in the appropriate way.” Julia Annas, *Plato and Common Morality*, 28 CLASSICAL Q. 437, 437 (1978).

218. The third dimension comes from Aristotle, who believed that morality was expressed through the pursuit of *eudaimonia*, translated roughly as “true happiness” or “flourishing,” which is achieved when one lives his life to one’s full potential. See ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 10-12 (1999).

219. C.S. LEWIS, *MERE CHRISTIANITY* 67-73 (1952).

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convictions or even uncharged bad acts.²²⁰ For the second dimension—duties people owe themselves—immorality could be found by consumption of drugs, alcohol, pornography, or other private behavior that a locality’s citizens might regard as harmful; indeed, suicide is sometimes regarded as an immoral act. In the third dimension—a general duty to live well—a society could view sexual orientation as immoral, because even though the individual plays fair with others and maintains internal harmony, he or she is seen as pursuing an unworthy purpose in life.²²¹

Additionally, although courts will most often be concerned with identifying morally bad traits, they can also use these types of duties to find morally good traits. Evidence suggesting that someone upholds the law, cultivates productive inner qualities, or pursues appropriate and laudable life goals could be proof of good moral traits. While these three types of duties do not provide courts with an exact answer for how to identify morality, they at least give courts an idea of the types of duties where a community’s morality is displayed, enabling them to better conceptualize moral character when it comes before them.

V. THREE CHARACTER EVIDENCE CASE STUDIES

Part III explained the basis of the morality component and Part IV set forth the framework for recognizing character, but this Part aims to illustrate how the framework would apply in real cases. The following cases are court decisions involving proof of a trait that may or may not be character. To demonstrate how the proposed framework illustrated in Figures 1 and 2 would be applied by a court, this Part reexamines these three character proof issues—alcoholism, homosexuality, and mental disorders—through the lens of the proposed framework.

220. Pincoffs, *supra* note 9, at 909 (noting that a society’s criminal code is the “minimal moral code . . . because [it] is a reflection of our thinking concerning what is an outrage and should not be permitted, since permitting it would lead to consequences no one in his senses could desire”). Indeed, the common law once recognized, *Huff v. Anderson*, 90 S.E.2d 329, 331 (Ga. 1955), and modern U.S. immigration law still recognizes, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478-79 (2010), a special category of law called crimes of moral turpitude. Defined as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general,” *In re Henry*, 99 P. 1054, 1055 (Idaho 1909), moral turpitude appeared to be a way for courts to specially signify moral overtones for a crime.

221. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1070 (1994) (arguing that “a political community . . . can rightly judge that it has a compelling interest in denying that homosexual conduct . . . is a valid, humanly acceptable choice and form of life”). This Note offers this viewpoint only by way of example.

A. Alcoholism as an Example

Joel Reyes was run over by a train in the darkness of night as he lay motionless on the railroad tracks near Brownsville, Texas.²²² He sued the Missouri Pacific Railroad Company in a federal district court, claiming that its employees were negligent in failing to see him and stop the train in time.²²³ The railroad responded by alleging that Reyes was contributorily negligent because he had passed out drunk on the tracks. Reyes countered by maintaining that he was walking along the railroad when he had been knocked unconscious by an unknown assailant.²²⁴ The outcome of the case rested on the question of how Reyes had come to be on those tracks, and the answer to that question turned on one evidentiary ruling: whether the judge would permit the jury to hear evidence of Reyes's four previous misdemeanor convictions for public intoxication to prove that he was drunk on the night of the accident.²²⁵

The trial court denied Reyes's motion in limine to exclude the past convictions and the jury found him more negligent than the railroad at the subsequent trial, effectively preventing him from recovering. The Fifth Circuit reversed and remanded, holding that the convictions were inadmissible under the character evidence scheme because they were "admitted for the sole purpose of showing that he had a character trait of drinking to excess and that he acted in conformity with his character on the night of the accident by becoming intoxicated."²²⁶ The original case turned on whether the prior convictions were character or habit proof.²²⁷ But what if the railroad had objected that the past convictions were not evidence of character, but instead evidence of alcoholism, a genetic disorder?

