

In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character

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I. INTRODUCTION

One of the oldest principles of Anglo-American law is that a person "should not be judged strenuously by reference to the awesome spectre of his past life."¹ This strongly entrenched tradition has led to the familiar rule of evidence law generally forbidding the use of character—including, of course, evidence of other misdeeds²—when it is offered to prove that a person acted in conformity with that character on a particular occasion.³

Today, that rule is under attack. In 1994, Congress passed crime legislation⁴ adding several new provisions to the Federal Rules of Evidence. Three of these rules allow character evidence, in the form of similar criminal conduct, to be used in prosecutions and civil actions alleging sexual misconduct or child molestation.⁵ The states have begun to take similar action,⁶ and though most legal scholars have criticized these rules,⁷ some have expressed sympathy with at least

1. M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 325 (1956); see also Major Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, ARMY LAW., March 1996, at 82, 86 ("American jurisprudence is grounded in the theory that courts try cases rather than persons."); Ernest E. Williams, *Evidence to Show Intent*, 23 L.Q. REV. 28 (1907).

The English law of evidence, in sharp contradistinction, for example, to the French law, will not permit a man's chances of proving his innocence of the offence with which he is charged to be prejudiced by a revelation to the jury of other misdeeds of a like character committed by him, or of any evidence the purport of which is to proclaim him a "bad man," and as prima facie likely to be guilty of the offence with which he is charged. The accused is on his trial for the specific crime alleged in the indictment: he is not in the dock to answer for his life-history.

Id. at 30. In *United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980), the court wrote: "It is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'" *Id.* at 523 (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977)). In *Myers*, the court also wrote that the rule is "[a] concomitant of the presumption of innocence." *Myers*, 550 F.2d at 1044.

2. Generally, character evidence is said to fall into three categories: reputation, opinion, and specific instances of conduct. See FED. R. EVID. 405. The present inquiry primarily concerns the use of specific instances of a person's conduct (including past states of mind) as circumstantial proof of a particular character trait.

3. For a general canvassing of the character evidence rules, see Richard L. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123 (1987). See also sources cited *infra* note 12.

4. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 16, 18, 21, 28, and 42 U.S.C.).

5. See FED. R. EVID. 413-15. For a discussion of societal perceptions about crime see *infra* notes 228-29 and accompanying text.

6. See *infra* note 229 and accompanying text.

7. The rules have sparked considerable controversy. For commentary criticizing the rules see James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994), Henley, *supra* note 1 (criticizing the military's version of Rules 413 to 415), Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV.

certain reforms of this type.⁸ In a social climate of ever-growing fear of crime, it would not be surprising to see serious efforts to do away with the character prohibition altogether. The recent amendments to the Federal Rules of Evidence would appear to constitute the first step in that direction.⁹ The rules have quite

37 (1994), Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285 (1995), David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995), James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753 (1995), Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883 (1995), Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57 (1995), and Anne Elsberry Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659 (1995). In 1995, the American Bar Association adopted a resolution opposing the substance of the new rules. See Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343 (1995). The Judicial Conference of the United States, given an opportunity to comment on the proposed rules before they became effective, suggested revisions to "clarify drafting ambiguities and eliminate possible constitutional infirmities." JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES 1 (1995), reprinted in 159 F.R.D. 51, 52 (1995).

8. See, e.g., David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529 (1994) (proposing a limited exception to the character bar in sexual-assault cases involving acquaintances); Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501 (1996); Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355 (1995) (supporting the policy of the new rules though sharply criticizing the drafting); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 35 (1994) (suggesting that evidence of other sex crimes be permitted in sex offense cases while "providing appropriate safeguards of fairness for the defendant"); Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) (supporting the new rules in cases in which the accused raises a consent defense); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 494-96 (1996) (favoring limited change while criticizing the new rules); Benjamin Z. Rice, Note, *A Voice from People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 950-51 (1996) (proposing that in spousal homicide cases, where defendant had physically abused victim in the 10 years prior to the alleged murder, evidence of specific acts of violence or physical abuse be allowed to show defendant's tendency to abuse spouse); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient"*, 57 U. PITT. L. REV. 107 (1995).

9. See Richard C. Reuben, *Some Judges Oppose Evidence Amendment*, A.B.A. J., Jan. 1995, at 20, 20 ("There is no question that it is the beginning of an experiment . . . to see whether, as a general proposition, we should just abolish the bar altogether.") (omission in original) (quoting Professor Edward Imwinkelried).

accurately been characterized as “radically chang[ing] the historic bar on character evidence being offered to prove present conduct.”¹⁰

The age of a rule does not alone justify its perpetuation. Bad rules should not endure after the evils they create or preserve are discovered. But stability in a system of law is a fundamental value. Respect for the role of *stare decisis* demands that we evaluate carefully the reasons for a rule before we break with the past. When a rule’s longevity can be measured in terms of centuries rather than only years or decades, it is particularly appropriate to undertake reform cautiously. The character rule presents such an instance.

The purpose of this Article is to examine the legal, historical, and philosophical origins of the rule prohibiting trial by character. Part II canvasses the basic content and common law development of the character bar. It also generally describes the relationship of the character bar to the rule permitting evidence of other crimes, wrongs, or acts when offered upon reasoning that does not involve an inference of character. Part III examines the justifications for the rule from a number of perspectives. First, the most common rationales offered by courts and legal academics are described. Next, I consider what I will call the “aspirational” rationale for the rule, drawing in part on the Jewish doctrine of *loshon hora*—a prohibition of negative talk about others. Next, I review the historical setting in which the rule arose, and set forth some of the other religious, philosophical, and substantive legal trends the rule reflects. I will pay particular, though not exclusive, attention to the period early in the nineteenth century during which the rule became firmly established. This was an era of massive social change in Great Britain and the United States, and while ascribing a cause-and-effect relation to social and philosophical movements and the creation of legal rules is a risky endeavor, it can at least be said that the establishment of the character rule corresponds well with these changes in society and in intellectual thought. Finally, I attempt to link the character rule with the evolution of certain aspects of tort and criminal law doctrine that elevate conduct over moral character.

Part IV reviews the current legislative attack on the rule. While this assault can be explained in light of the social climate of the late twentieth century, I will argue that the kinds of changes that are occurring cannot be justified on the basis of any corresponding evolution in the moral theory behind the proposition that people should be tried for their specifically charged acts, not for the flaws of their character.

II. THE PROHIBITION OF TRIAL BY CHARACTER

For at least two centuries, both English and American courts have generally prohibited the use of character evidence as circumstantial proof that a person

10. Taslitz, *supra* note 8, at 495.

engaged in particular conduct at issue in the case.¹¹ In the Parts that follow, I will describe the basic rule and discuss its long-standing acceptance.

A. General Description of the Ban on Character Evidence

The character rule is a very familiar part of American evidence law and has been explained at length elsewhere.¹² Generally speaking, the prosecution in a criminal case and all parties in civil cases are prohibited from offering evidence of a person's character¹³ as circumstantial evidence of that person's conduct.

This rule is actually rather narrow. Only if the evidence is offered to prove that a person possesses a relevant character trait that would make it more likely that

11. There are, of course, many other potential uses of character evidence; they are not under consideration in this Article. For example, the law is permissive with regard to character evidence when character is itself an essential element of a claim or defense. *See* FED. R. EVID. 405(b). Character evidence is also admissible under some situations when offered to prove the credibility or lack of credibility of a witness. *See id.* Rule 608 (concerning evidence of reputation, opinion, and conduct when challenging a witness's truthful character); *id.* Rule 609 (concerning evidence of criminal convictions for impeaching a witness).

12. For descriptions and critique of the character rule, see, for example, Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504 (1991), William G. Hale, *Some Comments on Character Evidence and Related Topics*, 22 S. CAL. L. REV. 341 (1949), Mason Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939), David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-87), 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 (1984), John R. Schmertz, Jr., *Relevancy and Its Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1 (1974), Joel Schrag & Suzanne Icotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J.L. ECON. & ORG. 319 (1994), Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993), Morris K. Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. CIN. L. REV. 283 (1949), H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982), Glen Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces*, 48 U. CIN. L. REV. 1 (1979), Wydick, *supra* note 3, and Daniel J. Capra, *Character Evidence and Prior Bad Acts*, N.Y. L.J., May 10, 1996, at 3.

13. A satisfactory definition of "character" is elusive. Wigmore defined character "as the actual moral or psychological disposition." 1A JOHN HENRY WIGMORE, EVIDENCE § 52, at 1148 (Peter Tillers rev., 1983). Elsewhere, Wigmore defined character as "any and every quality or tendency of a person's mind, existing originally or developed from his native substance, and more or less permanent in their existence." JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF § 52, at 103 (3d ed. 1937). Charles Tilford McCormick's treatise defines character as "a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." 1 CHARLES TILFORD MCCORMICK ON EVIDENCE § 195, at 825 (John William Strong ed., 4th ed. 1992) [hereinafter MCCORMICK ON EVIDENCE]. Another author states that the law treats character as "a collection of 'traits,' each a self-contained packet of potential conduct consistent with previously observed reactions to events, people, or things." Uviller, *supra* note 12, at 849. Almost certainly, "character" carries moral connotations.

she would commit the act in question is the evidence excluded.¹⁴ If the evidence takes the form of other misconduct of the person, it will often be admissible based on different, theoretically noncharacter, reasoning.¹⁵ Moreover, exceptions to the general rule permit the use of character evidence under limited circumstances in criminal cases.¹⁶ As Wigmore wrote, in criminal cases "[t]he rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."¹⁷ In civil cases, the prohibition on the use of character to prove a person's conduct (other than whether the person has told the truth as a witness) is virtually complete.¹⁸ As Wigmore stated: "It is to-day generally said that . . . the *character of a party in a civil cause is inadmissible; i.e.* that it cannot be used, as used for or against a

14. See FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."); *id.* Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

15. See *id.* Rule 404(b) ("Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."). Unfortunately, the law regarding when evidence satisfies this alternative analysis is quite confused. See Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981).

16. See FED. R. EVID. 404(a)(1) (permitting the use of character evidence by a criminal defendant, and by the government to rebut defendant's evidence); *id.* Rule 404(a)(2) (permitting the use of evidence of the victim's character under certain circumstances).

17. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 57, at 456 (3d ed. 1940). Thayer also recognized this rule, writing that it "forbids the use of a person's general reputation or actual character, as a basis of inference to his own conduct." JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 525 (Boston, Little, Brown & Co. 1898); see also 1 MCCORMICK ON EVIDENCE, *supra* note 13, § 189, at 793 ("[E]vidence of character in any form . . . generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, so-called circumstantial use of character.") (footnote omitted); H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 167, at 291 (John Lewis Niblack ed., 4th ed. 1935) ("Except so far as the character of the accused for veracity may be attacked when he is a witness, the state can not show his bad character in the first instance, i.e., before he offers to prove his good character.").

18. The rule provides exceptions only for evidence of the character of the "accused" and of the "victim of a crime," terms that are generally taken to limit the exceptions to criminal cases. See, e.g., *Hynes v. Coughlin*, 79 F.3d 285, 291-93 (2d Cir. 1996) (refusing to admit evidence of plaintiff's prison disciplinary record to prove his assaultive character in a § 1983 action against corrections officers for unreasonable use of force); Charles C. Marvel, Annotation, *Admissibility of Evidence of Character or Reputation of Party in Civil Action for Assault on Issues Other than Impeachment*, 91 A.L.R.3d 718, 723 (1979) (stating "[t]he widely recognized principle that evidence of the character or reputation of the party is ordinarily . . . inadmissible in a civil action"). A few cases have applied the exceptions to a limited number of civil actions. See *Perrin v. Anderson*, 784 F.2d 1040 (1986) (holding that evidence of character may be admitted in a civil action for violation of a person's civil rights where the circumstances make the case analogous to a criminal murder prosecution, but holding the evidence at issue in the case inadmissible, however, because it took the form of specific instances of conduct instead of reputation or opinion).

defendant in a criminal case, to indicate the likelihood that the act in issue was or was not done."¹⁹

Certain key empirical assumptions about character underlie the structure of the character rule. The most important of these is that people possess relatively stable character traits that provide some guide to their actions. Thus, it is assumed that if the trier of fact is presented with testimony concerning a person's particular character trait, the jury can make an assessment of the likelihood that the person engaged in the conduct at issue. Over the last several decades, the validity of the assumption about stable character traits from which accurate predictions about conduct can be made has been questioned in both the psychological and the legal literature.²⁰ Nevertheless, the common law character rule—based on this assumption—has been adopted virtually without change throughout the United States.²¹

B. Common Law History of the Character Rule

When did the character ban become so well established? There is no evidence of the existence of such a rule in the earliest stages of the common law's development. Wigmore asserted that character evidence "was resorted to without limitation" in early English practice.²² He believed that the use of bad character evidence "fit[s] . . . a more primitive notion of human nature," and he found indications of its use "without question down to the latter part of the 1700s."²³ At another place in his treatise, however, Wigmore recognized that evidence of other crimes and misconduct had been excluded by the courts considerably earlier.²⁴ Thayer also believed the character ban was "modern," stating that "[i]n

19. 1 WIGMORE, *supra* note 17, § 64, at 472-73 (emphasis in original).

20. For discussion of the psychological literature, see Davies, *supra* note 12, Leonard, *supra* note 12, Mendez, *supra* note 12, and Taslitz, *supra* note 12. For a recent article exploring the current state of psychological theory, see Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221 (1996).

21. For surveys of state adoption of the Federal Rule of Evidence 404(a), which governs the use of character for this purpose, see 1 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA ch. 14 (1987 & Supp. 1994), and 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-30 to T-36 (Joseph M. McLaughlin ed., 2d ed. 1997).

22. 1 WIGMORE, *supra* note 17, § 194, at 646; *see id.* § 194, at 646 n.1 (citing a number of English cases, dating to the seventeenth century).

23. 3 *id.* § 923, at 450.

24. Some of the oldest cases Wigmore cited were *Hampden's Trial*, 9 How. St. Tr. 1053 (K.B. 1684), and *Harrison's Trial*, 12 How. St. Tr. 833 (Old Bailey, London 1692). *See* 1 WIGMORE, *supra* note 17, § 194, at 646 n.1. In the former, Judge Withins stated:

You know the case lately adjudged in this Court; a person was indicted for forgery, we would not let them give evidence of any other forgeries but that for which he was indicted, because we would not suffer any raking into men's course of life to pick up evidence that they cannot be prepared to answer to.

Hampden's Trial, 9 How. St. Tr. at 1103. In *Harrison's Trial*, defendant was charged with murder. The prosecution called a witness to relate defendant's felonious conduct a year earlier. Lord Chief Justice Holt stated: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away! That ought not to be; that is nothing to the matter." *Harrison's Trial*,

earlier times such evidence was freely used in our courts.”²⁵ Furthermore, Julius Stone, who wrote influential studies of English and American cases in the early part of this century,²⁶ stated that “[a]n examination of the early text-writers fails to reveal any recognized rule excluding evidence of similar facts.”²⁷

Although the rule barring character evidence became firmly established by the first decade of the nineteenth century,²⁸ there are indications that the rule—or at least the principle that other misconduct of a person should not be used to prove the conduct at issue—was recognized considerably earlier. As early as 1692, in *Duke of Norfolk v. Germaine*,²⁹ we see a court refusing to admit evidence of other misconduct “without limitation.” *Germaine* was an action for adultery.³⁰ Plaintiff called many witnesses, but all testimony concerning the most clearly adulterous behavior concerned events that took place more than six years earlier, and for which the statute of limitations had expired.³¹ The testimony concerning events taking place during the relevant period was considerably more circumstantial.³² Though the behavior of defendant and the Duchess during the latter period was not clearly innocent, it only took on truly guilty bearing when considered in light of the testimony concerning earlier events.

Defendant pointed out the weakness of the evidence of events taking place during the relevant period,³³ and the government offered the following responses:

Att. Gen. For, as all unlawful conversations must have a beginning, it is necessary we should shew something of that, and the time, and that doth fortify the evidence that is given within the time.

Sol. Gen. Pray, my lord, if your lordship pleases, this is the use we make in giving in evidence some things before, to shew the fact within the six years, their frequent meeting in a lascivious manner; and we make use of that before the sixth year, to explain what use we make of it in matters done within the six years.³⁴

The court instructed the jury as to the limited purpose for which the evidence might be used:

12 How. St. Tr. at 864.

25. THAYER, *supra* note 17, at 525.

26. See Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter Stone, *England*].

27. Stone, *England*, *supra* note 26, at 958.

28. See *infra* notes 41-43 and accompanying text.

29. 12 How. St. Tr. 927 (K.B. 1692).

30. The Duke of Norfolk claimed that Germaine “did, by unlawful ways and means, entice away his duchess, by which means he had not the benefit of her society; and, by lascivious conversation, committed adultery with her, and caused her to commit adultery.” *Id.* at 928.

31. Witnesses testified to seeing defendant and the Duchess in bed together during the earlier period. See *id.* at 929-33.

32. Among other things, witnesses testified to seeing the defendant and the Duchess together under assumed names. Defendant called into question the credibility of the one witness whose testimony about the latter period was most incriminating. See *id.* at 934-45.

33. See *id.* at 939, 945.

34. *Id.* at 945.

The Defendant pleaded, That he did not commit any thing within these six years: what hath been before, is not now to be taken notice of. But the plaintiff's counsel hath given in evidence some acts before, which is not for any damage they expect, but to explain some actions that have been between them. For my part, I must declare, that these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose.³⁵

Thus, the trial court admitted the evidence only to demonstrate that the conduct that occurred during the period at issue, supported by highly equivocal evidence, was in fact part of an adulterous relationship. The evidence was not admissible for "any other purpose."³⁶ In particular, of course, the earlier conduct itself could not serve as the basis for a verdict against the defendant.³⁷

In the first edition of his 1762 treatise on crown law, Sir Michael Foster commented on the matter in relation to cases of high treason. Based on an English statute,³⁸ Foster wrote that evidence of overt acts not charged in the indictment is inadmissible.³⁹ He then wrote:

35. *Id.* at 945-46.

36. *Id.* at 945. The court's determination to admit the evidence for one purpose while forbidding its consideration for another suggests that the court accepted the key assumption underlying the doctrine of limited admissibility: that the jury can be expected to differentiate among potential uses of evidence and that it will abide by an instruction to ignore the evidence for certain logically relevant purposes. For detailed consideration of the doctrine of limited admissibility, see DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY* ch. 1 (1996).

Unfortunately, the court's assumption that the jury could distinguish among subtly different uses of evidence is highly questionable when applied to the evidence in *Germaine*, which had high probative value when considered for its forbidden purpose. Clearly, evidence that defendant had engaged in the unlawful behavior at a somewhat earlier time was highly probative on the question of whether he had done the same thing during the period of time over which suit was brought. Interestingly, though the jury ultimately rendered a verdict for the Duke, its damage award was very low, prompting the court to issue a "severe reprimand . . . for giving so small and scandalous a fine." *Germaine*, 12 How. St. Tr. at 948. Eventually, Parliament granted the Duke a divorce. The Duchess married *Germaine*. See *id.*

37. There is a narrow way to read the theory behind the court's conclusion in *Germaine*. Because the prior misconduct occurred more than six years before suit was brought, that conduct clearly could not have been the subject of an action. The court therefore might simply have intended to assure that the statute of limitations would not be violated—that a line would be drawn between acts which could form the predicate for an adverse verdict and those that could not. The court might not have had in mind any "rule" admitting or excluding other acts evidence to show a character-based propensity to commit adultery or otherwise to prove a fact. Thus, it is not possible to know how the court would have ruled as to adulterous behavior committed by defendant within the six-year limitations period, but with a person other than the Duke's wife.

38. See An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 7 & 8 Will. 3, ch. 3 (1695-6) (Eng.).

39. See SIR MICHAEL FOSTER, *CROWN LAW* 244-46 (photo. reprint 1982) (London, W. Clarke & Sons 1762). The statute provided "[t]hat no[] evidence shall be[] admitted or given of any overt act that is not expresly [sic] laid in the indictment against any person or persons whatsoever." 7 & 8 Will. 3, ch. 3, § 8. Foster explained the statutory exclusionary rule primarily on the basis of surprise: "lest the prisoner should be surprised or confounded by a multiplicity and variety of facts which he is to answer upon the spot." FOSTER, *supra*, at 244-

The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue, is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. . . . And had not those concerned in state prosecutions out of their zeal for the publick service sometimes stepped over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case. Since the common-law grounded on the principles of natural justice hath made the like provision in every other.⁴⁰

By the first decade of the nineteenth century, the rule excluding character evidence to prove a person's conduct was well settled. The case most often cited as the source of the rule is *Rex v. Cole*, a case that, only somewhat remarkably, is unreported.⁴¹ According to Samuel March Phillipps, the first edition of whose treatise appeared just four years later, the court held in *Cole* that "it would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offense as that charged against him."⁴² Summarizing the holding in *Cole*, Phillipps wrote: "Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offense at another time and with another person, and that he had a tendency to such practices, ought not to be admitted."⁴³

Phillipps only briefly treated the general subject of other misconduct evidence, but what he did write about the subject demonstrates the acceptance of the character rule. Early in his treatise, Phillipps recited what he considered to be the four most extensive rules "which have been established for the purpose of directing the testimony of witnesses."⁴⁴ The first of these, he wrote, was that "[e]vidence must be confined to the points in issue."⁴⁵ This general point concerning other misconduct encompassed a broad ban on character.

Since these early times, courts have rather consistently expressed support for the character ban, sometimes using particularly strong language to defend it. Consider *People v. Molineux*,⁴⁶ in which the high court of New York offered one of the best-known and most spirited defenses of the rule. The court wrote:

45.40. FOSTER, *supra* note 39, at 246.41. *Cole* was decided in 1810 at "Mich. term" "by all the Judges." SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 70 n.b (London, J. Butterworth & Son 1814). It appears to have been decided in the Buckingham Summer Assizes.42. *Id.*43. *Id.*; see also 1 WILLIAM OLDWELL RUSSELL, RUSSELL ON CRIME 737 (J.W. Cecil Turner ed., 12th ed. 1964) (describing *Cole* as a prosecution for an "unnatural offence" and noting that the case held "that an admission by the prisoner that he had committed such an offence at another time, and with another person, and that his natural inelination was toward such practices, ought not to be received in evidence").44. PHILLIPPS, *supra* note 41, at 69.45. *Id.* He elaborated: "[A]s the intent of evidence is to ascertain the truth of the several disputed facts or points in issue, either on one side or the other, no evidence ought to be admitted to any other point." *Id.*

46. 61 N.E. 286 (N.Y. 1901).

The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common-law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.⁴⁷

As the above language suggests, the *Molineux* court believed that the character evidence ban was one of the most important characteristics distinguishing the common law from civil law systems. As the court wrote:

Under the [civil law] there is no presumption of innocence. A mere official charge of crime puts the accused upon his defense. His history is an open book, every page of which may be read in evidence by the prosecution. Every crime or indiscretion of his life may be laid bare to feed the presumption of guilt. How different is our own common-law, which is the product of all the wisdom and humanity of all the ages! Under it the accused comes into a court of justice panoplied in the presumption of innocence, which shields him until his guilt is established beyond a reasonable doubt. His general character can be thrown into the balance by no one but himself. The incidents of his life, not connected with the crime charged, are his sacred possession. He faces his accuser in the light of a distinct charge, with the assurance that no other will be or can be proved against him.⁴⁸

Though *Molineux* was decided after the turn of the century, American case authority for the character evidence ban can be found dating to the early years of the republic.⁴⁹

47. *Id.* at 293-94 (citation omitted).

48. *Id.* at 300. Quoting an earlier New York decision, the court underlined this point another time:

"Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common-law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

Id. at 294 (quoting *People v. Shea*, 41 N.E. 505, 511 (N.Y. 1895)).

49. *See, e.g., Commonwealth v. Hardy*, 2 Mass. (1 Tyng) 303, 317 (1807) (noting exception to general character bar where evidence offered by the criminal defendant, at least in capital cases).

Only rarely does one come across judicial disdain for the ban on character evidence. One such case comes from the New Hampshire Supreme Court in *Darling v. Westmoreland*.⁵⁰ The court wrote:

The tendency to error has been aggravated by an exception . . . excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged, and his habitual commission of crimes or torts of a like kind as proof of such disposition. That such evidence is relevant, the law acknowledges by receiving, in criminal cases, and in some civil cases, evidence of a defendant's good character in his favor, and allowing such evidence to be rebutted, and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the general principle which admits relevant and material evidence.⁵¹

Although the New Hampshire court did not approve of the rule barring character evidence, neither did it doubt the universal acceptance of the rule.

C. Permissible Uses of Other Misconduct Evidence

Almost certainly, the prohibition of other misconduct evidence has never been absolute. It is only the use of such evidence to prove one's conduct through an inference of bad character that was and largely remains⁵² forbidden

[The prosecutor] is not allowed to go into proof of the commission of any other offence than that charged, or of the character of the prisoner, unless the prisoner himself opens the way for the admission of that evidence by putting his character in issue; and, even in that case, the prosecutor cannot prove particular fact, but must content himself with evidence of general character.

Walker v. Commonwealth, 9 Va. (1 Leigh) 574, 576 (1829).

50. 52 N.H. 401 (1872).

51. *Id.* at 406-07 (citations omitted). The court traced the origins of the rule to a peculiarity of English law: "There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation." *Id.* at 407. The court was referring to the fact that the criminal code at one time contained about 160 capital offenses, and judges wished to mitigate the harshness of the code by limiting evidence damaging to criminal defendants. *See id.* This did not impress the court; believing these reasons for the rule in England had been ameliorated adequately by narrowing the crimes subject to the death penalty, it felt that the rule, if ever necessary, had ceased to be so:

The conflict of laws having ceased, the temptation of courts to nullify the lower law which they are sworn to enforce has passed away. And however much reverence may remain for ancient innovations in behalf of human life under circumstances no longer existing, and however strong may be the inclination derived from that reverence and from habit to adhere to the practice of excluding evidence of human character furnished by experience, the extension of that practice to the rejection of experimental knowledge of the character of inanimate matter ought to stop.

Id. at 408.

52. Recent legislation permitting character evidence in civil and criminal cases involving sexual assault and child molestation has altered the landscape. *See infra* notes 228-29 and accompanying text.

categorically.⁵³ As a result, one might claim that the common law never fully embraced a character prohibition. From a historical perspective, however, this position is difficult to support because for a long period of time, the courts only reluctantly allowed the use of other misconduct evidence for assertedly noncharacter purposes. As the discussion in this section will demonstrate, courts often restricted such evidence to situations in which proof of the claim or defense almost necessarily required that such evidence be produced.⁵⁴

Early courts often spoke in broad terms about the admissibility of other misconduct evidence.⁵⁵ Despite this sweeping language, however, the courts did not intend to exclude *all* evidence of so-called "collateral facts." In his 1824 evidence treatise, Starkie set forth some permissible uses of other misconduct evidence:

Where the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with and tend to elucidate the issue. . . . So collateral facts are admissible to prove intention, malice, or guilty knowledge.⁵⁶

The most widely discussed early case establishing the admissibility of other misconduct evidence to prove guilt through noncharacter means is the 1804 English decision in *Rex v. Whiley*.⁵⁷ In *Whiley*, the defendants were charged with several crimes essentially amounting to forging and uttering bank notes. In particular, the prosecution alleged that defendants attempted to pay an ironmonger for an item with a certain note. When the ironmonger expressed doubt as to the note's validity, defendants appeared surprised and paid with another note. When defendants were questioned about their names and addresses and about how they obtained the questionable note, they gave false information. The ironmonger's employee then attempted to take them to the bank, but they

53. This assumes, of course, that the case is not a criminal prosecution and that the defendant has not chosen to defend in part on the basis of her good character. *See, e.g.*, FED. R. EVID. 404(a)(1), 405(a).

54. For example, even the early writers recognized that other misconduct evidence is often virtually necessary to prove mental states such as knowledge. After stating the general prohibition on other misconduct evidence, the early treatise writer Phillipps added: "On an indictment for uttering a bank-note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged." PHILLIPPS, *supra* note 41, at 70.

55. *See, e.g.*, SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 126 (John A. Dunlap ed., New York, Gould, Banks & Gould, 2d ed. 1816) ("As the sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue on the one side or on the other, no evidence ought to be admitted to any other point."). Phillipps further stated that in treason cases, "no evidence is to be admitted of any overt act, that is not expressly laid in the indictment." *Id.* at 135.

56. 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 382 (London, V. & R. Stevens & G.S. Norton 1824) (citations omitted).

57. 168 Eng. Rep. 589 (Old Bailey, London 1804). The case is also cited as *Rex v. Wylie*, 127 Eng. Rep. 393 (Old Bailey, London 1804).

refused to go. They were then arrested on suspicion of offering a forged note knowing it to be forged.⁵⁸

As further proof of defendants' knowledge, the prosecution offered evidence that defendants had uttered forged notes three times in the month before the incident for which they were prosecuted, and that when asked each time for their names and addresses, they gave false information. Defendants objected to this evidence because it suggested the commission of three other felonies that had not been charged in the indictment. In particular, they made a fairness claim, alleging that it was only against those crimes charged in the indictment "of which [they] had notice, or against which they were in any way prepared to defend themselves."⁵⁹ Defendants also argued that "a departure from [the general rule] would manifestly tend, by introducing transactions foreign to the charge, to confound and perplex prisoners in their defence."⁶⁰

The court rejected defendants' claim, chiefly on the basis of *Rex v. Tattershall*,⁶¹ a factually similar case in which the prosecution was permitted to offer evidence of defendant's other conduct to prove his knowledge of the forgery, "that is, whether from the conduct of the prisoner on one occasion, the Jury might not infer his knowledge on another."⁶² In *Tattershall*, the court determined that such evidence was admissible for that purpose.⁶³ Applying the *Tattershall* rule to the case before the court, Lord Ellenborough addressed the fairness argument and stressed the need for the evidence:

The observations respecting prisoners being taken by surprise, and coming unprepared to answer or defend themselves against extrinsic facts, is [sic] not correct. The indictment alleges that the prisoners uttered this note knowing it to be forged, and they must know that, without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which shewed their minds to be free from that guilt.⁶⁴

Ellenborough acknowledged that certain factors can affect the relevance and probative value of the other misconduct as evidence of knowledge, but held the evidence admissible nonetheless.⁶⁵ The other judges agreed. Justice Heath found

58. See *Whiley*, 168 Eng. Rep. at 589.

59. *Id.*

60. *Id.*

61. (1801) (unreported).

62. *Whiley*, 168 Eng. Rep. at 590.

63. See *Tattershall* (1801) (unreported).

64. *Whiley*, 168 Eng. Rep. at 590.

65. Ellenborough wrote:

True it is, that the more detached the previous utterings are, in point of time, the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant, the only question that can be made is, whether they are sufficient to warrant the Jury in making any inference from them as to the guilty knowledge of the prisoner; but it would not render the evidence inadmissible. —Circumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner's knowledge that these notes were forged. I am therefore of opinion . . . that it is competent for the Court to receive evidence of other

Tattershall dispositive; Baron Thompson considered the case "exactly in point."⁶⁶

It was from cases such as *Whiley*, along with comments of legal commentators, that the modern "other crimes, wrongs, or acts" rule emerged.⁶⁷

Thus, by the early nineteenth century, two parallel and related doctrines had emerged. First, it became clear that evidence of other crimes is not admissible if offered to prove a person's character-based propensity⁶⁸ to commit the act at issue. Second, that very evidence may be admitted if offered on any other basis for which it is logically relevant.⁶⁹ Ever since the development of these two complementary rules, courts have struggled to define the permissible and impermissible uses of other misconduct evidence. As anyone who has ever tried to understand (or teach) this material knows, this effort has not yielded clear principles.⁷⁰ Still, one thing is fairly clear: until early in the present century,

transactions, though they amount to distinct offences, and of the demeanor of the prisoner on other occasions, from which it may be fairly inferred that he was conscious of his guilt while he was doing the act charged upon him in the indictment; and if this species of evidence do [sic] not warrant such an inference, it will be laid out of the case.

Id.

66. *Id.*

67. See, e.g., FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."). Thirty-one states use versions of this rule. See JOSEPH & SALTZBURG, *supra* note 21, § 14.4.

68. The character rule does not bar all propensity inferences, but only those based on a person's character. Other inferences about a person's conduct that involve propensity do not fall within the prohibition. A simple example is habit evidence. If the factual question is whether a person locked her car door after parking the car on a particular occasion, evidence that she habitually did so, and thus did so on that occasion, would involve a propensity inference arising from her habit, not her character. See FED. R. EVID. 406 (governing admissibility of habit evidence). In addition, evidence offered to prove conduct under the "other crimes, wrongs, or acts" rule often involves the use of propensity inferences. See Kuhns, *supra* note 15, *passim*.

69. In fact, the rule admitting evidence of other wrongdoing for noncharacter purposes, especially to demonstrate guilty knowledge, probably predated the firm establishment of a rule excluding such evidence when offered to show a character-based disposition to commit certain kinds of misconduct.

70. Peter Tillers, the current reviser of this part of Wigmore's treatise, doubts that the courts have created defensible distinctions between the character and noncharacter use of other misconduct evidence:

In our discussions of detailed aspects of the character evidence rule, we survey various efforts to make the necessary distinctions in terms of relevancy and reliability rationales, but on the whole we find such explanations inadequate. In our own view, the windings and twistings of the character evidence rule and its various exceptions are largely without rational explanation because those windings and twistings reflect a half-hearted and unprincipled compromise between an interest in truthseeking and a belief that we should not judge people or their acts by their character.

1A WIGMORE, *supra* note 13, § 54.1, at 1156.

courts were rather restrictive in their treatment of other misconduct evidence, largely tending to restrict the evidence to situations in which the nature of the case virtually required it—to situations of practical necessity.⁷¹ Thus, what courts often called “exceptions”⁷² to the general rule of exclusion of other misconduct evidence were rather narrowly defined.

In fact, many of the early cases admitting such evidence for noncharacter purposes were prosecutions for so-called “specific intent” crimes, where proof of an essential element of the current charge could not be made other than through circumstantial evidence. In receiving stolen goods cases, for example, where successful prosecution depended on proving the defendant’s knowledge that the property she received was stolen, evidence of defendant’s prior receipt of similar stolen goods from the same or a similar source would often be

71. *See, e.g., Farrer v. State*, 2 Ohio St. 54 (1853). Defendant was charged with the murder of a child named James Forrest. Despite her apparently limited mental ability, defendant was employed as a nurse in the victim’s home. At that home, it was “not disputed, that she poisoned every member of the family, and that the mother and two children died of that poisoning.” *Id.* at 61. The trial court admitted evidence of these deaths, as well as of a number of other people who had previously died in different homes in which defendant worked. *See id.* at 64. James Forrest was the last to die at her current home. A postmortem examination revealed the presence of arsenic. There was evidence that defendant had access to arsenic. *See id.* at 67.

Defendant did not object to evidence of the other deaths in the Forrest home, which apparently were admitted to prove defendant had committed the crime at issue. However, defendant did object to admission of evidence of the poisoning of a Mrs. Green, which had occurred months before in another home in which defendant worked. *See id.* at 71. The Ohio Supreme Court agreed with defendant. In making this determination, Justice Corwin considered possible permissible purposes of the evidence, but rejected each on the facts of the case:

There is no necessity to show, that Nancy poisoned Mrs. Green, in order to prove that she had poison wherewith she might have poisoned the Forrest family . . .