Under this Note's proposed framework, the court would first look to the reason the convictions were offered. Here, the railroad intended to argue that Reyes was drunk on the night of the accident, because the Fifth Circuit noted that propensity was "the only possible [purpose] for which the evidence could be offered."²²⁸ Second, the court would ascertain whether there were local moral overtones to becoming intoxicated by alcohol. Whereas some courts

222. *Reyes v. Mo. Pac. R.R.*, 589 F.2d 791, 792 (5th Cir. 1979).

223. *Id.* Note that, because the case was brought in federal court, the Federal Rules of Evidence applied.

224. *Id.* at 793.

225. *Id.*

226. *Id.* at 794.

227. *Id.* at 794-95.

228. *Id.* at 794.

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might be torn²²⁹ between the older conception of temperance as a trait of character²³⁰ or newer scientific findings indicating that alcoholism is genetic,²³¹ and therefore not character, a judge using the framework will avoid that problem by determining whether or not the jury believes that alcoholism is a moral trait. It could be that, in Brownsville, drinking until intoxicated offended a sense of societal duty, not to mention several laws, and so the judge might identify a morality component to the proof.²³² Consequently, the evidence would fall into Area C of Figure 1 as character proof and the court would apply the character evidence scheme.²³³

B. Homosexuality as an Example

In *Parisie v. Greer*, the Seventh Circuit addressed an appeal by John Parisie, who had been convicted of murder.²³⁴ Parisie claimed that his victim had picked him up in his car, parked on an isolated road in Springfield, Illinois,²³⁵ and then made a homosexual advance that “triggered in Parisie an irrational and disproportionate response,” also known as the “homosexual panic”

229. See PARK, *supra* note 11, § 5.04, at 127 (“Despite the Advisory Committee’s reference to ‘temperance’ as a character trait, one could argue that intemperate use of alcohol is a medical condition . . .”).

230. See, e.g., *United States v. Doe*, 149 F.3d 634, 638 (7th Cir. 1998) (listing temperance as a character trait).

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

232. If the court determined no moral weight was involved, it would then have examined the four convictions to determine if they satisfied the Davies factors for habit evidence. See, e.g., *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985) (upholding the district court’s admission of drinking disposition as a habit despite its being a “close call” under an abuse of discretion standard); *State v. Kately*, 637 A.2d 214, 218 (N.J. Super. Ct. App. Div. 1994) (affirming the admission of nightly drinking as habit evidence); cf. *Waller v. Massey-Ferguson, Inc.*, 66 F.3d 322 (5th Cir. 1995) (per curiam) (holding that the district court did not abuse its discretion in finding that Waller’s drug abuse was consistent with habit evidence).

233. For additional cases considering whether alcoholism is character, see *Rowe v. United States*, 167 Ct. Cl. 468, 473, 488 (1964) (per curiam), which affirmed an undesirable discharge for chronic alcoholism despite the Air Force’s regulations that distinguished between a psychiatric disorder and character; and *Quinto v. City & Borough of Juneau*, 664 P.2d 630 (Alaska Ct. App. 1983), which found a defendant’s “reputation . . . for being ‘a cautious, sober individual’” to be character evidence, *id.* at 634 (quoting testimony excluded at trial).

234. 671 F.2d 1011, 1011-12 (7th Cir. 1982), *vacated*, 705 F.2d 882 (7th Cir. 1983) (en banc) (per curiam).

235. *Id.* at 1015.

defense.²³⁶ During the trial in state court,²³⁷ Parisie attempted to offer three witnesses who had engaged in “homosexual relations with Jackson and knew his reputation as a homosexual.”²³⁸ The trial court excluded the evidence and testimony, and Parisie was subsequently convicted. His case eventually made its way to federal court in a habeas corpus proceeding.²³⁹

After an en banc hearing on Parisie’s habeas petition, Judge Swygert wrote in his separate opinion that “[t]here is no consensus even in the medical and psychiatric communities whether homosexuality is a character trait (which would generally be provable under Illinois law only by evidence of reputation) or a medical condition (which would surely be directly provable by evidence of symptoms).”²⁴⁰ He concluded that the proof of Jackson’s homosexuality should have been admissible either as character evidence or as a medical condition and that the trial court’s failure to permit the proof violated the defendant’s right to call witnesses in his defense.²⁴¹