Nor can it be successfully argued, that this proof of the poisoning in August, was necessary to prove that in November the prisoner knew the nature and uses of arsenic. The intent of the prisoner was not to be so established. In the case of passing counterfeit money, evidence of other acts of passing is admitted, because many persons occasionally take counterfeit money, and attempt to pass it, while ignorant of its spurious character. But persons do not buy arsenic without knowing its uses.

Id. at 71-72. Corwin concluded that the evidence should have been excluded because “[i]t could not perform any other office than that of needlessly exciting prejudice against the accused.” *Id.* at 72. A concurring judge also emphasized the lack of need for the evidence and the danger of unfair prejudice. *See id.* at 73-74 (Thurman, J., concurring). *Farrer* is somewhat unusual in its lengthy discussion of the issue, but its essential approach is not.

72. *See, e.g., Gassenheimer v. State*, 52 Ala. 313, 318-19 (1875) (stating the principle that evidence must be confined to the points in issue, and that in criminal cases, evidence of conduct that would constitute another offense should not be admitted, acknowledging, however, the existence of what the court called “exceptions” to this rule, but ultimately finding none applicable to the present case); *People v. Seaman*, 65 N.W. 203, 206 (Mich. 1895) (reviewing American and English authority supporting what it called “exceptions” to the “general rule . . . that evidence shall be confined to the issue, and that on a trial for felony the prosecution will not generally be permitted to give evidence tending to prove the defendant guilty of another distinct and independent felony”); *State v. Raymond*, 21 A. 328, 330 (N.J. 1891) (employing “exceptions” terminology); *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901) (employing “exceptions” terminology).

admitted.⁷³ The perceived need for the evidence often drove the courts to admit.⁷⁴ In prosecutions for uttering counterfeit instruments or coin, proof of defendant's awareness of the fakery was required, and the courts would often admit evidence of other acts of uttering the same or similar material to prove knowledge.⁷⁵ Where

73. See, e.g., *People v. Rando*, 3 Park. Crim. 335 (N.Y. Sup. Ct. 1857). Defendant was convicted of receiving certain riding equipment (a saddle, bridle, and bits) knowing it was stolen. At trial, over objection, the prosecution was permitted to prove that at the time of his arrest, defendant was in possession of other stolen goods owned by persons other than the victim from whom the items at issue had been stolen. See *id.* at 335. The trial court appears to have admitted the evidence as proof of scienter—defendant's knowledge that the goods he possessed were stolen.

On appeal, defendant apparently conceded that had the other stolen property been that of the same victim, it would have been admissible. The prosecutor responded that none of the authorities placed such a limit on the admissibility of this kind of evidence. See *id.* at 338 (argument of A. Oakey Hall, for the people). In his argument, the prosecutor offered the reason for the rule allowing evidence of other goods in defendant's possession:

The reason of the rule is this: Receiving stolen goods is no crime of itself. There may be innocent purchasers, and very often there are. It is the knowledge they are stolen. If a man is in the practice of passing counterfeit money or of buying stolen goods, evidence of this rebuts any presumption of innocent possession or purchase, and raises affirmative presumption of guilty knowledge or *scienter*.

Id. (argument of A. Oakey Hall, for the people).

The court declined to adopt the limitation urged by defendant. In a very brief opinion citing no authority, the court stated simply that "[w]here a party is indicted for the crime of knowingly receiving stolen goods, it is competent to the prosecution to give in evidence a series of other acts of the like character, to show the knowledge or *scienter* of the accused, or to rebut any presumption of innocent mistake." *Id.* at 339; see also *State v. Ward*, 49 Conn. 429, 439 (1881) (similar); *Shriedley v. State*, 23 Ohio St. 130 (1872) (similar).

74. The court in *Commonwealth v. Charles*, 14 Phila. Rep. 663 (Court of Oyer and Terminer of Luzerne County 1871), for example, distinguished typical larceny cases from prosecutions for receiving stolen goods and certain others:

Larceny is not one of the class of offences, where the usual rules of evidence are of necessity relaxed in order to reach the motives, intention and knowledge of the accused. The necessity for this species of evidence arises most frequently in cases of conspiracy, of uttering forged instruments, counterfeit notes and coin, and of receiving stolen goods. Although admitted in other cases, where the intent becomes essential in determining guilt and its degree, yet in the cases above mentioned, the act which is the subject of inquiry is almost always equivocal, where *malus animus* cannot, as in the ordinary crimes of violence, be presumed, and in most cases can only be determined by evidence of the prisoner's conduct on other occasions.

Id. at 664.

75. Among the earliest was *State v. Van Houten*, 3 N.J.L. 248, 273 (Sup. Ct. 1810). Defendant was charged with knowingly uttering a counterfeit ten-dollar bill in payment for goods at a Trenton store. To prove defendant's knowledge that the bill was counterfeit, the prosecutor was permitted to offer evidence that on the same evening, defendant had passed other counterfeit bills at other stores in Trenton, and that he had done the same at other places that day. See *id.* at 249. The prosecutor argued that it was necessary to admit such evidence because knowledge was in the mind of defendant, and could not be proven other than circumstantially. See *id.*

By a two-to-one vote, the court held that admission was proper, "not . . . to prove the fact that [defendant] passed the bill, or that the bill itself was counterfeit, but the knowledge that

particular crimes did not require a showing of such intent, the courts were generally unwilling to admit the other crimes evidence.⁷⁶

The courts also tended to admit evidence of other misconduct in other types of cases when certain defenses were raised. For example, if defendant in a prosecution for murder by poison claimed the death was accidental, evidence of defendant's similar misconduct with the same poison was often admitted to prove her knowledge of the poison's effect, and thus her intent.⁷⁷ The same might be

he had of its being counterfeit at the time of passing it; and the fraudulent and evil intent with which he did it." *Id.* at 250.

In other cases, defendant's *possession* of other similar counterfeit items was admitted. *See, e.g., Stalker v. State*, 9 Conn. 341 (1832) (finding in prosecution for passing a counterfeit half-dollar, that evidence of defendant's possession of other counterfeit half-dollars was admissible to prove his knowledge that the coin at issue was counterfeit). Other cases allowed admission of evidence that defendant possessed counterfeiting apparatus. *See, e.g., State v. Antonio*, 5 S.C.L. (3 Brev.) 562 (1816) (finding in prosecution for counterfeiting coins, evidence that defendant was found in possession of coining instruments admissible to prove defendant's criminal intent, stressing the need for the evidence).

76. *People v. Smith*, 56 N.E. 1001 (N.Y. 1900), is a particularly telling example. Defendant and his father were charged with setting a fire that destroyed eleven buildings, seven of which were owned by defendant's mother. These seven were also insured. The prosecution offered evidence that just before the fire, defendant, his father, and his mother removed most of the contents of the buildings, and that they later falsely claimed these items were lost in the fire. The prosecutor also stated in his opening statement that he would offer evidence that before the fire in issue, other buildings in which defendant had an interest were destroyed by fire. The trial court allowed the evidence. *See id.* at 1003. On appeal, the court held that the court should have excluded all evidence of other fires. The court wrote:

This case is unlike the cases of larceny by trick or device, obtaining money under false pretenses, receiving stolen property knowing it to have been stolen, passing counterfeit money knowing it to be such, where the intent is determinative of the crime, but often remains in doubt when but the single transaction charged in the indictment is unfolded. An honest man may, by chance, be confronted by all the accusing circumstances and yet be innocent. If, however, it should appear that a person thus confronted, and protesting his innocence, had been involved in the like circumstances upon former occasions, confidence in his honesty would probably be replaced by a conviction of his rascality. Many cases illustrate this view, and show when such evidence is admissible. They have no application here.

Id. at 1003-04 (citations omitted). Clearly, the court was motivated by the lack of need for the evidence in this type of case.

77. *See, e.g., State v. Lightfoot*, 78 N.W. 41, 43 (Iowa 1899) (admitting, in criminal trial for malicious poisoning of a horse with strychnine, evidence that strychnine was found at the same time in feed boxes of other horses owned by the same person, and that all the horses died at about the same time to prove "the premeditated and malicious character of the act which caused the death of [the horse]"). Two early English cases also illustrate this use of other misconduct evidence. In *Rex v. Mogg*, 172 Eng. Rep. 741 (Oxford Summer Circuit, Worcester Assizes 1830), defendant was charged with administering sulphuric acid to eight horses with intent to kill them. Defendant did not deny administering the substance, but claimed he did so to make the horses' coats shine rather than to injure them. Though defendant objected to testimony by a prosecution witness that defendant had frequently done the same thing, the court allowed the evidence, stating that "other acts of administering may go to shew whether it was done with the intent charged in the indictment." *Id.* at 742. Similarly, in *Regina v. Garner*, 176 Eng. Rep. 594 (Midland Circuit, Lincoln 1864), Mr. Garner and his wife were charged with

true in an arson prosecution in which defendant claimed the fire had an accidental rather than intentional origin.⁷⁸

While some nineteenth century courts admitted other crimes evidence in some situations where there was no compelling necessity (or where there was not a very close connection between the act at issue and the other crime),⁷⁹ most courts were less likely to allow it. Today, by contrast, most courts employ considerably more expansive reasoning, arguably allowing evidence of other wrongs under circumstances in which only a dubious distinction can be made between the purported noncharacter use and the forbidden character inference,⁸⁰ and on only

the poisoning murder of Jemima Garner, Mr. Garner's mother. Intent was sharply disputed. There was evidence of quarrels between Mrs. Garner and Jemima Garner. Mr. Garner was in the business of selling arsenic for agricultural purposes, and also sold milk. At one point, Mrs. Garner expressed jealousy of a woman named Shepherd. Not long after, Shepherd's children became violently ill after tasting some milk sent by Mrs. Garner to Shepherd. Additional milk delivered to another person that day also apparently caused illness, and the following day, several people in the Garner home, including Jemima Garner, also became ill after eating rice pudding made with the milk. Mrs. Garner attended to her mother-in-law during her illness and prepared all her meals. The prosecution also offered evidence that after Jemima Garner's death, a horse owned by a person Mrs. Garner allegedly disliked, as well as two other horses, were poisoned while in the defendants' stables. Finally, evidence was produced to show that Mr. Garner's first wife had died of arsenic poisoning. All this evidence was offered "for the purpose of showing that Jemima Garner died from poison wilfully administered to her by the prisoners, and not taken by accident." *Id.* at 595. The court admitted the evidence. (Defendants did not object to the evidence, and the report of the case does not contain the court's rationale for admitting it.) *Garner* was criticized by the court in *Regina v. Hall* [1887] 5 N.Z.L.R. 93, on the basis that the evidence in question was "apparently" used to strengthen evidence that it was the defendant who administered the poison. The court considered this purpose improper, stating, "[t]his case . . . [was] an extraordinary one; and its result . . . [being] in every way unsatisfactory." *Id.* at 106.

78. See, e.g., *Knights v. State*, 78 N.W. 508, 510 (Neb. 1899) (admitting, in prosecution for burning a building containing some of his own goods, evidence that on the same night, defendant set other fires in adjacent buildings, "not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of defendant . . . and satisfy the jury that the act was intentional, and not an accident").

79. Early American courts were especially lenient in admitting evidence of the sexual conduct of the victims of rape, sexual assault, adultery, and other actions involving sexual misconduct. See SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 61 (Boston, Little, Brown & Co. 1842) (stating that such evidence is admissible in prosecutions for rape or assault with intent to commit rape, where the action "is considered as involving, not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connexion with the prisoner; though not with other persons"). Even in types of cases in which most courts admitted other misconduct evidence, a few courts apparently did so more liberally than others. See, for example, *State v. Jacob*, 8 S.E. 698 (S.C. 1889), where, in a prosecution for receiving stolen goods, the court admitted evidence that at the same time defendant received the goods charged in the indictment, he also received other goods stolen from the same owner. Absent evidence that defendant knew these other goods were stolen, the propriety of admission under general principles recognized by most courts seems questionable.

80. As indicated previously, the current reviser of Wigmore's treatment of character evidence finds that the alleged distinction between character and noncharacter use of the evidence is often intellectually incoherent. See *supra* note 70. For a probing analysis of the reasoning involved in admission of evidence pursuant to the other crimes, wrongs, or acts rule,

very tenuous evidence that the defendant even engaged in the other misconduct.⁸¹ Nevertheless, the courts have continued to hew the *principle* that defendant's other acts of misconduct are not admissible to prove her character, and from that, her behavior on the relevant occasion.

III. REASONS FOR THE GENERAL CHARACTER PROHIBITION

Discerning the reasons for the rule excluding evidence of character (particularly other acts of wrongdoing) is a difficult and uncertain enterprise. The origins of any legal doctrine are always complex; their explanations lie in both accessible and inaccessible history, in philosophical movements both comprehensible and mysterious to late twentieth century minds. Lurking at all times is the risk of erroneously assigning a cause-and-effect relationship to temporal juxtapositions of developments in different fields.⁸² In addition,

and how that reasoning often intersects the forbidden character reasoning, see Kuhns, *supra* note 15.

81. This is certainly true after *Huddleston v. United States*, 485 U.S. 681 (1988), in which the Supreme Court stated that other crimes evidence is admissible as long as there is evidence sufficient to support a finding that the other crime occurred, that the evidence is relevant to an issue in the case, that the court issues proper limiting instructions, and that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See *id.* at 690-92. It will be the unusual act that does *not* satisfy this lenient test.

82. Describing characteristics of "evolutionary functionalism," which he considered to be the dominant vision of American legal historicism, Robert Gordon writes of the assumption that "[l]egal systems should be described and explained in terms of their functional responsiveness to social needs." Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 63 (1984). He characterized that assumption as follows:

The general functionalist method is to construct (or, as is rather more common, to assume without much discussion) a typology of stages of social development and then to show how legal forms and institutions have satisfied, or failed to satisfy, the functional requirements of each stage. Obviously, an enormous gap in sophistication and conceptual power separates the best and worst examples of this method. At its best, as in Weber's work, complex bundles of rules are tied through explicit theorizing to elaborate accounts of social development. At its comically vulgar worst, the method produces wholly speculative functional rationales for legal rules in underlying social changes—vacuously described rationales such as "the evolution of the right of privacy was a response to the increasing complexity and interdependence of modern society."

Id. at 64 ([no source provided for quoted passage]). Hopefully, the tentative links drawn in the discussion herein will not be among the "comically vulgar worst" of examples.

It is, of course, not at all likely that the economic arrangements of Western capitalism were a necessary precondition for the growth of the current legal regime. Max Weber, for one, believed the truth to be just the opposite:

"Economic conditions . . . have . . . everywhere played an important role, but they have nowhere been decisive alone and by themselves. . . . To those who had interests in the commodity market, the rationalization and systematization of the law in general and . . . the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence . . . of capitalistic enterprise, which cannot do without legal security."

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scholars often have a tendency to look at the development of Western legal traditions in terms of nations rather than as the product of a process that involved practically the whole of Europe.⁸³ And perhaps most frustratingly, explanations for the origins of common law legal doctrines also lie in a judicial record that has survived in an incomplete state.⁸⁴

Despite these difficulties, it is possible to look to the legal, historical, religious, philosophical, and political record available to us, certain threads of which reveal intriguing clues.

A. Legal Rationales

Courts and legal commentators have long declared that the common law's refusal to allow trial by character is a great and fundamental feature that distinguishes it from other systems. Wigmore, for example, wrote that the exclusion of character evidence was "a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence."⁸⁵ The authors of a much-cited law review article stated that "[a]dherents to the common law have for centuries boasted of a certain Anglo-American solicitude for the prisoner, contrasting their accusatorial methods with the inquisitorial devices of continental jurists."⁸⁶ Another author wrote: "This consideration for the accused is, I believe, in striking contrast with the course followed in most European countries. There the past is raked up, and the defence of an accused person, even if innocent, must be a Herculean task if his past career is not free from blemish."⁸⁷

TRADITION 546-47 (1983) (first two omissions added; last three omissions in original) (quoting MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 304-05 (Max Rheinstein ed., 1954)).

83. See BERMAN, *supra* note 82, at 538-40. Berman also criticizes conventional legal historiography, which divides Western history into distinct periods including the Middle Ages and the Modern Age, and focuses on the Renaissance and Reformation of the fifteenth and sixteenth centuries. In his view, periodization of history entirely misses an eleventh and twelfth century Renaissance and Reformation which "constituted the first great turning point in the history of the West, and . . . [were] the source not only of the Western legal tradition but of other major aspects of Western social thought and social action as well." *Id.* at 538.

84. Perhaps nowhere is this more true than in reconstructing the development of tort liability at common law. For the last century or so, scholars have attempted to piece together the origins of tort law and its evolution to its present form. Much of this analysis has been built upon the small handful of cases that have survived from the fourteenth through the seventeenth centuries. See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 63-103 (Mark DeWolfe Howe ed., 1963) (1881); FREDERICK W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1936); Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361 (1979); see also sources cited *infra* note 171.

85. 1 WIGMORE, *supra* note 17, § 194, at 647; see *id.* § 194, at 647 n.2 (noting the French practice); see also THAYER, *supra* note 17, at 525 (noting that such evidence is "freely used . . . in other than English-speaking countries").

86. Slough & Knightly, *supra* note 1, at 325.

87. F.L. Stow, *Evidence of Similar Facts*, 38 L.Q. REV. 63, 63 (1922).

Even Bentham, a committed critic of English evidence law, supported the notion of an exclusionary rule covering much evidence of character to prove conduct. Dividing possible bad character evidence into "general" and "particular" terms, Bentham wrote:

1. Is it conceived in general terms? no specification of facts, no instances of particular misconduct on any individual occasion specified?—a wide, and at the same time a safe, door is opened to calumny. The calumny is in its nature unpunishable. By the supposition, no particular fact is or can be specified; nothing which, for the purpose either of punishment or compensation, is capable of being disproved. What is delivered is mere matter of opinion; and that an opinion which, by the power of the law itself, a man is compelled to give.

2. Is it conceived in particular terms? particular facts stated?—Still either the door is left open to calumny, or fresh difficulties present themselves. Neither on this or on any other occasion ought a man's reputation to be liable to be destroyed or impaired by mere hearsay evidence. If a punishable or otherwise disreputable act is to be charged upon a man, on this occasion as on others, the charge ought to be made good by a satisfactory mass of evidence. On this as on any other occasion, he ought to be heard in his defence, with liberty to contest the charge, and produce exculpatory evidence of all sorts, as in other cases. Under the name of giving evidence of character, what then does the operation here in question amount to? It is trying one cause for the purpose of another cause. Say rather, trying an indefinite number of causes: for it is not a single swallow that makes a summer, a single act a habit, a disposition, a sufficient ground for character, and that unfavourable. Causes thus in any number are tried—one cause, at least, is tried—as it were in the belly of another.⁸⁸

Clearly, courts rarely exclude character evidence on the ground that it is irrelevant in determining conduct. On the contrary, it has long been believed⁸⁹ that evidence of character satisfies the lenient test of logical relevance⁹⁰ when offered as proof of conduct. As Wigmore wrote:

A defendant's character, then, as indicating the probability of his doing or not doing the act charged, is essentially relevant.

In point of human nature in daily experience, this is not to be doubted. The character or disposition . . . of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct. In point of legal theory and practice, the case is no different.⁹¹

88. 3 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 195-96 (London, Hunt & Clarke 1827).

89. The validity of that belief has been challenged to some extent. See, e.g., Leonard, *supra* note 12, at 25-31 (generally arguing that much character evidence does not satisfy the test of logical relevancy); Mendez, *supra* note 12, at 1041-60 (same). But see Davies, *supra* note 12, at 517-18 (concluding that under some circumstances, it is possible to draw reliable inferences of action in conformity with character); Taslitz, *supra* note 12, at 32-34, 64-86 (same).

90. Under modern principles, evidence is relevant if it has "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." FED. R. EVID. 401.

91. 1 WIGMORE, *supra* note 17, § 55, at 450 (emphasis in original).

This proposition has been repeated many times,⁹² though the authorities occasionally exhibit some confusion.⁹³ True, the probative value of character evidence is often rather low, particularly when it takes the form of community reputation or lay opinion, but there are indeed some cases in which one might rationally assign significant probative value to the evidence.⁹⁴

If character evidence is not excluded on relevance grounds, why do the courts reject it, particularly in a general environment that favors the admission of relevant evidence as a tool to improve the accuracy of truth determination? There

92. See JOHN JAY MCKELVEY, *HANDBOOK OF THE LAW OF EVIDENCE* § 108, at 149 (St. Paul, West Pub'g Co. 1898) ("Where the question is whether X. did or did not do a certain act, his character, if proved, might throw a strong light upon the issue, and justify an inference as to the act charged."); THAYER, *supra* note 17, at 525 ("Undoubtedly, as a mere matter of reason, it often affords a good basis of inference . . .").

[Jurors] will very naturally believe that a person is guilty of the crime with which he is charged if it is proved . . . that he has committed a similar offense, or any offense of an equally heinous character. And it can not be said with truth that this tendency is wholly without reason or justification, as every person can bear testimony from his or her experience, that a man who will commit one crime is very liable subsequently to commit another of the same description.

UNDERHILL, *supra* note 17, § 180, at 310; see Kuhns, *supra* note 15, at 777 ("Proof that a criminal defendant has committed specific bad acts other than those included in a current charge may be relevant to prove the defendant's guilt."); F.R. Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 OR. L. REV. 267, 268-69 (1952) ("[P]erhaps in the greater number of cases in which 'other crimes' evidence is offered there is some slight relevance."); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 760 (1975) (voicing the same conclusion with respect to testimonial credibility); Stone, *England*, *supra* note 26, at 956 ("By definition . . . facts similar in the narrow sense to the main fact in issue are always relevant thereto . . .") (emphasis in original); *Evidence—Other Crimes*, 29 MICH. L. REV. 473, 473 (1931) [hereinafter *Other Crimes*] ("Evidence of crimes of any sort, or even of unsuccessful attempts or uncompleted plans, is relevant enough, since it tends to show a criminal tendency and an habitual disregard for accepted standards of conduct.").

93. See, e.g., Marshall McKusick, *Techniques in Proof of Other Crimes to Show Guilty Knowledge and Intent*, 24 IOWA L. REV. 471, 474 (1939) ("It is conceded as a general rule that the fact that the defendant committed a criminal offense at some other time than the one for which he is presently on trial is irrelevant . . ."); Slough & Knightly, *supra* note 1, at 333 ("To state that a man is disposed to commit murder, or disposed to commit larceny, therefore he most likely has committed murder or larceny on *this* occasion is tantamount to a rejection of all common sense rules of relevancy.") (emphasis in original).

94. Suppose, for example, that *X* is arrested for bank robbery. Eyewitnesses identify *X* as the robber, and *X* was apprehended near the scene of the crime. The prosecution now wishes to offer evidence that *X* had committed 10 bank robberies (all using common techniques) in the past year. Further, it is clear that the police did not focus attention on *X* because of *X*'s prior conduct (thus avoiding the "usual suspects" problem). Under these circumstances, it is difficult to argue that the evidence of *X*'s prior behavior, offered to show a character-based disposition to rob banks, is not highly probative of *X*'s guilt. This appears particularly true if one imagines a situation in which all of the prosecution's evidence is the same except that *X* is a longtime member of the clergy who is known in the community as a law-abiding citizen.

This is not an argument for admissibility of the character evidence at issue in the hypothetical. As I argue herein, there are many compelling reasons to exclude character evidence that do not depend on its lack of significant probative value.

appear to be several reasons. First, courts have long been concerned about the dangers posed by character evidence. Most commonly cited is the danger of unfair prejudice, which takes at least two forms. One form might be called "inferential error prejudice." It occurs when the factfinder assigns undue weight to the evidence as evidence of guilt of the present charge. Justice Jackson had this type of danger in mind when he wrote:

The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.⁹⁵

Similarly, Wigmore believed that evidence of other bad acts should not be admitted because "[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited."⁹⁶ Others have written in a similar vein.⁹⁷

Wigmore, however, also focused on a second type of prejudice when he discussed the danger that the factfinder might "take the proof of it as justifying a condemnation irrespective of guilt of the present charge."⁹⁸ This might be called "nullification prejudice," because when the jury acts in this manner, it convicts a person for being a bad person, not for guilt of the particular crime at issue. Other writers have also identified this kind of prejudice.⁹⁹

95. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (footnote omitted). In the omitted footnote, Justice Jackson quoted a then nearly century-old statement of Chief Justice Cockburn:

"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 quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character."

Id. at 476 n.9 (quoting *Regina v. Rowton*, 10 Cox Crim. Cas. 25, 29-30 (1865)).

96. 1 WIGMORE, *supra* note 17, § 194, at 646. Wigmore undoubtedly did not mean that the actual probative value of the evidence is great, but rather that it tends to be given greater weight than that to which it is entitled. *See id.*

97. *See, e.g., Stone, England, supra* note 26, at 957 (noting concern that "even though such similar facts might be of probative weight to the fact alleged, they influence the minds of the jurymen unduly"); Clinton J. Morgan, Note, *Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence*, 3 VAND. L. REV. 779, 779 (1950) ("The evidence is not excluded because it has no probative value, but because its probative value is far outweighed by its prejudicial effect.").

98. 1 WIGMORE, *supra* note 17, § 194, at 646.

99. *See, e.g., United States v. Carrillo*, 981 F.2d 772, 774 (5th Cir. 1993) ("Character evidence is not excluded because it has no probative value, but because it sometimes may lead a jury to convict the accused on the ground of bad character deserving punishment regardless of guilt."); MCKELVEY, *supra* note 92, § 108, at 149 ("The reason for excluding this class of evidence is its unreliability in that it may be easily affected by passion or prejudice on the part of the witness testifying, and also the danger that it may be given undue weight by the jury."); Lacy, *supra* note 92, at 285 (recognizing potential for prejudice and possibility that prosecutors

Unfair prejudice is not the only concern, however. The writers have long stressed at least two other reasons to exclude evidence of other acts. First is the unfairness of surprising the actor with such evidence. This consideration overlaps with that of unfair prejudice, but encompasses more basic fairness concerns as well. Wigmore, in fact, considered unfair surprise to be the "chief reason" for the character rule,¹⁰⁰ and cited cases as far back as 1684 supporting exclusion for reasons of surprise.¹⁰¹ Others have also mentioned this concern.¹⁰² Though surprise is less of a concern under modern rules,¹⁰³ it can still arise in some situations. For example, if defendant has withheld information of other misconduct from counsel (perhaps believing that the prosecution would not learn of it or would not be permitted to use it), prosecution questioning on the matter might both surprise the defendant and place unprepared defense counsel at a disadvantage in seeking to minimize the impact of the evidence.

Finally, courts exclude character evidence out of fear of its complicating effect and jury confusion that can result. The danger of overcomplication of issues, and the confusion it is likely to engender, is very real. As one writer has noted, "particularly if there is a dispute about whether the defendant committed the

sometimes offer such evidence "more for its prejudicial than for its probative value"); Stow, *supra* note 87, at 63 (noting the danger of "being harassed and prejudiced by questions regarding other offences committed or alleged to have been committed by [an accused person]"); *Other Crimes*, *supra* note 92, at 473 (noting the danger that the factfinder "will . . . convict the defendant simply on the basis of his criminal record, or at least will be strongly prejudiced against his cause"); Ray Justak, Case Comment, *Admissibility of Other Offenses to Prove Intent in Sex Cases*, 39 J. CRIM. L. & CRIMINOLOGY 485, 486 (1948) (noting the danger of prejudice to the accused in sex cases).

100. 1 WIGMORE, *supra* note 17, § 216, at 713. He wrote that "the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications." *Id.* § 193, at 646. (Wigmore may have been speaking both of surprise and the sort of prejudice already discussed.)

101. *See supra* note 24.

102. *See, e.g.,* THAYER, *supra* note 17, at 525 (noting that such evidence "tend[s] to surprise a man"); Stone, *England*, *supra* note 26, at 957-58 ("such evidence is said to be excluded because its introduction surprises the defendant unfairly, compelling him, at a moment's notice, to answer charges concerning the whole of his past life"); Justak, *supra* note 99, at 486 ("[s]uch evidence is also objectionable because it requires the defendant to defend himself against crimes with which he is not charged in the indictment"). One other author, while not specifically mentioning surprise, nevertheless discussed considerations of fairness as supporting the rule. *See* MCKELVEY, *supra* note 92, § 108, at 149-50 (asserting that the rule is supported by "the same spirit of fairness which concedes everything to the accused, and throws all burdens upon the accuser, that characterizes the English law of evidence").

103. The drafters of the Federal Rules of Evidence did not include "surprise" as among the dangers against which probative value should be measured when determining whether to exclude relevant evidence. The Advisory Committee appeared to believe that danger of surprise can be reduced by notice requirements and other procedural devices, and that its impact can be evaluated under the heading of "unfair prejudice." *See* FED. R. EVID. 403 advisory committee's note. An amendment to Federal Rule 404(b), in fact, requires that in criminal cases, the prosecution provide the defendant notice of its intent to introduce evidence of the defendant's other acts, and of the general nature of the evidence it intends to offer. *See* FED. R. EVID. 404(b).

other acts, introduction of evidence concerning those acts could be time-consuming and distract the factfinder from the central issues in the case."¹⁰⁴ This concern, too, has been voiced for several hundred years.¹⁰⁵

B. The Aspirational Rationale

Another justification for the character rule might be classified as *aspirational*. To understand this justification, it is necessary to address briefly two potential purposes of evidence rules.

Broadly speaking, evidence rules can be designed to serve two different types of purposes. First, and most frequently, evidence rules can facilitate the adjudication process itself. Second, rules of evidence can be designed to promote or effectuate a substantive policy of the law.¹⁰⁶

Rules can be designed to facilitate the adjudicatory process in many different ways. Some rules, for example, regulate the inferential process by informing the jury about the uses to which certain evidence may be put.¹⁰⁷ Other rules are aimed at increasing the accuracy of verdicts,¹⁰⁸ speeding the trial,¹⁰⁹ making the testimony of witnesses more coherent,¹¹⁰ preventing undue embarrassment of witnesses,¹¹¹ or preventing the jury from being misled or confused.¹¹² Simple

104. Kuhns, *supra* note 15, at 777; *see also* Stone, *England*, *supra* note 26, at 958 ("the introduction of [other acts] evidence is said to bring in collateral issues of which there would be no end"); Justak, *supra* note 99, at 486 (noting that other acts evidence "tends to complicate the issues for the jury").

105. *See* Harrison's Trial, 12 How. St. Tr. 833, 864 (Old Bailey, London 1692); *supra* note 24 (discussing *Harrison's Trial*, where Lord Chief Justice Holt criticized evidentiary practices that amount to putting the defendant's entire life on trial); *see also* MCKELVEY, *supra* note 92, § 108, at 150 ("In many civil cases the exclusion of character evidence rests also upon the very slight value which it has to establish any fact in issue, and the danger of leading the jury into collateral inquiry which will confuse and obscure the real issues.").

106. Some rules, of course, can serve both adjudicatory and substantive purposes. For a preliminary examination of the relationship between evidentiary rules and substantive law, *see* David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797 (1992).

107. Perhaps the clearest example is the limited-admissibility rule, which requires the court to take steps to prevent the jury from using evidence for impermissible purposes. *See* FED. R. EVID. 105. Federal Rule 105 is discussed at length in LEONARD, *supra* note 36, ch. 1.

108. *See, e.g.*, FED. R. EVID. 102 (instructing the court to construe the rules "to the end that the truth may be ascertained").

109. *See, e.g., id.* Rule 403 (empowering the judge to exclude evidence that is needlessly cumulative or would cause undue delay); *id.* Rule 611(a)(2) (empowering the judge to take steps to "avoid needless consumption of time"); *id.* Rule 102 (requiring the judge to administer the trial so as to "eliminat[e] . . . unjustifiable expense and delay").

110. *See, e.g., id.* Rule 611 (generally empowering the judge to control the mode and order of witness interrogation, and loosening common law rules concerning the scope of cross-examination and the use of leading questions).

111. *See, e.g., id.* Rule 611(a)(3) (empowering the court to control interrogation so as to "protect witnesses from harassment or undue embarrassment").

112. *See, e.g., id.* Rule 403 (guarding against the admission of evidence that would "confus[e] the issues, or mislead[] the jury").

fairness is also a stated purpose of some evidence rules.¹¹³ Of course, some rules serve the adjudicatory process by seeking to avoid unfair prejudice;¹¹⁴ as already noted,¹¹⁵ this is often stated as the key purpose of the character rule.

Rules of this type do not primarily serve important substantive legal policies or values. Though they often have secondary impact on substantive policy, their main purpose is to promote efficiency and accuracy of adjudication, and to see that the trial is conducted with decorum and civility. Their primary purpose is not to vindicate substantive rights.

Other rules are more substantive in nature. The rule regulating the admissibility of subsequent remedial measures is a good example.¹¹⁶ Though the rule serves some adjudicatory goals such as efficiency by excluding irrelevant or marginally probative evidence, and simple fairness,¹¹⁷ its primary purpose is to promote public safety by encouraging those who own or control dangerous instrumentalities to take steps to make them reasonably safe.¹¹⁸ Another example is the rule excluding evidence of liability insurance.¹¹⁹ Though its primary purposes are to prevent prejudice caused by the jury awarding excessive damages against the insured party on the basis that the party will not ultimately be responsible for paying the damages and to limit the admission of irrelevant or marginally probative evidence,¹²⁰ the rule also promotes compensation of injured parties by encouraging people to obtain liability insurance.¹²¹ Part of the purpose of both the subsequent remedial measures rule and the liability insurance rule is, therefore, to promote morally virtuous behavior, or, at least, to prevent subversion of virtuous behavior. In this sense, these rules are aspirational.

The character rule is undeniably designed in part for adjudicatory purposes. By targeting the unfairly prejudicial effect of bad character evidence, the rule seeks

113. There are many examples of rules promoting fairness. Among them are *id.* Rule 102 (citing "fairness in administration" as a purpose of the rules), and *id.* Rule 106 (requiring admission of other parts of a writing when a party is allowed to introduce some part of the writing). The so-called "curative admissibility" doctrine also promotes fairness by allowing admission of evidence that would otherwise have been excluded when the adverse party improperly introduces inadmissible evidence. See 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5039, at 199 (1977) (describing concept referred to variously as "'waiver,' 'estoppel,' 'opening the door,' 'fighting fire with fire,' and 'curative admissibility'"). In addition, rules requiring notice to the adverse party when a party intends to introduce certain types of evidence are fairness-oriented rules. See, e.g., FED. R. EVID. 404(b) (requiring notice of intent to introduce other crimes, wrongs, or acts evidence); *id.* Rule 412(c) (requiring notice of intent to introduce evidence of past sexual behavior of alleged victim in sex-offense cases).

114. This is the most common use of Federal Rule 403 and its state counterparts.

115. See *supra* notes 95-99 and accompanying text.

116. See FED. R. EVID. 407 (excluding evidence of subsequent remedial measures when offered "to prove negligence or culpable conduct").

117. See LEONARD, *supra* note 36, §§ 2.3.1, 2.3.3.

118. See *id.* § 2.3.2.

119. See FED. R. EVID. 411 (excluding evidence of the possession of liability insurance coverage if offered "upon the issue whether the person acted negligently or otherwise wrongfully").