Here, if the court had applied the proposed framework, a much different opinion could have resulted. Rather than attempting to discern what medical and psychiatric communities think and comparing homosexuality to epilepsy, the court would focus on propensity and morality. First, the court would look to whether the basis of the evidence was propensity reasoning.²⁴² Here, that is

²³⁶. *Parisie*, 705 F.2d at 899 (Swygert, J., concurring in part and dissenting in part) (internal quotation marks omitted).

²³⁷. Because the trial was in state court, the Federal Rules of Evidence did not apply. However, as the Seventh Circuit noted, Illinois courts would likely have come out the same way as federal courts on this issue. *Id.* at 901. Regardless, this Note applies the Federal Rules to the facts of this case to demonstrate how the framework would apply in this scenario.

²³⁸. *Id.* at 899.

²³⁹. *Id.* at 882. The procedural posture of the case is somewhat complicated. Parisie first appealed to the Illinois Court of Appeals, which affirmed his conviction. *Parisie*, 671 F.2d at 1013. The Illinois Supreme Court denied discretionary review, and his state collateral claims were likewise denied. *Id.* Parisie filed a federal habeas corpus proceeding in district court, which denied relief on summary judgment without holding an evidentiary hearing or reviewing the state record. *Id.* Then a panel of the Seventh Circuit reversed the district court on the grounds that refusal to permit character evidence deprived the defendant of a fair trial, but the panel was itself vacated by an en banc court in a decision generating nine different opinions, none with a majority, on both the court’s jurisdiction and merits of the case. *Parisie*, 705 F.2d at 882-83.

²⁴⁰. *Id.* at 900 (Swygert, J., concurring in part and dissenting in part) (citation omitted).

²⁴¹. *Id.* at 901-02.

²⁴². Insofar as propensity reasoning from past conduct relies on the trait in question remaining consistent, the immutability of sexuality is still a matter for debate. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (pointing to three scientific reports of a biological basis for homosexuality, but criticizing equal protection arguments on the basis of immutability);

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clearly the case: Judge Swygert notes that the evidence is relevant because Jackson's "homosexuality made it likelier that he made a homosexual advance toward Parisie."²⁴³ Next, the court would place itself in the average juror's position and look at the community's moral standards. Whether or not homosexuality is viewed as a moral trait would almost certainly vary widely by locality.

Interestingly, the record of the jury selection proceedings reveals that the trial court asked some of the potential jurors, if they heard that a person in the case was a homosexual, whether they would feel "prejudice or sympathy" for that person.²⁴⁴ One juror responded, "You can't expect me to say this isn't going to make any difference"²⁴⁵ Thereafter, the court stopped asking jurors about their views on homosexuality and none of the jurors who eventually convicted Parisie were asked that question. This record suggests that, applying community standards, homosexuality had a moral connotation in Springfield.²⁴⁶ The framework reveals that the proof implicates both inference error and nullification prejudice and, therefore, the court should apply the character evidence scheme.²⁴⁷ In Figure 1, this evidence would fall within Area C.

Pepper Schwartz, *The Science of Sexuality Still Needs Social Science*, SCIENTIST, Feb. 6, 1995, at 12 (discussing recent biological evidence that sexuality could be genetic).

243. *Parisie*, 705 F.2d at 900-01 (Swygert, J., concurring in part and dissenting in part).

244. *Parisie*, 671 F.2d at 1012.

245. *Id.* at 1012 n.2.