120. See LEONARD, *supra* note 36, §§ 6.4.1-4.2.

121. See *id.* § 6.4.3.

to prevent inaccurate verdicts caused by overvaluation of the evidence, to lessen any punitive impulses the jury might have, and to help ensure that a party is not faced with evidence it was not prepared to meet. Additionally, by limiting inquiry into collateral matters, the rule prevents confusion and streamlines the trial.

But the character rule also has aspirational goals. I have already pointed out that the principle that guards against trial by character is deeply embedded in English and American history and practice.¹²² This is not a mere adjudicatory policy; most fundamentally, it represents a substantive value about how people *should* behave in relation to each other. It tells us that in making judgments that affect each other, some kinds of considerations should be out of bounds. This concept requires further explanation and limitation.

Undeniably, we use evidence of character in our daily lives. When deciding whether to hire a certain person as a babysitter for our children, we place heavy emphasis on what we know (or have come to believe) about that person's sense of responsibility, judgment, caution, prudence, and thoughtfulness, among other qualities.¹²³ It is virtually impossible not to do so, and as a practical matter, any effort to regulate our behavior to prevent us from considering such qualities would fail. But even so, in our society there are ancient and deeply embedded moral proscriptions against the act of *speaking* ill of others, even when the information being passed along has a basis in fact. In Jewish tradition, this principle can be traced to Psalm 34, in which David states:

Who is the man that desireth life,
And loveth days, that he may see good therein?
Keep thy tongue from evil,
And thy lips from speaking guile.¹²⁴

This passage has given rise to the concept of *loshon hora* (literally, evil talk) and its opposite, *Shmiras HaLoshon* (guarding of the tongue). *Loshon hora* refers generally to various forms of speech prohibited by the *Torah*, and more specifically to derogatory or harmful speech.¹²⁵ *Shmiras HaLoshon*, on the other hand, concerns the quality of exercising caution in speech.¹²⁶ The two concepts are central to Jewish ideals, embracing the importance of expression, and the view that words can both help and harm. The very act of speech, in fact, is seen as the essential determinant of how people relate to each other in society,¹²⁷ recognizing that "at the core of virtually every broken friendship, shattered

122. See *supra* Part II.B.

123. I am grateful to Professor Miguel Méndez of Stanford Law School for supplying this example.

124. *Psalms* 34:13-14.

125. See SHIMON FINKELMAN & YITZCHAK BERKOWITZ, *A LESSON A DAY* at xvi (1995). The book is based on the writings of Chofetz Chaim.

126. See *id.*

127. "The Torah's laws of speech, whose observance is capsulized by the timeless term *Shmiras HaLoshon*, constitutes G[o]d's plan for how people should live with each other." *Id.* at xxi. "When one guards his speech and engages others in conversations that are positive and constructive, the merit of *Shmiras HaLoshon* is multiplied many times because, by exercising restraint in speech, one draws others to this *mitzvah* as well." *Id.* at xxxiv.

career or divorce is a seed of hatred, a seed usually planted by a hurtful word.”¹²⁸ Though hurtful speech often seems an innocuous part of human nature; in fact it is not.¹²⁹ It is, of course, difficult to control one’s hurtful thoughts, but it is the expression of those thoughts that does the real harm:

Thoughts exist in a separate, private sphere. Once articulated, the thought is no longer a private matter. It becomes an item on the world’s agenda—something to be agreed with or argued; proven or disproven; attended to or ignored.

A person may work side by side with someone for years, and during the entire time harbor the thought that the colleague is “annoying.” For all those years, the thought has no power to affect anything or anyone beyond the person thinking it. Then, one day, this person enters into a conversation with a third co-worker, and offers his assessment of the other man as “annoying.” The instant that thought is released into the world, it sets out on a path of destruction. Now another person’s attention has been drawn to this man’s allegedly “annoying” mannerisms. He loses a little respect for him, identifies him as a little less competent, a little less appealing.

Inevitably, this new assessment affects their relationship. It creates a bias in the third person’s mind which he will now confirm every time the “annoying” person does or says anything. And it may go much further. This third person may well share his new-found perception with others, thereby altering their perceptions as well. It is not even necessary that they believe what they hear. Even if they never seriously think about the statement, it seeps into the subconscious and colors their future assessments of this person’s behavior. The situation could easily evolve into one in which the colleague tagged as “annoying” feels inexplicably distanced from others. His livelihood, his self-esteem, even his outlook on life could suffer from the voicing of that one word, “annoying.”¹³⁰

As the above passage implies, it does not matter whether, in fact, the coworker is “annoying.” Even information that is truthful or accurate can do unwarranted harm.¹³¹ Our petty daily character judgments, when voiced, can be the source of the kind of hatreds that divide us as nations, as cultures. Our judgmental words deny the goodness and value of others:

Loshon hora reflects the belief that everyone and everything should conform to one’s own standard. It arises out of an intolerance of differences between oneself and others—someone else’s customs as opposed to one’s own, someone else’s opinion as opposed to one’s own, someone else’s financial approach as opposed to one’s own. The underlying basis for

128. *Id.* at xxi-xxii.

129. Finkelman and Berkowitz write:

[T]his devastating force has somehow glided through the centuries disguised as a relatively harmless aspect of human nature. But the toxicity of *loshon hora* isn’t hard to grasp. One need only examine the aspects of human nature that fuel it: arrogance, anger, jealousy, a critical attitude and a negative outlook. That is the formula that energizes *loshon hora* and sets it flying.

Id. at xxiii.

130. *Id.* at xxvii-xxviii.

131. One form of *loshon hora*, known as *motzi shem ra*, is simply slanderous. But other forms need not be untrue. See *id.* at xxxix-xl.

focusing on these differences is the sense that one's own way is the right way.¹³²

To speak ill of others not only hurts the subject, but also the speaker. To demean others is to demean oneself; though there might be momentary gratification in passing along such information, to do so leads ultimately to unhappiness and bitterness in the speaker.¹³³ For all of these reasons, Jewish law forbids *loshon hora*—forbids saying that a person is of bad character or possesses a negative character trait.¹³⁴ There is also a prohibition on *listening* to or heeding *loshon hora*.¹³⁵

On the other hand, to hold one's tongue, or to speak well of others, expresses the unity of people,¹³⁶ engenders mutual respect,¹³⁷ and "creates a greater sense of closeness and trust with one's friends and neighbors. . . . [W]ithout creating enemies and derogating others, there is still much to be said. The words that remain are those that can be spoken gently, that relate positive judgments and cement the bonds among friends."¹³⁸

The Jewish doctrines of *loshon hora* and *Shmiras HaLoshon* provide considerable support for the law's treatment of character evidence, particularly in criminal cases. By forbidding the use of bad character to prove guilt, the law prevents the prosecution from calling witnesses to speak ill of others, even when the information is accurate. On the other hand, it is permissible for defendant to call witnesses to attest to defendant's good qualities that would make criminality less likely. Only then may the prosecution respond with contrary evidence, to correct injustice that might result from the jury's lack of balance in understanding defendant's character. The contemporary law has not gone even this far, with the possible exception of the recent adoption of rules permitting character evidence in rape and other sexual-assault and child-molestation prosecutions.¹³⁹ It thus appears that in generally forbidding the use of bad character evidence, the law has adopted the basic tenet of *loshon hora*.¹⁴⁰ The

132. *Id.* at xxxvi.

133. As the authors of one text state, "In his eyes, he is surrounded by irritating, inconsiderate, flawed people who make his world a disappointing, uncomfortable place." *Id.* at xxxvii. More deeply, it is thought that the speaker's "words, and the sense of power they confer upon him, foil the soul's constant striving toward its Source. By pushing others down, *loshon hora* provides one with the illusion of becoming more elevated." *Id.* at xxxvii-xxxviii.

134. *See id.* at 58.

135. *See id.* at 230.

136. *See id.* at xxxii.

137. *See id.* at xxxv.

138. *Id.* at xxxix. It has even been said that *Shmiras HaLoshon* is the key for attaining God's mercy. *See id.* at xlv.

139. *See* FED. R. EVID. 413-15.

140. There are exceptions to the prohibition of *loshon hora*, the most common of which is when relating such information serves a constructive purpose. Even then, however, there are strict limits. The rules are complex, but may be summarized as follows: One may speak negatively about a person only to help the person or another the person has victimized, to resolve major disputes, or to enable others to learn from the person's mistakes. Even then, several preconditions must each be satisfied: The remarks must be based on firsthand information and careful investigation; it must be clear that the person is wrong; the person has

doctrine of *loshon hora*, deeply embedded in Jewish tradition, thus provides strong aspirational support for the character evidence rule.

Religious tradition aside, there is an important distinction between conducting trial by character and the everyday use of character to govern one's conduct. In making judgments such as whether to hire a certain person to care for our children, we are looking forward, not back. We are striving to limit risk, increase the value of the forward-looking decision, and create a situation in which we will be comfortable and reassured. To the extent our judgment whether to hire a particular babysitter is based on these types of considerations, even a decision based on an inaccurate assessment of the person's character might be relevant; we will feel better not hiring the person even if the stories we have heard are exaggerated or simply untrue. And if our goal is to minimize risk of future harm, a decision not to hire somebody who has carelessly performed babysitting duties in the past in fact serves that goal, because to some limited extent, our action will indeed decrease the risk. The point is that in such a situation, we are not seeking to determine whether a particular event will in fact take place at a specified time in the future, but whether the risk of that event occurring is sufficiently great to merit extra caution. Generally, character-based decisions in everyday life are of this kind.¹⁴¹

been confronted but refuses to change his behavior; the statement will be accurate; the speaker's intent is solely constructive, and there is a reasonable chance that the intended goal will be achieved; there is no alternative means of achieving the goal; and the statement will not cause undue harm. See FINKELMAN & BERKOWITZ, *supra* note 125, at 148. So, for example, when one knows of a serious threat to another person of which that person is unaware, it is permissible (in fact, obligatory) to pass along the information, as long as the conditions described above have been satisfied. See *id.* at 188. (In cases of only possible harm, a warning may be given, but if based on hearsay, the warning must be couched as founded on unconfirmed secondhand information that may or may not be true. See *id.* at 190.) Negative information may also be shared when necessary to prevent or break up a relationship that is harmful to one of the parties, again assuming that the preconditions have been met. See *id.* at 210.

The narrow exceptions to the prohibition of *loshon hora* do not track perfectly those that apply in contemporary evidence law, though some states have partly adopted the exception for the ignorant victim of a threat. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345-51 (Cal. 1976) (holding that therapist-defendant could be liable for failing to warn plaintiff of potential serious threat posed by defendant's patient, in part because societal interest outweighs general practice of doctor-patient confidentiality). Even if the prosecution can demonstrate that the character evidence it possesses is accurate and will help lead to the conviction of a dangerous criminal, the rules do not allow admission of the evidence.

141. It is true that not all uses of character in daily life concern decisions about the future. All parents, for example, are called upon often to resolve disputes among their children that require determining what has happened in the past. But even when acting in a pseudojudicatory mode, we are often not truly called upon to make actual determinations of past events. Indeed, parents often resolve the dispute among their children not by reaching a decision about what occurred, but by assuming the status of informal mediator, seeking to facilitate compromise and accommodation rather than assuming the role of factfinder. Even in situations in which parents "decide" facts about past events, such decisions are informal and often based much more on the desire to terminate the dispute than adjudicate rights.

As shown, it is not always *good* to make such character judgments in our daily lives, even if we can hardly cease doing so altogether. Wrongful judgments, and the accusations that often accompany them, do cause harm. Were we able to do so, we would be considerably more comfortable if we could base our decisions on reliable, concrete information rather than vague rumors and idle speculation. In other words, we might *aspire* to do better by our neighbors.¹⁴²

Decisions made in the courtroom are fundamentally different. In that public setting established for the formal resolution of disputes about past events, we are forced to adjudicate facts; we can seldom avoid making concrete and largely final decisions about events. In this context, the harms that can be engendered by character-based decisionmaking can be extremely costly.

Even though we are aware that "truth" can never be determined with certainty, factfinding error can be very costly. Naturally, error can have significant impact on the parties, whose financial well-being, freedom, and even life may depend upon the outcome. Because admission of character evidence frequently creates a significant risk of inferential error, decisions based upon it are often highly dubious.¹⁴³ Judgments based on erroneous factfinding not only affect the parties in the case before the court, they also erode public confidence in the civil- and criminal-justice systems, creating a very real risk of disorder. It is one thing to rely on broad and often unreliable notions of character when making forward-looking decisions in everyday life; it is quite another to use such information as the basis for formal adjudication of serious disputes about past events. If we are somewhat uncomfortable about using character evidence to make decisions in our daily lives, we should be particularly troubled about its use when the stakes are considerably higher.

Regardless of the accuracy of character evidence in a given situation, however, its use in formal adjudication also violates the common principle that people should not be judged based upon their characters. The trial can and should be a model for formal decisionmaking. The types of evidence we find acceptable in that setting should represent our highest, not our lowest, instincts about how we ought to behave. If we believe that we should avoid making decisions based on character, then the trial process should reinforce that belief through regulation

142. In the middle territory between informal private behavior and formal courtroom decisionmaking, errors of judgment can be very costly. Consider the case of Richard Jewell, for several months very publicly held out as a suspect in the fatal bombing that took place in a public square during the 1996 Summer Olympics in Atlanta. The event occurred in July 1996, and it was not until late October, nearly three months later, that the F.B.I. formally notified Mr. Jewell that he was no longer a suspect. In the interim, his life was made extremely difficult. He could not find employment, and his name became synonymous with a certain type of profile of a deranged terrorist. He can hardly be accused of exaggerating when he states that the time during which he was a suspect was a "nightmare," and that the accusation nearly destroyed his life. Demonstrating the impact of inaccurate reputation and opinion evidence, Jewell stated, "Let the headlines be based on facts. . . . Don't shape the facts to make the headlines." Eric Harrison, *Tearful Jewell Describes 3-Month "Nightmare"*, L.A. TIMES, Oct. 29, 1996, at A1 (omission added).

143. Of course, even if character evidence were allowed, it would seldom constitute the only evidence against defendant. In some cases, however, it would undoubtedly tip the scales against defendant.

of character evidence. As such, it can model the kind of behavior to which we aspire. It can encourage people to seek ways to avoid judgment by character in their everyday lives, even while recognizing that some decisions in daily life will always be based on such information.

C. Historical, Religious, and Philosophical Foundations

Although the historical, religious, and philosophical roots of the character rule are difficult to uncover with certainty, there are some clues.

1. Historical Foundation

From the standpoint of history, it is no coincidence that the rule excluding evidence of character became universally recognized in England and the United States during the period of rapid industrialization. This development, one of the most significant social upheavals in human history, brought several fundamental changes in the social structure. These changes were mirrored in our conception of the trial and of the procedural rules governing it.

Industrialization brought people together in numbers not seen before. Prior to the nineteenth century, European and American society was largely agrarian.¹⁴⁴ Because most people produced the things necessary to sustain life, or were provided with these necessities by the landowners for whom they worked, it was not necessary to maintain a large number of connections with the world outside their homes. When it was necessary or useful to deal with others, the relationships were more personal; people were well acquainted with each other and relied upon this personal knowledge to conduct business and form social ties. People knew the characters of those with whom they had social and business ties, and felt competent to determine the proper level and nature of their interactions with others on the basis of this knowledge.

Preindustrial society—particularly feudal society—was also characterized by rigid social stratification.¹⁴⁵ A small landowning class controlled the vast majority of wealth and power. The bulk of the population either lived in poverty or depended upon the wealthy class for work and support; there was very little of what today would be called a middle class. In the eyes of others, one's status

144. Even much earlier, however, cities had begun to grow. It has been estimated that during the period from 1050 to 1200, the urban population of Europe increased tenfold. See BERMAN, *supra* note 82, at 534.

145. This does not mean that Western "feudal" law and society did not contain the seeds of some modern institutions; the contrary appears to be true. See *id.* at 532-45. Berman writes:

The historiography is basic to the theory: if the historiography is wrong, the theory falls with it. If the main features of modern Western law, the main legal concepts and institutions and processes, emerged in the late eleventh and twelfth centuries—the heyday of what social theorists, starting with the Enlightenment and the French Revolution, have called the era of feudalism—then that fact in itself is a substantial refutation of the usual materialist view both of law and of history.

Id. at 543-44.

in this rigid structure was highly indicative of one's moral worth. While it is an oversimplification to say that people were not viewed as individuals but solely as creatures of their status, this characterization is more accurate as a description of preindustrial than of industrial society.

Key aspects of the early procedural law reflected these personal characteristics of Western culture. People's confidence in their ability to assess the characters of their associates was manifested in the modes of trial employed in the early days of the common law. The "trial" was conducted largely through the observance of certain formalities, none of which had much to do with what we would today consider "proof." In particular, the term "witness" often carried a completely different meaning. Referring to the early common law form of trial known as "trial by witnesses," Thayer wrote:

This appears to have been one of the oldest kinds of "one-sided" proof. There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge's mind. Certain transactions, like sales, had to take place before previously appointed witnesses. Those who were present at the church door when a woman was endowed, or at the execution of a charter, were produced as witnesses. In case of controversy it was their statement, sworn with all due form before the body of freemen who constituted the popular court, that ended the question.¹⁴⁶

In some modes of trial, formalism was carried to an extreme; truth was determined by the sheer *number* of "oath-takers" one produced. Formal procedures in fact prescribed the number of witnesses one must produce in order to "prove" a claim or defense. Producing that number of oath-takers would be accepted as proof of the validity of the underlying claim or defense. "Proof" was in the act of bringing forth these witnesses; it was not in any knowledge these witnesses might have possessed about the particular transaction or event at issue.