246. Other courts have struggled to decide if homosexuality is character evidence as well. *See, e.g.*, *United States v. McGee*, No. 93-7503, 1994 WL 395111, at *5 (5th Cir. 1994) (analyzing a "reputation for homosexual conduct"); *United States v. Whalen*, 940 F.2d 1027, 1034 (7th Cir. 1991) (upholding the district court's exclusion of evidence of a homosexual propensity as character); *Cohn v. Papke*, 655 F.2d 191, 193 (9th Cir. 1981) (excluding evidence tending to show that "it was within Cohn's character to commit homosexual acts"); *State v. Rivera*, 733 P.2d 1090, 1100 (Ariz. 1987) ("Evidence of homosexuality generally has been treated as character evidence."); *State v. Treadaway*, 568 P.2d 1061, 1066 (Ariz. 1977) (en banc) (analyzing a doctor's medical opinion as to the nonviolent personality of homosexuals as evidence of character); *State v. Rushing*, 541 N.W.2d 155, 163 (Wis. Ct. App. 1995) (Myse, J., concurring) (discussing a "character trait of homosexuality"). In one instance, a military court admitted proof of a service member's heterosexuality as good character to rebut charges of homosexual conduct, finding that "it is sufficient . . . that appellant's heterosexual behavior has a moral component that could be viewed as either morally praiseworthy or condemnable." *United States v. Gagan*, 43 M.J. 200, 203 (C.A.A.F. 1995).

247. Exclusion of evidence of homosexual conduct may occur regardless of whether it is deemed character or not. *See, e.g.*, *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988) ("Evidence of homosexuality is extremely prejudicial."); *State v. Lovin*, 454 S.E.2d 229, 236 (N.C. 1995) (holding evidence of homosexual proclivity inadmissible as unduly prejudicial).

C. Mental Disorders as an Example

In *Bell v. Whitten*, the Louisiana Court of Appeals addressed an appeal by Deputy Chris Bell, who was suing a family after being injured by a friend of their son—who happened to be underage—while drinking alcohol at the family’s home.²⁴⁸ During the trial,²⁴⁹ the family offered proof that the boy had two mental conditions, “intermittent explosive disorder” and “conduct disorder, solitary aggressive,” that had caused him to react and injure the officer when he was approached by police.²⁵⁰ The deputy objected, claiming that evidence of these disorders was character evidence under Louisiana’s character evidence scheme, which mirrors the Rules.²⁵¹ As in *Reyes*, the trial court denied the motion in limine and admitted the evidence, resulting in a verdict for the defendant.²⁵² On appeal, the court determined that the disorders were “not an attempt to introduce evidence of a character trait” because they were “diagnosed medical condition[s],” and affirmed the trial court.²⁵³

Applying the proposed framework, the court would determine that propensity established the underlying relevance, because “the defense sought to establish that [the boy’s] actions were consistent” with his disorders.²⁵⁴ Next, the court would apply community standards to determine if “intermittent explosive disorder” or “conduct disorder, solitary aggressive”²⁵⁵ are moral traits. Instead of relying on a medical diagnosis, the court would perceive how the jury would react. Here, if the court determined that the average juror would be unlikely to hold the boy responsible for his mental

248. *Bell v. Whitten*, 722 So. 2d 1057, 1059 (La. Ct. App. 1998).

249. As in *Parisie*, this trial took place in a state trial court, where the Federal Rules did not apply. In Louisiana, the Code of Evidence governs character proof determinations, and article 404(A) tracks closely Federal Rule 404(a). Compare FED. R. EVID. 404(a), with LSA-C.E. art. 404(A). Additionally, as with the *Parisie* example, regardless of the rule applied in the actual case, this Note applies the framework under the Federal Rules for demonstrative purposes.

250. *Bell*, 722 So. 2d at 1060.

251. *Id.*

252. *Id.* However, the deputy did recover against a different defendant. *Id.*

253. *Id.* at 1061. The reasoning behind the court’s determination in this case establishes a dangerous precedent. If all it takes for a mental trait to escape the character evidence scheme is for it to be a “diagnosed medical condition,” then, for example, a propensity for theft could be diagnosed as kleptomania. Cf. 22 WRIGHT ET AL., *supra* note 6, § 5233 (noting that a court would be unlikely to permit a party to redefine the character trait of stealing as kleptomania). This would permit the prosecution to offer exactly the type of evidence the scheme is designed to exclude.

254. *Bell*, 722 So. 2d at 1061.

255. *Id.*

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disorders, then the court would find that the evidence is not character proof. In Figure 1, that ruling would place the proof in Area B, but outside of Area C. The court could then determine if it is habit proof under Rule 406 or, if not, whether it passes the Rule 403 balancing test. Regardless, the framework has fulfilled its purpose and aided the court in making a determination that the mental disorders in this case, in this context, were not character proofs.²⁵⁶

VI. IMPLICATIONS OF THE FRAMEWORK

In Part V, the framework was applied to several examples, and its advantages became more obvious. The proposed framework will provide courts with the tool they need to conceptualize character evidence determinations. In doing so, it will enable a more uniform application of the character evidence Rules, force courts to reveal the reasoning behind their character determinations, and better tailor evidentiary rulings to the local juries sitting as factfinders. However, these benefits do not come without several costs. This Part will discuss both the advantages of and potential concerns with the proposed framework.

A. Advantages of the Framework

Perhaps the largest advantage to the proposed framework is that it provides a new perspective for courts when ruling on character evidence objections by separating the propensity and morality components of character evidence. The framework's two-step process is more straightforward for courts to apply than the conclusory and circular definitions of character used by courts in the past. In the same way that the *Youngstown* and *Chevron* frameworks have aided courts and litigators in approaching constitutional questions of executive

²⁵⁶ For other examples of courts determining mental characteristics, see *LaPrime v. Pallazzo*, No. 95-30883, 1996 WL 625367, at *1 (5th Cir. Oct. 9, 1996) (per curiam), which admitted the trait of “anti-social personality disorder” characterized by “manipulative behavior and aggressive reactions to authority figures”; *Bemben v. Hunt*, No. 93-C-509, 1995 WL 27223, at *2 (N.D. Ill. Jan. 23, 1995), which admitted the trait of “organic delusional disorder with symptoms of paranoid ideations and irrational behavior”; and *State v. Ferguson*, 803 P.2d 676, 679 (N.M. Ct. App. 1990), which admitted the traits of “suspicious” and “paranoid” unless in a moral context. For an example of a court that got the right result, see *United States v. Kepreos*, 759 F.2d 961, 964-65 (1st Cir. 1985) (en banc), which upheld the exclusion of evidence of “personality traits” such as “avoidance, denial, repression, naivete, dependency, and tunnel vision” for their likelihood of confusing the jury.

power and court deference to agency rulemaking,²⁵⁷ respectively, this framework will give courts a starting point for considering how to recognize character evidence. But in the same way that those frameworks do not provide the answer to questions such as whether the President may act unilaterally in a given foreign affairs crisis or whether an agency's interpretation of a statute is presumptively correct, neither will this framework, by itself, answer whether proof is character evidence. Rather, it is simply a conceptual tool that will operate to increase judicial efficiency.

The framework for recognizing character proof will further one of the chief goals of the Federal Rules of Evidence: uniformity across the federal system.²⁵⁸ This claim may seem surprising, given that one feature of the framework is variation across communities. But under the current regime, courts have no common standard to apply when faced with a question of character determination. The framework would provide a common standard. Although the local results under the framework might vary in courts across the country, this is no different than what currently happens under the *Erie* doctrine.²⁵⁹ Indeed, these differences could hardly be avoided; if a jury in one locality would be prejudiced by proof that would not prejudice a jury in another locality, then the courts in those jurisdictions would be well within their authority to admit or exclude the evidence accordingly. Therefore, the benefits of uniformity inherent in the framework far outweigh its costs.

The proposed framework also helps courts answer the threshold question that has long plagued courts: what is character evidence? All character evidence disputes must, by necessity, begin with that question, but it has not always been clear what "character" means. Does the phrase mean character in the metaphysical sense or a different legal sense? If it were the former, then courts would be in trouble; not even psychologists can always be certain whether a trait is a metaphysical character trait or a medical condition. It would be asking too much of our judges to recognize something that scientists and researchers cannot identify with certainty. Even if courts could recognize metaphysical character traits, it does not follow that these are the types of traits that might prejudice a jury. Instead, courts should apply the scheme for the reasons it was

257. See *supra* note 29. *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008) (finding that the Court does not apply *Chevron* in most of the cases that are "*Chevron*-eligible," and that in a majority of cases evaluating agency statutory interpretations, "the Court does not apply any deference regime at all").