Thus, in large part, the early common law trial was an exercise in determining the character of the parties. A person prevailed not by proving facts in the modern sense, but by demonstrating her good character. Even when Henry II instituted the inquest form of trial in the late twelfth century, there was no taking of "evidence" in the modern sense. Rather, the royal judges would pose a series of specific questions to jurors, who were neighbors of the parties and had personal knowledge of the facts. These questions would then be answered when the judges visited to formally hear the cases.¹⁴⁷

Though the modern trial (and the formal evidentiary system by which it is conducted) began to develop centuries before the period of industrialization, its growth was at first very slow.¹⁴⁸ As the process of "proof" began to be conceived

146. James Bradley Thayer, *The Older Modes of Trial*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 376 (Association of Am. Law Sch. ed., 1908) [hereinafter SELECT ESSAYS] (citations omitted).

147. See BERMAN, *supra* note 82, at 449.

148. Vestiges of older forms of trial continued in parts of Europe for centuries after reforms began:

The blood feud continued in many parts of Europe into the fifteenth century, despite the opposition of both canon law and royal law. . . . Although Germanic procedures of compurgation were transformed into testimony under oath,

as a reconstruction of past events employing witnesses with firsthand knowledge, formal evidence rules governing the trial emerged. Wigmore found no indication of evidence rules through the twelfth century,¹⁴⁹ but he noted the beginning of a fundamental change in the concept of the trial between the years 1200 and 1500: "With the full advent of the jury, in the 1200s, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests."¹⁵⁰

Wigmore points out, however, that during this period, "jurors are as yet relied upon to furnish in themselves both knowledge and decision."¹⁵¹ From the sixteenth through the eighteenth centuries, however, changes occurred, that made possible the modern trial and a formal set of evidentiary rules:

By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises.¹⁵²

From this point, evidence rules proliferated as the modern formal trial system evolved. By 1830, most of the basic principles of modern evidence law had appeared.¹⁵³ It was during this latter period that the rule generally barring evidence of character to prove a person's conduct became firmly established.¹⁵⁴ Trials were no longer stylized exhibitions of the moral characters of the parties. Rather, in line with Enlightenment thinking then dominant throughout much of Europe and the United States, trials were conceived of as a rational, even "scientific," search for truth¹⁵⁵ in which evidence was aimed more at determining conduct than at attempting to discern the inner nature and moral worth of the parties.

nevertheless the measuring of the value of an oath according to the status of the witness showed traces of the old formalism.

Id. at 527.

149. See John Henry Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 SELECT ESSAYS, *supra* note 146, at 691, 691-92.

150. *Id.* at 692.

151. *Id.*

152. *Id.* at 692-93.

153. See *id.* at 695-97.

154. See *supra* Part II.B.

155. See Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 410 (1995) (noting "the Enlightenment belief in the fundamental separability of the subjective mind and the objective world, and the identification of truth with neutral objective reality"). Cammack also stated that current understandings of ideal qualifications for judicial factfinders can be traced to the Enlightenment idea that truth is objective and knowledge true only if it is an accurate representation of the external world. See *id.* at 411-15; see also Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 486 (1996) ("Since the Enlightenment, there has been a sustained effort . . . to devise methods of dispute resolution applying previously stated law to facts, facts discerned on the basis of documentary and real evidence, sworn testimony, empirical probability, and the application of rational inference from undisputed reality.").

The common law trial, then, began as a character-based exercise. "Proof" was less by establishing facts than by demonstrating the parties' relative merits as human beings. The adoption of a more modern concept of "proof" was precisely a rejection of the primacy of character. It was an embrace of the Enlightenment idea that the private and public lives of people should be separated, and that in their public existence, people should be judged not according to who they are but by their deeds.

The final stages of the evolution of the trial from a formal demonstration of inner moral character to a more "objective" search for accurate reconstruction of events were accompanied by the beginning of the period of industrialization. This innovation brought about a fundamental and (to this day) permanent change in the social structure from one almost entirely rural to one increasingly urban in nature.¹⁵⁶ With the advent of large factories, cities grew dramatically to form a vast urban web in which people no longer produced the necessities of life for themselves. Now, to obtain goods and services it was necessary to turn to specialists, and doing so required the formation of a complex series of interdependent and increasingly anonymous relationships. Ironically, though urbanization brought a growing percentage of the population together into closely packed cities, the very fact that it was necessary to deal with so many people and business entities on a day-to-day basis made it impossible to know very many people very well. With urbanization and specialization it was no longer feasible to know the "characters" of the people with whom one dealt in daily life.

The increasingly anonymous and complex social and economic lives of the growing urban classes therefore mandated a different conception of personal responsibility. Because the absence of information made it no longer possible for people to judge each other by their inner moral characters, proof had to be made by resort to external signs.

2. Protestant Theology and the Doctrine of Predestination

The social shift away from emphasis on inner character can also be associated with the rise of Protestantism. As Max Weber pointed out, this movement,

156. Examining these massive demographic changes, one author writes: "From the end of Reconstruction until World War I, the United States was transformed from an agrarian, rural nation in which business was conducted primarily by small, locally owned firms, to an urban, industrial economy in which business was dominated by large, nationally based corporations." Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 598 (1994). The author also notes that "[t]he rapidly growing urban areas controlled sources of finance and marketing. Significant economic decisions now were being made in far away places by unknown parties, rather than locally." *Id.* at 602. Another historian describes the United States during the nineteenth century as a society of "island communities" which conducted their business informally and personally. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at xiii (1967). Today, of course, the economy is becoming global, as evidenced by the North American Free Trade Agreement, the expansion of the European Community, and other multinational trade agreements.

particularly as characterized by Calvinism, was closely linked to the growth of modern capitalism, and fundamentally altered the focus of peoples' lives.¹⁵⁷ A foundational tenet of Calvinist philosophy was the doctrine of predestination, which holds that whether one is among the elect or the damned is predetermined, cannot be ascertained with certainty, and can never be changed by good deeds or inner reforms on the part of the individual. Calvin wrote:

Man, by his fall into a state of sin, hath wholly lost all ability of will to any spiritual good accompanying salvation: so as, a natural man, being altogether averse from that good, and dead in sin, is not able, by his own strength, to convert himself, or to prepare himself thereunto.¹⁵⁸

By the decree of God . . . some men and angels are predestinated unto everlasting life; and others forordained to everlasting death.¹⁵⁹

Those of mankind that are predestinated unto life, God, before the foundation of the world was laid, according to His eternal and immutable purpose, and the secret counsel and good pleasure of His will, hath chosen, in Christ, unto everlasting glory, out of His mere free grace and love, without any foresight of faith, or good works, or perseverance in either of them, or any other thing in the creature, as conditions, or causes moving Him thereunto; and all to the praise of His glorious grace.¹⁶⁰

The rest of mankind God was pleased, according to the unsearchable counsel of His own will, whereby He extendeth or withholdeth mercy, as He pleaseth, for the glory of His sovereign power over His creatures, to pass by; and to ordain them to dishonour and wrath for their sin, to the praise of His glorious justice.¹⁶¹

Calvinist theology, in fact, held that achieving grace had nothing to do with one's actual moral worth. As Weber explained Calvin's position:

God does not exist for men, but men for the sake of God. All creation, including of course the fact, as it undoubtedly was for Calvin, that only a small proportion of men are chosen for eternal grace, can have any meaning only as means to the glory and majesty of God. . . .

. . . We know only that a part of humanity is saved, the rest damned. To assume that human merit or guilt play a part in determining this destiny would be to think of God's absolutely free decrees, which have been settled

157. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Charles Scribner's Sons 1958) (1904-05). For criticism of Weber's historicism, see BERMAN, *supra* note 82, at 545-52. While praising aspects of Weber's work, Berman criticizes Weber's classification of societies into various ideal types (which, to some extent at least, correspond to actual societies), and each with a particular idealized form of law. This classification system made it difficult for Weber to see that actual Western legal systems as they emerged during the late eleventh and early twelfth centuries actually contained aspects of all of the types Weber had described. See *id.* at 550-51.

158. CORNELIUS BURGESS, *THE CONFESSION OF FAITH OF THE ASSEMBLY OF DIVINES AT WESTMINSTER* ch. IX (*Of Free-Will*), § 3 (S.W. Carruthers ed., Free Presbyterian Publications 1978) (1646).

159. *Id.* ch. III (*Of God's Eternal Decree*), § 3.

160. *Id.* ch. III, § 5.

161. *Id.* ch. III, § 7.

from eternity, as subject to change by human influence, an impossible contradiction. . . . God's grace is, since His decrees cannot change, as impossible for those to whom He has granted it to lose as it is unattainable for those to whom He has denied it.¹⁶²

The futility of any effort to achieve salvation through good deeds did not, however, lead to a belief that engaging in good deeds was of no value. On the contrary, though it is impossible for one to change his or her fate, the person might find clues in successes and failures in the ordered affairs of daily life.¹⁶³

The underlying philosophy of predestination, tempered with the hope that one might find evidence of one's fate through good deeds and material success, caused people to change their perspectives from one focusing on a person's internal moral character to an examination of individual worldly achievement. The greater one's accomplishments (mostly, of course, the accumulation of wealth), the more likely it was that the person was among the elect. Evidence of a person's fate thus consisted in the fruits of individual initiative and accomplishment. Though the Protestant movement as described by Weber arguably might be compatible with a particular class of character judgment (character as measured by the accomplishments of the individual), the inquiry was quite different from the type of judgment supported by a class- or group-based moral inquiry in the more stratified preindustrial society. Indeed, the Protestant view that evidence of one's fate can be found in an examination of worldly accomplishments is quite different from a judgment of morality or character. This is because the very point of this aspect of Protestant theology was not to determine one's actual moral *character*, but to find some evidence on the

162. WEBER, *supra* note 157, at 102-04 (footnotes omitted). In this, Calvin's philosophy was suggested by Luther's own views, though Luther did not emphasize this aspect of the doctrine. See *id.* at 99-100. Some Protestant thinkers after Luther rejected this view. As Weber explained:

Melanchthon quite deliberately avoided adopting the dark and dangerous teaching in the Augsburg Confession, and for the Church fathers of Lutheranism it was an article of faith that grace was revocable (*amissibilis*), and could be won again by penitent humility and faithful trust in the word of God and in the sacraments.

Id. at 102.

163. As Weber wrote:

[T]wo principal, mutually connected, types of pastoral advice appear. On the one hand it is held to be an absolute duty to consider oneself chosen, and to combat all doubts as temptations of the devil. . . . The exhortation of the apostle to make fast one's own call is here interpreted as a duty to attain certainty of one's own election and justification in the daily struggle of life. In the place of the humble sinners to whom Luther promises grace if they trust themselves to God in penitent faith are bred those self-confident saints whom we can rediscover in the hard Puritan merchants of the heroic age of capitalism and in isolated instances down to the present. On the other hand, in order to attain that self-confidence intense worldly activity is recommended as the most suitable means. It and it alone disperses religious doubts and gives the certainty of grace.

Id. at 111-12 (footnotes omitted).

ultimate question of one's *fate*, a matter which was not within human control. Character, then, was not the point.¹⁶⁴

In only this limited sense, a person's fate came to be connected in Protestant theory with the person's emergence as an individual.¹⁶⁵ Otherwise, the key Calvinist doctrine of predestination shunned the impact of "character" on an individual's worth.

3. Moral Philosophy

The view that society's focus should be upon one's acts rather than abstract moral character is also evident in the writings of late eighteenth and nineteenth century moral philosophers. Kant, in particular, believed that punishment could only be justified for the *act* of committing a crime: "*Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime.*"¹⁶⁶

This did not mean Kant was unconcerned with evidence of a person's psychological qualities; it was a person's internal character which he believed could not be the basis for punishment. Kant wrote:

164. Describing Puritan doctrine, Weber wrote that "works are not the cause, but only the means of knowing one's state of grace." *Id.* at 141.

165. The concept of "individualism," of course, can take many forms, some of which could lead to a very different conclusion. One iteration, for example, would hold that a judgment of individual worth should be based upon aspects of a person's private, inner life as well as of her public deeds. On this view, it is precisely a person's inner being that makes her a unique individual; the assignment of moral responsibility would thus require an inquiry into character.

Contrasting earlier guilds with capitalist arrangements of American Protestant entrepreneurs, Weber wrote:

The sect controlled and regulated the members' conduct *exclusively* in the sense of formal *righteousness* and methodical asceticism. . . . The capitalist success of a guild member undermined the spirit of the guild—as happened in England and France—and hence capitalist success was shunned. But the capitalist success of a sect brother, if legally attained, was proof of his worth and of his state of grace, and it raised the prestige and the propaganda chances of the sect. Such success was therefore welcome. . . . [T]he guild, of course, could not give birth to the modern bourgeois capitalist *ethos*. Only the methodical way of life of the ascetic sects could legitimate and put a halo around the economic "individualist" impulses of the modern capitalist *ethos*.

MAX WEBER, *The Protestant Sects and the Spirit of Capitalism*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 302, 322 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (emphasis in original).

166. IMMANUEL KANT, THE METAPHYSICS OF MORALS 140 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) (emphasis in original). Kant continued:

For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens.

Id. at 140-41 (emphasis in original).

The real morality of actions, their merit or guilt, even that of our own conduct, thus remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of this character is ascribable to the pure effect of freedom, how much to mere nature, that is, to faults of temperament for which there is no responsibility, or to its happy constitution . . . can never be determined; and upon it therefore no perfectly just judgments can be passed.¹⁶⁷

Hegel was another moral philosopher who believed it was the act that justified the punishment. Indeed, in his view, respect for the dignity of the criminal demanded punishment; it was an injury to the criminal *not* to punish:

The injury . . . which is inflicted on the criminal is not only just *in itself* (and since it is just, it is at the same time his will as it is *in itself*, an existence . . . of his freedom, *his* right); it is also a *right for the criminal himself*, that is, a right *posited* in his *existent* will, in his action. For it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right.¹⁶⁸

It has also been argued that John Locke's philosophy of individualism embraced a similar notion: that a person is "the natural proprietor of his own person and capacities, owing nothing to society for them."¹⁶⁹

In sum, prominent moral philosophers of the late eighteenth and early nineteenth centuries frequently adopted positions about the standing of the individual that are consistent with the exclusion of character evidence at trial. Though courts did not refer to the philosophers in creating and upholding the character rule, their jurisprudence echoed their influential voices.¹⁷⁰

167. IMMANUEL KANT, CRITIQUE OF PURE REASON 475 n.a (Norman Kemp Smith trans., London, MacMillan & Co. 1963) (1787); see ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 243 (1989) ("When Kant addresses the question of judging legal guilt, he necessarily limits such judgments to considerations of a person's external behavior and that person's empirical or psychological personality and history. There is no way to determine with any certitude an individual's purely internal moral character.").

168. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 100, at 126 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (emphasis in original).

169. C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 255 (1962).

170. Support for the character rule can also be found in eighteenth and nineteenth century political philosophy. The change from an agrarian to an industrial economy, and from a highly stratified to a more complex society, coincided with the rise of the equality principle embodied in such public documents as the American Declaration of Independence. The view that "all [people] are created equal," expressed at the nation's founding and reaffirmed at the height of the Civil War, see, e.g., GARRY WILLS, LINCOLN AT GETTYSBURG (1992), is incompatible with a rule permitting trial by inner moral character or social status. The Fourteenth Amendment to the Constitution, which guarantees to all citizens the "equal protection" of the laws, is also an explicit embrace of the fundamental concept of equality before the law.

This sentiment was occasionally echoed by the courts. In *People v. Molineux*, 61 N.E. 286 (N.Y. 1901), for example, the New York court defended the character rule partly on the basis that it is "rooted in [a] jealous regard for the liberty of the individual." *Id.* at 293. For further discussion of *Molineux*, see *supra* notes 46-48 and accompanying text.

To judge guilt or innocence of crime on the basis of what is presumed to be the person's moral character would violate the principle of equality at the heart of the relationship between

IV. LACK OF CHARACTER EMPHASIS IN SUBSTANTIVE LEGAL STANDARDS

The historical, religious, and philosophical movements that decreased the emphasis on the inner moral character find a counterpart in certain key developments in areas of substantive law. Aspects of tort law and criminal law will be considered, with a view toward demonstrating that the structure of modern tort and criminal law doctrine mirrors the broader social and philosophical movements already discussed.

While it is true that the earlier tort law did not typically base liability on personal moral fault, arguments for such standards were explicitly made but rejected by the courts during the nineteenth century. Instead, for accidental harm, courts universally opted for a standard that keeps the inquiry largely outside the mind and soul of the actor, and places it instead in the conduct of the person as compared to the mythical reasonably prudent person. And although change has occurred in some areas of tort law since the mid-nineteenth century, those changes have moved standards even further from the character of the actor and toward a form of strict liability. Even in the area of intentional torts, where the actor's "intent" must be shown, the inquiry remains relatively superficial in virtually all instances. Defendant's character is not in issue, nor must defendant be shown to have harbored malice or other ill will. Liability rests on the intentional *act* only, not abstract moral character.

Modern concepts of mens rea and intent in criminal law can be seen in a similar light. Whereas the linguistic formulations of legal standards were at one time heavily laden with moral terminology, modern standards are written in considerably more objective terms. Today, the focus is more on the lawfulness of the person's conduct than on the character of the person's soul. Where intent is required, what counts is not the state of mind that arises from moral depravity, but simply the intent to cause a particular outcome.

In these ways, the evolution of tort and criminal law doctrines tracks the rise of the external view in religious and moral philosophy.

the American government and the people. A rule requiring that people be judged by their actions and specifically defined state of mind at the time in question accords more respect to the principle of equality.

Admittedly, the equality principle argues *against* the rule generally permitting a criminal defendant to offer evidence of her good character to prove her innocence. *See, e.g.*, FED. R. EVID. 404(a)(1). A system that allows members of privileged classes or well-known and admired celebrities to assert their innocence by means of positive character evidence arguably offers those people benefits that would not be available to average people. On the other hand, the likelihood of *preventing* jurors from considering the reputations of well-known personalities is minimal.