258. See H.R. Rep. No. 93-650, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7075, 1973 WL 12555, at *7075 ("The purpose of this legislation is to provide a uniform code of evidence for use in the Federal courts . . .").

259. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

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created and stick to their area of expertise: determining objective relevance and subjective prejudice.

The framework also has implications for attorneys and their clients involved in litigation, chief among these being that it will reduce surprise and encourage fairer outcomes. It reduces surprise for litigants by increasing predictability in two ways: first, in permitting litigants to prepare and argue reasoned objections regarding purported character evidence; and second, in enabling them to better foresee likely outcomes than the current muddled methods. In the current state of character evidence determinations, it is sometimes unclear how a court will rule and even more unclear how to persuade them that a trait is or is not character. The framework provides a common node of understanding around which both parties can structure their arguments. While the exact rulings may vary by locality in some instances, the parties would each presumably have local counsel who would be well-positioned to advise on the morality of the trait in question. There will always be cases of uncertainty, but overall the framework would channel arguments into a more predictable and more reasoned pattern of argument.

The framework's local community standard for the morality prong is a virtue for litigants because it ensures fairer outcomes in trials. This standard allows courts to adjust for local conditions, which is important because the prejudice associated with certain traits can change with culture and geography.²⁶⁰ What is perceived as character in one community may not be in another, and therefore the framework prevents courts from applying an ill-fitting character evidence scheme to a jurisdiction and therefore mistakenly admitting prejudicial or excluding relevant evidence. For the same reasons, the framework implicitly cautions trial courts against applying precedents from jurisdictions with very different cultural contexts. Precedent from courts in a different era from the same locality or courts that are in a different region will often be useless for a judge determining his own locality's moral standards. Additionally, the framework's flexibility incorporates a built-in sunset (or sunrise) clause, which allows a court to update its local standard based on society's changing attitude toward the morality of specific character traits.

Each step of this framework has established standards so that courts are both enabled to evaluate evidence and required to disclose their reasoning under each prong. Propensity is an objective determination of relevance, which is a task courts must commonly perform during trials.²⁶¹ Morality is a subjective determination of prejudice in the community, which is something

^{260.} See *supra* note 206 and accompanying text for a discussion on how morals vary by location.

^{261.} See *supra* Section IV.B.

that a court sitting in the locality will be best positioned to decide.²⁶² By providing these standards, the framework forces trial judges to reveal their reasoning in a way that the current circular definitions do not. Disclosing the underlying reasoning will, in turn, allow observers to scrutinize the court's rulings and ensure that courts serve a "legitimizing function" by allowing both parties have their "day in court."²⁶³

B. Potential Concerns with the Framework

Of course, even clear standards are not necessarily simple to apply. For example, under the propensity prong, courts may struggle with Rule 404(b) "other purposes" proof.²⁶⁴ Proof that is relevant under propensity reasoning and an "other purpose" might pose a problem. Should courts recognize that proof which is ostensibly relevant under both theories passes the propensity prong? Under the prong's low threshold, the answer is yes. First, the distinction between propensity and "other purposes" evidence is not clear. In fact, many scholars contend that "other purposes" are actually propensity reasoning in disguise.²⁶⁵ In their view, "bad acts evidence is behavioral evidence, and behavioral evidence can be relevant only if we assume that behavior does not change."²⁶⁶ Therefore, courts should find that proof relies on propensity reasoning when an objective juror could use it as propensity evidence.

Second, even if there is a way to theoretically distinguish between propensity and "other purposes" evidence, courts should still use the objective juror test because the halo effect indicates that evidence which rests even partly on propensity reasoning can be misused by a jury.²⁶⁷ In short, evidence that a juror could misuse for propensity reasoning can trigger inferential error and nullification prejudice, especially if the court finds that the trait has morality implications. Third, Rule 404(b) is part of the character evidence regulatory

^{262.} See *supra* Section IV.C.

^{263.} Leonard, *supra* note 21, at 3 (internal quotation marks omitted).

^{264.} See *supra* note 77 and accompanying text for discussion on "other purposes" proof under Rule 404(b).

^{265.} See, e.g., Davies, *supra* note 21, at 508-09 & n.24, 533 n.168 (explaining that these alternative theories are actually impermissible propensity reasoning in disguise); Kuhns, *supra* note 77, at 797 (noting that Rule 404(b) actually involves balancing under Rule 403); Morris, *supra* note 44, at 182 (arguing that even the purported non-character exemptions in Rule 404(b) rely on character propensity reasoning).

^{266.} Morris, *supra* note 44, at 208.

^{267.} See *supra* notes 119-128 and accompanying text for a discussion of the halo effect.

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scheme; it plays a role in determining admissibility of evidence, but not in identifying whether or not that evidence involves character reasoning.

Furthermore, the framework is still an improvement over the current Rule 404(b) confusion, even if it is assumed that there is a clear difference between the two relevance theories and there is no chance the jury might be misled. In that very unlikely situation, the framework would still enable the court to make the proper admissibility conclusion. For example, if a court adopted the framework and found that an “other purposes” proof was based on propensity reasoning, two different results might obtain. First, if the “other purposes” proof had no moral connotations, then it would not be subject to the character evidence scheme regardless of its propensity basis. Second, if the evidence did implicate moral concerns, then the court would apply the regulatory scheme. But under Rule 404(b), the court would simply apply the Rule 403 balancing test,²⁶⁸ the same test it would eventually apply if the proof had no component of morality.²⁶⁹

Although each path ends in Rule 403, the result is likely to be very different. By finding moral weight, the court has already identified the “other purposes” proof as highly prejudicial and, therefore, it will be more likely to exclude the proof under the balancing test in Rule 404(b) than it would be with the nonmoral “other purposes” proof.²⁷⁰ In other words, the framework would function as intended. It would give the court the correct questions to ask in order to discover what about the “other purposes” evidence at issue makes it most likely to trigger the rationales of unfair prejudice behind the character evidence rules, but it would not tell the court mechanically whether or not to admit the evidence.

Additionally, courts may have problems under the morality prong identifying morality in their local communities.²⁷¹ It may seem that they are

268. FED. R. EVID. 404(b) advisory committee’s notes; see Rodriguez, *supra* note 77, at 457-58 (explaining that Rule 404(b) includes a Rule 403 balancing test).

269. See *supra* text accompanying notes 59-61 for a discussion of Rule 403’s role as the final hurdle for evidence in the Rules.

270. This interpretation of Rule 404(b) would not require amending the Rules or even a new judicial interpretation because it is consistent with governing Supreme Court precedent in *Huddleston v. United States*, 485 U.S. 681 (1987). In *Huddleston*, the Court highlighted four factors for courts to consider in Rule 404(b) cases: that the proof in question was (1) offered for a “proper purpose,” (2) relevant under Rule 401, (3) admissible under Rule 403, and (4) restricted to its proper purpose by a limiting instruction, if requested. *Id.* at 691. Under the framework, these four factors would still be included in Rule 404(b) interpretations; first, the “proper purpose” would trigger the Rule 404(b) consideration, the second and third factors are included in the two-step framework, and the fourth factor is not foreclosed by the framework.

271. See *supra* note 198-211 and accompanying text for a discussion on the subjective standard.

simply replacing the vague concept of character with another vague concept: morality. But determining subjective morality is a much more discrete task than trying to look into the minds of people to find traits of character. Morals are discoverable because they are observable, and a judge living in the community is likely to have a good sense of what types of traits would prejudice residents of that community. Furthermore, many traits of character will be obvious. Even when the ruling is a close call, such as in a region that is evenly split on a trait's morality or is in a state of transition, the judge may take the opportunity to voir dire potential jurors on their beliefs related to certain matters to get a better sense of what might prejudice the jury.²⁷² Given that the parties probably know what issues will be most important to their clients at trial, it seems likely that they will already have struck the outlying jurors for cause or with their preemptory strikes, leaving average local jurors behind to compose the jury. Regardless, trial judges must make decisions on complicated issues all the time and the difficulties of this framework are not unique to the character evidence context. For example, when making evidentiary determinations under Rule 403, courts must determine a proof's prejudicial effect on the jury, so the concept of, and inherent problems with, taking the perspective of the average juror are not foreign to judges.