*A. Nineteenth Century Evolution of Tort Doctrine:
Responsibility for Accidental Harm*

Early in the common law development of rules governing civil liability for accidentally caused harm, character was deemed impertinent. During the fifteenth and sixteenth centuries, liability was more or less strict.¹⁷¹ Generally speaking, one acted at one's peril. If, for example, a person cut his shrubs in such a way as to cause branches to fall on an adjoining neighbor's land, the person would be liable for any damages caused by the branches or by their removal, even if the initial falling occurred without carelessness.¹⁷² Only under limited circumstances would a person not be held liable for causing harm to another.¹⁷³ In short, action

171. See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

Civil liability in the common law was originally based on a fairly simple concept—trespass. The King's Court in early England issued the writ of trespass to any litigant who could show that he had sustained a physical contact on his person or property, due to the activity of another. . . . [I]t should be noted that this ancient concept of trespass had reference to any contact achieved as the consequence of one's conduct against the interest of another, no matter under what circumstances it occurred, as long as the defendant's causative conduct was his voluntary act.

Id. at 361-62; see also MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 70 (1977) ("Under traditional legal doctrine, trespasses or nuisances to land could not be justified by the social utility of the actor's conduct nor could the absence of negligence serve as a limitation on legal liability for injury to person or property."); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 316 (1894) (arguing that early tort law was "indiscriminate" in that it did not distinguish between acts that were intentional and acts that were accidental).

The conventional wisdom has been attacked in recent years by suggestions that the historical record does not support such a neat characterization of early common law. See, e.g., LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 299-302 (2d ed. 1985); G. EDWARD WHITE, *TORT LAW IN AMERICA* 13-15 (1980); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722-34 (1981).

172. See *Thorns Case*, Y.B. 6 Edw. 4, fo. 7, Mich., pl. 18 (1466), reprinted in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 94 (6th ed. 1995). Justice Littleton stated, "If a man suffers damage, it is right that he be recompensed . . . for if your cattle come on to my land and eat my grass, notwithstanding you come freshly and drive them out, it is proper for you to make amends for what your cattle have done . . ." *Id.*, reprinted in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 94, 96 (6th ed. 1995).

173. See *id.*, reprinted in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 94, 96 (6th ed. 1995). Chief Justice Choke stated:

[W]hen the principal thing is not lawful, then the thing which depends upon it is not lawful. For when he cut the thorns and they fell on to my land, this falling was not lawful, and then his coming to take them away was not lawful. . . . [B]ut he should have said that he could not do it in any other manner or that he did all that was in his power to keep them out And, Sir, if the thorns or a great tree had fallen on his land by the blowing of the wind, in this case he might have come on to the land to take them, since the falling had then been not his act, but that of the wind.

Id.; see also *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616). The court set forth several exceptions to the rule of strict liability:

outside of one's own domain was not a necessary part of life, and thus one should be responsible for the effects of those actions in which one chooses to engage. The point here is not that the early common law rule was one of character-based liability. To the extent the common law embraced a rule of strict liability for the harmful effects of one's volitional actions, the law eschewed concern with the actor's intentions, inner character, or motivations. The point is simply that the early common law viewed with suspicion any action that adversely affected others outside the narrow confines of home and family. It was arguably this position that changed with the onset of the industrial revolution.

Even as the growth of industry beginning in the early nineteenth century caused courts to rethink the value of action and the basis of liability for accidental harms,¹⁷⁴ courts did not adopt liability standards that called for an internal examination of actors' behavior and character. Instead, by the middle of the nineteenth century, courts had firmly established that in most situations,

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

Id. at 284. "Negligence" no doubt carried a different meaning, and more likely referred to something more akin to an "inevitable" accident. For a recent description of *Weaver v. Ward*, see generally Gary T. Schwartz, *Weaver v. Ward*, 74 TEX. L. REV. 1271 (1996) (forwarding *Weaver v. Ward* for "favorite case" in the Favorite Case Symposium).

174. By the early part of the nineteenth century, the old view of action went into decline. With the growth of industry, and particularly the construction of large factories to produce goods and railroads to carry raw materials and manufactured goods, some amount of harm came to be viewed as an inevitable, and indeed necessary, part of daily life. More to the point, the action that produced the goods, and made them available to the public, was viewed as a good thing rather than something people undertook at their peril. The growth of large cities and the complex social interactions they required of all inhabitants were considered a social good that benefited all, and with which the law should not interfere. *See, e.g.,* *Losee v. Buchanan*, 51 N.Y. 476, 484-85 (1873). Action, indeed, is progress. To adhere to a rule that made one liable without fault for harms caused in the development of one's land "would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism." *Brown v. Collins*, 53 N.H. 442, 448 (1873). Some American historians have asserted that nineteenth century tort rules were in fact designed to assist emerging industries by limiting the situations in which industries would be held responsible. Morton Horwitz wrote:

[S]ince many schemes of economic improvement had the inevitable effect of directly injuring or indirectly reducing the value of portions of neighboring land, common-law doctrines appeared to present a major cost barrier to social change. . . . In short, there existed a major incentive for courts not only to change the theory of legal liability but also to reconsider the nature of legal injury. In an underdeveloped nation with little surplus capital, elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development.

HORWITZ, *supra* note 171, at 70. However, the view that nineteenth century courts invoked the negligence principle as a subsidy to developing industry has been challenged. *See generally* Schwartz, *supra* note 171.

responsibility for causing accidental harm was to be measured not according to the personal weaknesses, intelligence, or abilities of the defendant, but according to the "objective" standard of the "reasonably prudent person." In the famous 1837 decision of *Vaughan v. Menlove*,¹⁷⁵ an English court explicitly rejected the defendant's argument that his responsibility for fire damage to a neighbor's property should depend on whether he acted "to the best of his judgment,"¹⁷⁶ opting instead for a standard common to all, that of "ordinary prudence."¹⁷⁷ In the 1850s, the principle of the "reasonably prudent person" became entrenched in American law.¹⁷⁸

In 1881, Holmes specifically addressed this objective theory of fault in *The Common Law*, rejecting the view that it should be based on one's individual shortcomings:

Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming, as would practically result from Austin's teaching. . . .

....

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. . . .

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for.¹⁷⁹

175. 132 Eng. Rep. 490 (C.P. 1837).

176. *Id.* at 492 (argument of defense counsel, R.V. Richards, in support of the rule).

177. *Id.* at 494 (opinion of Tindal, C.J.).

178. As Chief Justice Shaw of the Massachusetts Supreme Judicial Court wrote in the most celebrated case adopting this principle:

[I]f both plaintiff and defendant at the time of the [accident] were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time, both the plaintiff and the defendant were not using ordinary care, then the plaintiff could not recover. . . .

. . . [W]hat constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.

Brown v. Kendall, 60 Mass. 292, 296 (1850).

179. HOLMES, *supra* note 84, at 85-87.

Today, it is hornbook law that in most cases of accidental harm, liability will be imposed only for acts which, under the circumstances, would have been avoided by a reasonably prudent person.¹⁸⁰ Neither a rule of strict liability nor a rule considering personal moral shortcomings is generally applied.¹⁸¹ Tort law as a whole embraces few liability standards requiring proof of malice, ill will, or some other noxious state of mind.¹⁸² Indeed, concern about the dangers of imposing responsibility for certain morally questionable *failures* to act accounts in part for the general principle that forbids liability for failing to rescue a stranger whose peril was not caused by the defendant's conduct.¹⁸³

The more recent expansion of strict liability in tort law attests to the dominance of a nonpersonal conception of responsibility. To impose liability without fault is to reject explicitly the notion that character matters in such cases. Thus, for example, product manufacturers may be held strictly liable for harms caused by production defects. In such cases, one does not inquire into the steps the manufacturer took to produce a safe product; it is the *output* rather than the *input* that matters.¹⁸⁴ Evidence that the manufacturer monitored its production process reasonably, even beyond the efforts of other manufacturers of similar products,

180. Prosser and Keeton state the matter as practically necessary:

The whole theory of negligence presupposes some uniform standard of behavior. . . . The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act.

The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea: the "reasonable man of ordinary prudence."

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173-74 (5th ed. 1984) (footnotes omitted); see also RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

181. Strict liability for accidental harm is limited to certain classes of cases, including some products-liability actions. See *infra* notes 183-86 and accompanying text.

182. One of the rare situations in which tort law requires proof of such a state of mind concerns the award of punitive damages. According to the *Restatement*, such damages "may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2); see also CAL. CIV. CODE § 3294(a) (West 1997):

In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

183. See RESTATEMENT (SECOND) OF TORTS § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

184. See *id.* § 402A.

will simply be irrelevant to the question of liability.¹⁸⁵ Strict liability works in much the same way in other areas, such as liability for engaging in "abnormally dangerous" activities.¹⁸⁶

B. The Tort Law Concept of "Intent"

Rules governing liability for intentional torts also reflect a nonpersonal construct of responsibility. American courts' refinement of the elements of the tort of battery illustrates this framework.

In the influential late nineteenth century decision of *Vosburg v. Putney*,¹⁸⁷ defendant, a child of nine, was seated in a classroom that had been called to order by the teacher. Intentionally (but lightly and without intent to injure) defendant kicked the shin of the plaintiff, an eleven-year-old child across the aisle. Unforeseeably, plaintiff suffered grievous harm as a result of the kick.¹⁸⁸ Plaintiff sued, asserting a cause of action for battery. Defendant argued that because he did not intend to injure plaintiff, he could not be held liable. The Wisconsin Supreme Court, in an opinion which is still followed, sided with the plaintiff:

[P]laintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.¹⁸⁹

How does one determine whether the act was itself unlawful? The court continued:

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful.¹⁹⁰

The required unlawful intent for the tort of battery rests not in the defendant's intention to bring about harm, but only on the defendant's *intention to commit a*

185. By the same token, evidence of actual negligence by the manufacturer, if available, adds nothing to plaintiff's case that plaintiff cannot achieve through a strict-liability claim. Only if the plaintiff can demonstrate the kind of indifference or wilfulness that traditionally enables the plaintiff to recover punitive damages will the defendant's state of mind or moral shortcomings matter.

186. See RESTATEMENT (SECOND) OF TORTS § 519.

187. 50 N.W. 403 (Wis. 1891). For a discussion of the importance of this case on its centennial, see Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 WIS. L. REV. 877.

188. See *Vosburg*, 50 N.W. at 403. Apparently, defendant kicked plaintiff close to the site of a preexisting injury that had not completely healed. See *id.*

189. *Id.*

190. *Id.* at 403-04.

touching that the law brands as unlawful. If the act is unlawful, the intention to do the act is also unlawful. Thus, if the jury finds that defendant meant to kick plaintiff (as the jury found in *Vosburg*), it does not matter that defendant did not wish to cause harm,¹⁹¹ or even that defendant was not aware harm would occur.¹⁹² Nor is the door open to defendant's testimony that he did not know kicking plaintiff under these circumstances was an unlawful act; the jury will determine whether society considers the act unlawful, and if it reaches such a conclusion, it does not matter that defendant was unaware of that fact.¹⁹³ Therefore, it is the defendant's intention to do a particular act, and not the defendant's morality, that counts. Even a defendant ignorant of the possible consequences, or ignorant of the unlawfulness of the conduct, would be liable for battery if he intentionally brought about the touching that we characterize as unlawful. An actor who hopes that her act will not cause a touching will not escape liability if she knows that a touching is substantially certain to occur.¹⁹⁴ As Prosser and Keeton state, "[t]he actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence."¹⁹⁵

Even in the most basic of intentional torts, therefore, establishing the requisite mental state does not necessitate an inquiry into the defendant's moral character. This does not mean that there is no moral component to intentional torts. We consider a person who does not understand the unlawfulness of her actions to be morally flawed precisely because she does not understand the rules. Indeed, the familiar adage that ignorance of the law is no excuse applies to situations such as these. But the fact remains that the defendant's ignorance, which does tend to mitigate the moral wickedness of the act, is not relevant to the inquiry whether the defendant has committed the tort of battery.¹⁹⁶

191. See KEETON ET AL., *supra* note 180, § 8, at 36 ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm.") (footnote omitted).

192. As the language quoted above suggests, this does not mean intention to do harm would be irrelevant if, for example, plaintiff sought to prove malice as a prerequisite to an award of punitive damages. But the tort of battery, and the award of compensatory damages for its commission, does not require a showing of intention to harm.

193. Prosser and Keeton explain that the requisite intent for battery is:

an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good.

KEETON ET AL., *supra* note 180, § 8, at 36-37 (footnotes omitted).

194. The *Restatement* defines "intent" to mean "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965). The term "consequences" in the context of battery refers to the touching, not to harm from the touching.

195. KEETON ET AL., *supra* note 180, § 8, at 35.

196. There are some narrow situations in which the tort law employs a somewhat more specific definition of intent. For example, the *Restatement* requires that to be liable for the intentional infliction of emotional distress, the plaintiff must prove that the defendant "by extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (emphasis added). The drafters explain that the rule applies where the actor desires to inflict severe emotional distress, and also where

*C. Evolution of the Mens Rea Element in Criminal Law:
Retreat from Morally Tinged Labels*

Before the development of contemporary versions of substantive criminal law doctrine such as the *Model Penal Code*, the criminal law addressed definitions of intentionality in strikingly moral terms.¹⁹⁷ In the area of homicide, for example, and particularly in standards governing so-called "depraved heart" murder, one can find this kind of language in both the works of legal commentators and the opinions of English and American courts.

Influential commentators often wrote in moral terms. Blackstone stated that malice aforethought, which distinguishes manslaughter from murder, is "any evil design in general; the dictate of a wicked, depraved, and malignant heart."¹⁹⁸ Foster defined implied malice (a situation in which the intent to kill or greatly harm could not be proven but in which defendant was guilty of serious wrongdoing) as involving "the plain indications of a heart regardless of social duty and fatally bent upon mischief."¹⁹⁹

Courts often used similar morally tinged language. In *Commonwealth v. Drum*,²⁰⁰ for example, the Pennsylvania Supreme Court defined malice as homicide demonstrating "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty."²⁰¹

The tone of modern descriptions is qualitatively different. In England, definitions speak simply of intent to kill or intent to do great bodily harm.²⁰² In the United States, some courts speak of awareness of an unjustified risk to life, while others allow conviction to be based on the mere showing that defendant engaged in extremely dangerous behavior without justification. The *Model Penal Code* definition of reckless murder requires demonstrating a substantial and

he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.

Id. § 46 cmt. i. Thus, for this tort at least, the intent must be more specific. Not only must defendant intentionally engage in the conduct that causes the required harm, but the defendant must intend that harm to occur. In most situations, however, such specific intent is not required in tort law.

197. A discussion concerning the characterization of intent in criminal law is drawn from Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996).

198. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198-99 (University of Chicago Press 1979) (1769).

199. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 74 (London, MacMillan 1883) (quoting Sir Michael Foster).

200. 58 Pa. 9 (1868).

201. *Id.* at 15. One can find similar expressions even in more recent cases. In *Jenkins v. State*, 230 A.2d 262, 266 (Del. 1967), for example, the court spoke of "cruel and wicked indifference to human life," and in *People v. Love*, 168 Cal. Rptr. 407, 411 (Ct. App. 1980), the court used the phrase "element of viciousness—an extreme indifference to the value of human life."

202. See *Hyam v. Director of Public Prosecutions*, 2 All E.R. 41, 42 (H.L. 1974).

unjustifiable risk to human life under circumstances manifesting extreme indifference to the value of human life.²⁰³

The difference is subtle but not trivial. Common law phraseology invites the audience to engage in character-oriented visualization.²⁰⁴ These formulations invite the jury to punish bad moral *character* instead of morally unacceptable *conduct*. As such, juries are misled about the nature of the mental state necessary to the crime. The more modern phrases are not devoid of moral content, but the focus appears to be on the character of the conduct rather than that of the actor. If the conduct is unlawful, the actor is guilty.

D. The Modern Concept of Intent in the Criminal Law

The criminal law's concept of intent is more complex and problematic than that of the tort law, but there are similarities. Although the criminal law expresses some concern with moral fault, this does not mean that successful prosecution requires proof of the kind of moral depravity unnecessary in intentional tort cases.

Traditionally, the criminal law assigned two basic meanings to intent. As LaFave and Scott explain:

A crime may be defined in such a way that the defendant, to be guilty of it, must intentionally engage in specific conduct (and, perhaps also, intentionally do so under specified attendant circumstances, the intention requirement applying to the circumstances as well), or a crime may be defined in terms of an intention to produce a specified result.²⁰⁵

Examples of crimes requiring the first type of intent are common law burglary, larceny, and forcible rape.²⁰⁶ In each such case, the required intent is to engage in the proscribed conduct (to intentionally break and enter, to intentionally take and carry away property, to intentionally engage in sexual intercourse).²⁰⁷ Examples of the second type of intent are intent-to-kill murder, intent-to-injure battery, and assault with intent to kill.²⁰⁸ In this second group of cases, the requirement of an intent to bring about a specified result involves a specialized application of the same concept of basic intent used by the tort law. It can be met by proving either a conscious desire to cause that result or knowledge that the result is substantially certain to follow.²⁰⁹

The *Model Penal Code* takes a somewhat different approach in dealing with the required mental state for different types of crimes. The *Model Penal Code* defines four subjective states of mind that can suffice for criminal responsibility: acting purposely, knowingly, recklessly, or negligently.²¹⁰ Essentially, one acts

203. MODEL PENAL CODE §§ 2.02(2)(c), 210.1, 210.2(1)(b) (Proposed Official Draft 1962).

204. See Pillsbury, *supra* note 197, at 116-19.

205. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.5, at 303 (1986).