Judges could also have trouble under the morality prong if they feel that they are opening themselves to criticism by the community by professing to issue judgments based on community morals. This is not an insignificant concern, for a court's true authority rests in its legitimacy with the public. However, this criticism is unlikely to result in the majority of cases, for several reasons: most rulings on traits of character will probably be uncontested, most cases will be unlikely to get public attention, and trial courts are in the best position to know the morality of the trait at issue. For those rare cases that are contested, the notorious close calls, the court would have had to make a judgment even without the framework. Moreover, the legitimizing function of revealing the courts' reasoning to the public may counterbalance any loss of legitimacy due to a perceived declaration of morals.

These more honest evidentiary rulings would also enable more reasoned appellate review, as courts of appeals would struggle to understand the process by which the trial court recognized a trait as character. But while this would enable easier review, it would not necessarily result in more trial court rulings being overturned, because "[t]he standard of review applicable to the evidentiary rulings of the district court is abuse of discretion."²⁷³ This high

272. See *supra* notes 244-246 and accompanying text for an example of jury selection.

273. *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) (citing *United States v. Abel*, 468 U.S. 45, 54-55 (1984)).

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hurdle would encourage trial courts to use their best judgment when determining local moral standards.

Overall, by disentangling analysis of the objective and subjective components, courts will have an easier time coming to reasoned conclusions, and therefore improve the factfinding nature of trial courts. In short, the framework moves courts away from circular and conclusory definitions, and instead refocuses them on a straightforward process based on the underlying rationales for regulating character proof in the first place.

CONCLUSION

The purpose of this Note has been to conceptualize character in the law of evidence and to propose a framework for how courts can master the difficult task of recognizing character evidence. First, after surveying existing definitions, it concluded that current methods of recognizing character are unsatisfactory.²⁷⁴ Second, it examined and provided empirical support for the inference error and nullification prejudice rationales behind the character evidence scheme to clarify why courts are so concerned about character proof.²⁷⁵ Third, it explained and justified a morality component to character evidence using traditional tools of statutory interpretation: textualism²⁷⁶ and purposivism.²⁷⁷ Fourth, it proposed a two-step framework for courts to apply when recognizing whether a trait is or is not character,²⁷⁸ and gave content to each step.²⁷⁹ Finally, it provided three examples of the framework in action²⁸⁰ and concluded by discussing the implications of the proposal.²⁸¹

Character is still a mysterious concept; the framework proposed by this Note will not change that. However, by separating objective propensity from subjective morality and providing a clear, two-step process for judges to use when conceptualizing character, the proposed framework will disentangle courts' currently muddled character evidence analysis and give litigants a better understanding of outcomes. It will focus courts on the rationales for the character evidence scheme and prevent scientific notions of character from

²⁷⁴. See *supra* Part I.

²⁷⁵. See *supra* Sections II.C-D.

²⁷⁶. See *supra* Section III.A.

²⁷⁷. See *supra* Section III.B.

²⁷⁸. See *supra* Section IV.A.

²⁷⁹. See *supra* Sections IV.B-C.

²⁸⁰. See *supra* Sections V.A-C.

²⁸¹. See *supra* Part VI.

corrupting the truth-seeking function of trials. The framework will also permit courts to make reasoned and logical decisions about what a jury should hear and what it should not. Trials will be more likely to result in fair outcomes and fulfill their legitimizing function. It will be one small, but important, step toward bringing rationality to the “grotesque structure.”²⁸² Hopefully, by application of this framework, judges like Chief Justice Montgomery will be better able to “outline the contours” of character and recognize “what the term includes and what it does not.”²⁸³

²⁸². *Michelson v. United States*, 335 U.S. 469, 486 (1948).

²⁸³. *State v. Williams*, 874 P.2d 12, 24-25 (N.M. 1994) (Montgomery, C.J., concurring).