206. See *id.*

207. See *id.*

208. See *id.*

209. See *supra* notes 187-96 and accompanying text.

210. See MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962).

"purposely" when she wishes to cause a particular result, and "knowingly" when she is aware that the result is practically certain to occur.²¹¹ Though these definitions make it difficult to distinguish the intent required for the crime of battery from that required for the tort of battery, there are differences. Under the *Model Penal Code*, criminal battery clearly occurs when one intends to injure or acts with criminal negligence.²¹² The first type would also be supported under the tort law; though only intent to contact is necessary, intent to injure would justify an award of punitive damages. Criminal negligence, however, would not supply the necessary foundation for a battery claim in tort law. This is true even though criminal negligence generally means the creation of a high degree of risk or recklessness and thus goes beyond the "unreasonable risk" definition of negligence in the tort law.²¹³ Even the creation of a great risk of contact, or an act done with reckless disregard for the consequences, is not a civil battery.

A third theoretical type of criminal battery, that which relies on the doing of an unlawful act, is the one most akin to the tort law's concept of "unlawful intent." Though American jurisdictions are in disarray, most would hold that this type of intent will not support a criminal prosecution for battery.²¹⁴ Thus, the prototypical form of intent for the commission of a civil battery—the intentional commission of an act society judges to be unlawful²¹⁵—will not support a prosecution for the crime of battery in most states. Something more, whether it be intent to harm or the kind of indifference that falls under the rubric of criminal negligence, must be demonstrated.

The differences between the tort law and criminal law concepts of intent are of little concern to the present inquiry. Even though a criminal prosecution for crimes such as battery appears to require something more than is necessary for tort liability, moral depravity is not that additional element. The prosecution need not show that defendant knew her conduct was *wrong* or that defendant bore the victim malice or ill will. In some cases, it is enough that defendant meant to harm or knew that harm was substantially certain to result from her conduct. In others, it is sufficient to prove "criminal negligence," proof of which does not involve a trip into the inner moral world of defendant.

The limited defense of insanity recognized by the criminal law also illustrates that the inquiry involved in assessing criminal responsibility is not morally based. Under the *M'Naghten* test for insanity, defendant will only be excused if a mental disease or defect causes her to not know either the nature and quality of the act or that the act is wrong.²¹⁶ Under the *Model Penal Code* standard, defendant's defect of the mind must be shown to cause a lack of substantial capacity either to appreciate the criminality of the act or to conform her conduct

211. See 1 LAFAVE & SCOTT, *supra* note 205, § 3.5, at 306.

212. See 2 *id.* § 7.15, at 303-04.

213. See *id.* § 7.15, at 305-06.

214. See *id.* § 7.15, at 306-07. It is safe to assume that this concept requires that defendant do the act intentionally.

215. Recall that defendant need not know the act is unlawful. It is sufficient that society deems the act unlawful. See *supra* note 196 and accompanying text.

216. See 1 LAFAVE & SCOTT, *supra* note 205, § 4.2, at 437-38.

to the law's requirements.²¹⁷ Under either standard, one is not excused unless the mental disease or defect is the source of defendant's lack of knowledge or appreciation of the wrongfulness of her conduct or of her inability to conform her actions to the requirements of the law. If defendant's lack of such knowledge, appreciation, or ability to conform her conduct derives from another source, she will not be excused by the insanity defense. To put it differently, except in the case of a mental disease or defect, the law simply considers defendant's lack of understanding or control to be irrelevant to the determination of responsibility.

The treatment of the so-called psychopathic personality exemplifies this view. Though the concept is difficult to define, "it is commonly asserted that a psychopath is one who exhibits an abnormality only in the repetitious performance of antisocial or criminal acts. Such a person differs from others only in the quantity or types of his actions and not by the quality of his mental facilities."²¹⁸ This is quite different from the kind of mental state that satisfies insanity tests. As one author has written, "[c]raziness, as exemplified in modern insanity tests, involves fundamental irrationality. The actor works for ends which are nonsensical according to our view of the world or the means chosen to attain meaningful ends appear nonsensical."²¹⁹ The psychopathic personality is different. "[T]he worst killers embrace evil for the rewards it brings—rewards the rest of us might acknowledge and to a lesser extent seek in our own lives. These killers embrace the thrill of wrongdoing, of power, of revenge against enemies and self-promotion."²²⁰ The psychopathic personality would not be entitled to an insanity defense under either the *M'Naghten* test²²¹ or the *Model Penal Code's* definition.²²²

In criminal law, therefore, it is not the actor's actual appreciation of the wrongfulness of the conduct, but the actor's ability or inability to possess such appreciation, that in part divides the responsible from the insane. A person's inner moral character does not define or describe conditions for criminal liability.

V. THE RECENT RETREAT FROM THE CHARACTER BAN

In Congress and state legislatures today, criminal law reforms are being enacted at a dizzying pace. The death penalty is being extended to crimes to which it did not apply previously.²²³ The conditions of inmate confinement have

217. *See id.* § 4.3, at 462-64.

218. *Id.* § 4.2, at 439; *see* ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT OF ROYAL COMM'N ON CAPITAL PUNISHMENT §§ 394-402 (1953); *see also* MODEL PENAL CODE § 4.01 cmt. 6 (Tentative Draft No. 4, 1955) (also taking the position that the psychopath differs from others only quantitatively and not qualitatively).

219. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 477 (1990) (footnote omitted).

220. *Id.* at 479.

221. *See* 1 LAFAYE & SCOTT, *supra* note 205, § 4.2, at 439-40.

222. *See* MODEL PENAL CODE § 4.01 cmt. 6 (Tentative Draft No. 4, 1955).

223. Consider, for example, the federal Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 16, 18, 21, 28, and 42 U.S.C.). This crime legislation made dozens of federal crimes subject to capital punishment. The death penalty in the United States has been called "a political ping-pong ball."

been made more primitive, draconian, and humiliating.²²⁴ Chain gangs have returned.²²⁵ "Three strikes" legislation demands considerably harsher sentencing for crimes committed by repeat felons than would be imposed in the same case in the absence of past misconduct,²²⁶ in many cases even if the current crime is relatively minor.²²⁷ And in the law of evidence, the prohibition on the use of character evidence to prove the conduct of a criminal defendant is being whittled away. In 1994, Congress bypassed the usual method for amending the Federal Rules of Evidence and enacted three new rules making similar-crimes evidence

Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 5 n.17 (1995).

224. One of the more notorious examples of implementation of primitive conditions can be found in Maricopa County, Arizona, where Sheriff Joseph Arpaio has instituted chain gangs, built a jail out of tents, required inmates to wear pink underwear, and taken other steps that degrade and humiliate inmates. See *Report Harshly Criticizes Tough Arizona Sheriff*, STATE J.-REG. (Springfield, Ill.), Jan. 11, 1998, at 2, available in 1998 WL 5552553; David Schwartz, *Amnesty Group Takes Aim at Arizona Sheriff's Jails*, DALLAS MORNING NEWS, Jan. 18, 1998, at 45A, available in 1998 WL 2506156; *Sheriff Joseph Arpaio Creates "Affordable Housing" in the Land of the Sun* (last modified Nov. 21, 1996) <<http://www.ncn.com/~snews/arpaio/sheriff.htm>>.

225. Chain gangs have recently been reintroduced in several states. See, e.g., Recent Legislation, 109 HARV. L. REV. 876 (1996) (discussing Act of June 15, 1995, ch. 283, 1995 Fla. Sess. Law Serv. 2649, 2650 (West), requiring Florida Department of Corrections "to implement a plan by December 1, 1995, for inmate labor wearing leg irons in chain-gang work groups"); see also Peter Morrison, *The New Chain Gang*, NAT'L L.J., Aug. 21, 1995, at A1; Brent Staples, *The Chain Gang Show*, N.Y. TIMES MAG., Sept. 17, 1995, at 62; Curtis Wilkie, *Back on the Chain Gang—Amid Fanfare and Complaints, Alabama Puts Shackled Prisoners to Work*, BOSTON GLOBE, May 4, 1995, at 1 (describing reintroduction of chain gangs in Alabama).

One author has written that the "only purpose [of the chain gang] is degradation and humiliation of human beings for political points." Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE DAME L. REV. 845, 847-48 (1996).

226. See, e.g., Violent Crime Control and Law Enforcement Act, 108 Stat. 1796; CAL. PENAL CODE § 1170.12 (West Supp. 1998); 730 ILL. COMP. STAT. ANN. 5/5-8-I (West Supp. 1998). One author reports that at least 47 states have now enacted legislation providing enhanced penalties for repeat offenders. See Meredith McClain, Note, "Three Strikes and You're Out": The Solution to the Repeat Offender Problem?, 20 SETON HALL LEGIS. J. 97, 100 & n.15 (1996).

227. Washington's law, for example, requires a minimum sentence of 10 years in prison for any person convicted of a second felony, a third misdemeanor, or a third petit larceny. See WASH. REV. CODE ANN. § 9.92.090 (West 1998). In the case of a third felony, fifth misdemeanor, or fifth petit larceny, the law requires life imprisonment. See *id.* California's law is stricter still, requiring a person convicted of a second felony to serve a sentence double the length of one that would be served for the same offense by a first offender. See CAL. PENAL CODE § 667(e)(1) (West Supp. 1998). Persons convicted of a third violent felony are to be sentenced to 25 years imprisonment, or three times the sentence of a first offender, whichever is greater. See *id.* § 667.5. The same applies to persons convicted of a third serious felony. See *id.* § 1192.7. In one notorious case, a man with prior felony convictions including robbery, attempted robbery, drug possession, and unauthorized use of a vehicle was sentenced to 25 years to life imprisonment when convicted of stealing a slice of pizza. See *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, § 1, at 21.

admissible to prove the defendant's character (and thus guilt) in prosecutions for sexual assault and child molestation, as well as in civil actions based on such conduct.²²⁸ A number of states have made similar changes in their evidence rules.²²⁹

It appears that as a society, we are becoming impatient with what we perceive to be a significant increase in crime; the fact that statistics do not support this perception²³⁰ does not seem to matter. What counts is the sense of fear that pervades people's lives. Fear of crime is a persistent and significant phenomenon in American society:

Across the country . . . crime is down but concerns arc up. Nationally, lawlessness ranked as a leading domestic concern even though every kind of

228. See FED. R. EVID. 413-15.

229. See, e.g., CAL. EVID. CODE § 1108 (West Supp. 1998) (allowing evidence of similar offenses in prosecutions for sexual offenses if probative value of evidence is not substantially outweighed by danger of unfair prejudice); IND. CODE ANN. § 35-37-4-15 (West 1998) (allowing similar-crimes evidence in prosecutions for child molestation and incest if probative value of evidence is not substantially outweighed by danger of unfair prejudice); MO. ANN. STAT. § 566.025 (West Supp. 1998) (allowing evidence of other crimes against minors to show propensity to commit such crimes).

230. Most crime, particularly violent crime, has been declining for the past four years. The F.B.I.'s Uniform Crime Reports for 1995 show that overall violent crime declined by 5% from the previous year. The murder rate was down by 12%, and the number of reported rape cases declined by 7% from the previous year. In fact, the F.B.I. statistics show declines for almost all types of crime. See Patricia O'Donnell Brummett, *Despite the Figures, Crime Is a Big Problem*, L.A. DAILY NEWS, June 2, 1995, at V1; Michael Shanahan, *Crime Rates Are Down, Americans Still Fearful*, PLAIN DEALER (Cleveland), June 30, 1996, at 26A. The F.B.I. data, compiled from local police reports, indicated that the juvenile-crime rate was also down. In 1995 the national rate for violent crime among juvenile offenders declined 2.9%. The decline in murders was particularly steep, dropping 15.2% from the previous year, and 22.8% since 1993. See Fox Butterfield, *Juvenile Violent Crime Rate Dips*, L.A. DAILY NEWS, Aug. 9, 1996, at N1. The drop in crime is nationwide, with the most significant reductions noted in the largest cities. See John Marzulli & Bob Liff, *Major Crime Drops 11%; Homicide Rate Near 28-Year Low*, N.Y. DAILY NEWS, June 19, 1996, at 5; *Statistics Indicate Crime Is Down in New York; Residents Are Hopeful, but Not Sure of Change*, ARIZ. REPUBLIC, May 25, 1996, at A35 [hereinafter *Statistics Indicate*]. For example, in New York City, the homicide rate dropped 25% in 1995, and was at a 28-year low by the first six months of 1996. Likewise, new Justice Department statistics show a 16% decline in crime in cities along the United States-Mexico border (San Diego, Nogales, El Paso, and Brownsville). See Mary Beth Alexander, *Crime Rate in State Hits 25-Year Low*, L.A. DAILY NEWS, July 2, 1996, at N3; John M. Broder & Tony Perry, *Clinton Takes Credit for Crime Drop at Border*, L.A. TIMES, June 11, 1996, at A3; Dan Lungren, Editorial, *Turning the Tide: Falling Crime Rates Signal Heartening Trends*, SAN DIEGO UNION-TRIB., May 19, 1996, at G1, available in 1996 WL 2159983.

Notwithstanding the favorable numbers, residents of large cities and small towns alike continue to view crime as an overwhelming problem. Some experts attribute this to the fact that there is a considerable amount of crime in the United States as compared to other industrial countries. The media may also play a role in undermining people's confidence in the declining crime rate. Media exaggeration via television coverage of the most grisly crimes, and tabloid shows that dramatize violence, leave the average person with a sense that random violence can happen to anyone, anywhere. See *All Things Considered: Citizens Feel Uneasy Despite Drop in Crime Rate* (NPR broadcast, May 6, 1996) (transcript available in 1996 WL 4370425); Brummett, *supra*, at V1; Shanahan, *supra*, at 26A; *Statistics Indicate, supra*, at A35.

serious crime fell nationwide last year. . . . But few believe that there has been a real decrease. Few feel safer, and many still feel that the quality of life in their communities is being further eroded by criminality.²³¹

Identifying the sources of the fear is a complex question. No doubt the media's focus on the facts of particularly gruesome and shocking crimes has contributed to a growing sense of danger.²³² The national obsession with all types of crime reporting has indeed helped to create the impression that we live in an increasingly dangerous society. And the apparent randomness of many widely reported violent crimes makes people feel more vulnerable; we perceive that we cannot avoid becoming crime victims by carefully choosing our acquaintances and the neighborhoods in which we will live and work.

But the contemporary sense of fear does not arise solely from a perceived increase in crime. In the United States, fear also derives from increasing pluralism in all its forms. While in earlier times, most immigrant and other nonmajority groups sought assimilation as the ultimate measure of success and self-worth, more recently the assimilationist urge is not so evident among such groups. Whether justified or not, those who have already assimilated have begun to feel threatened by what they perceive to be a rise in the number of people who reject the "melting pot" ideal and instead seek to retain their own religious, social, and cultural identities. The impersonal nature of our society precludes us from developing close relationships with many people, and the unwillingness of some groups unquestioningly to embrace the assimilationist position increases these groups' apparent insularity. Along with it, fear and anxiety grow among the so-called mainstream population.

This fear of difference is accompanied by a deep anxiety that our society no longer adheres to a common set of values.²³³ We fear that even the most fundamental of values—respect for the lives and property of others—is no longer shared by everyone. Thus we turn to the creation of legal standards that elevate "our" values and that label as inferior what we perceive to be competing values. From that point, it is only a small step to branding the holders of those values as themselves inferior, marking a return to the status-based society of an earlier day. It might at first seem that this new form of status orientation is different than that of earlier times—that status measured by economic position has been replaced by status measured by culturally held norms. But the difference is more apparent than real. More often than not, those whose values appear different from ours are also people at the lower rungs of the economic ladder. Almost certainly, calls for sealing the borders or denying benefits to noncitizen immigrants—legal and illegal—are motivated in part by this type of fear of those different from us.²³⁴

231. *Fear Persists in Wake of Falling Crime Rates; High-Profile Cases Shouldn't Obscure Hard-Won Progress*, L.A. TIMES, June 9, 1996, at B17.

232. "It is the shock value of certain crimes, and the inexplicable nature of others . . . [that] leaves people with a palpable sense of unease regarding their safety." *Id.*

233. The assumption, of course, is that in former times, Americans of diverse backgrounds *did* share common values. As the Civil War and other events during the last two centuries demonstrate, that proposition is highly dubious.

234. Arguably, calls for elimination of affirmative action programs also result from a fear

Ironically, then, the very anonymity of mass society that helped lead to the abandonment of character-based justice has now been turned on its head. Fear of diversity has bred a call for generalized, rather than individualized, justice. But enshrining such an idea through the general allowance of character evidence would be contrary to one of the nation's most precious principles: that it is not only tolerable, but noble, for people to embrace a variety of different values, and that the criminal law should punish conduct, not belief or status.

VI. CONCLUSION

A whirlwind of legislative activity has surrounded the growing perception that our society is becoming increasingly dangerous as a result of criminality. It is not at all clear, however, that this movement has in fact been accompanied by a generalized rejection of the long-established and deeply embedded belief that formal legal judgments should not depend upon considerations of general moral character. Each of us would object to being the subject of a trial at which our purported moral failings were paraded before the jury as proof of our participation in the claimed unlawful activity;²³⁵ our willingness so to judge others should be tempered by our own abhorrence of such evidence were the tables to be turned.

At the same time, the more people come to see society as composed of predators and victims, the more likely it is that legislatures will adopt rules designed to protect the latter from the evils of the former. The so-far partial abrogation of the character ban is emblematic of this trend. Respect for the traditions of American law and for the principle that its institutions should reflect our highest aspirations demand that that trend be reversed.

of difference. See, for example, Proposition 209, the "California Civil Rights Initiative," a ballot proposition in November 1996 which, as codified in California's state constitution, provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a). The initiative is intended to eliminate all forms of affirmative action in the public realm.

235. Or, for that matter, as an invitation to the jury to disregard the facts of the case at hand and convict solely on the basis of bad character.

